Date: 20240621

File: 561-02-43429

Citation: 2024 FPSLREB 83

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

PATRICE LAQUERRE

Complainant

and

PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS

Respondent

Indexed as
Laquerre v. Professional Association of Foreign Service Officers

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: Himself

For the Respondent: Zachary Rodgers, counsel

Decided on the basis of written submissions, filed January 16 and 30 and February 12, 2024.

REASONS FOR DECISION

I. Complaint before the Board

[1] Disputes between bargaining agents and the members whom they represent can often be summarized as disagreements as to how the bargaining agent should defend an employee's rights. This is such a case.

[2] On August 30, 2021, Patrice Laquerre ("the complainant") made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") in which he alleged that his bargaining agent, the Professional Association of Foreign Service Officers ("the respondent" or PAFSO), failed its duty of fair representation, contrary to s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[3] The complainant is a foreign service officer. His collective agreement includes several of the National Joint Council (NJC) Foreign Service Directives (FSDs) that provide terms and conditions of employment for officers working overseas. He disagreed with the interpretation made by Global Affairs Canada ("the employer") of FSD 34 concerning the education allowance for his children while he was posted abroad. The respondent refused to pursue a grievance on his behalf; since it was a grievance related to collective agreement interpretation, he could not pursue it on his own.

[4] Did the respondent breach its duty of fair representation? For the reasons that follow, I find that it did.

II. Context

[5] The parties agreed to proceed by way of written submissions. In the course of the exchanges, the complainant asked to add "evidence", to support his position. The respondent reserved its right to object to additional material that has not been tested in a hearing.

[6] The respondent objected to a number of documents that the complainant forwarded to the Board that according to the respondent are not relevant to this dispute. The basis for the objection is either that the documents in question did not exist at the time the respondent decided not to support the grievance or that it was not raised in the course of the discussions between the complainant and the respondent.

[7] I agree that those documents are not relevant to the decision that I must make in this case about the respondent's duty of fair representation. I did not consider them when making my decision. The complainant's additional documents may or may not be relevant to his grievance; it does not shed light on whether the respondent's actions amounted to a breach of the duty of fair representation.

[8] Obviously, the decision requires a factual background. It is understood that the facts are not evidence in the true sense of the word — they have not been given under oath nor been subjected to cross-examination. There was no disagreement on the basic facts underlying the complaint.

[9] The complainant has been a foreign service officer with the employer since September 2002. From July 2016 to July 2021, he was posted at the Canadian embassy in Buenos Aires, Argentina. In March 2018, his spouse and two of her daughters (aged 16 and 15 at the time) relocated from Paraguay to Buenos Aires, to live with him.

[10] The complainant's stepdaughters' first language is Spanish. Their level of French and English at the time did not allow admitting them to a French or English school at the levels (grades 10 and 11) that they would have been admitted to in a Spanish high school.

[11] The employer maintains a list of compatible schools for which it will pay the tuition fees. Two are on the list in Buenos Aires: Lycée Jean Mermoz (French) and the Lincoln School (English). Both schools confirmed to the complainant that his stepdaughters were not sufficiently proficient in either language to be admitted at their grade levels.

[12] In March 2018, both stepdaughters were enrolled at the Colegio Champagnat, a private Catholic institution that was primarily Spanish but that offered a solid English program that would enable the girls to improve their English proficiency. The complainant paid for their tuition and did not seek reimbursement from the employer as the girls had not yet been recognized as dependants. They obtained that status in March 2019.

[13] In May 2021, the complainant submitted a request for his stepdaughters to attend a school not on the list of compatible schools, pursuant to FSD 34.2.6. Since the issue required a novel interpretation of FSD 34, it was referred to Working Group B, the

Interdepartmental Coordinating Committee of employer representatives at the NJC. It is tasked with the consistent application of FSDs by federal departments that have employees serving abroad.

[14] On June 8, 2021, Working Group B, on the Education Sub-Committee's recommendation, rejected the requests, because the schools that his stepdaughters attended (one had changed schools and enrolled in another private Spanish school) did not meet the criteria of FSD 34.1.5(a), which provides for "… instruction in the appropriate official language, i.e., English or French …".

[15] As a result, the complainant was not reimbursed for his stepdaughters' tuition for 2019. He has not yet submitted a claim for 2020 and 2021.

[16] As soon as he received Working Group B's refusal, the complainant contacted Paul Raven, the respondent's labour relations and FSD advisor, to let him know of his intention to grieve the decision. At that time, he was unaware that grieving an FSD's interpretation (they are part of his collective agreement) requires bargaining agent support (see s. 208(4) of the *Act*).

[17] Mr. Raven responded immediately, indicating that he would review the information that the complainant provided and that he would get back to the complainant as soon as possible. He did not indicate then that the respondent's support was necessary for the complainant to grieve the decision.

[18] The same day, the complainant shared with Mr. Raven the arguments that he would advance to challenge the decision. They turned on his interpretation of FSD 34.1.5.

[19] The next day, Mr. Raven emailed the complainant, stating that he did not see a way forward for the grievance; he also informed the complainant that the respondent's support was necessary to file a grievance.

[20] Mr. Raven's reasoning is outlined in the following extract from his email:

> …
>
> *A central element of the intent of FSD 34 as a whole can be found within its introduction. The first sentence of the second paragraph of FSD 34 reads as follows:*

> An education allowance is provided to employees assigned outside Canada who incur costs necessary to obtain education for dependent children, which would ordinarily be provided/obtained without charge in the public school system in Ontario or equivalent in other provinces.
>
> *In a nutshell, that means that FSD 34 covers education-related expenses at post when the same education could have been obtained for free via the public school system in Ontario. As you are aware, while students are able to take individual 'elective' high school courses in other languages (German, Spanish, Latin …), the 'free' (public) schools in Ontario are either primarily French, primarily English or bilingual (primarily a blend of French and English). This aligns with the language of FSD 34.1.5 (a):*
>
> > instruction in the appropriate official language, i.e., English or French, consistent with section 23 of the Minority Language Educational Rights prescribed by the Canadian Charter of Rights and Freedoms;
> >
> > …
>
> *So, the* Charter *provides that Canadians have the right to have their children educated in French or English. With that in mind, I do not see a discrimination element here - the* Charter *ensures education in French or English - not any language of the parents's [sic] choice.*
>
> *All of the above being said, while I appreciate the arguments that you have made, I am unfortunately not seeing a way forward in terms of a grievance.…*
>
> …

[21] Mr. Raven added that FSD-related grievances are subject to the NJC's By-Laws. By-Law 15.1.4 restates the requirement for bargaining agent support when a collective agreement interpretation is at issue.

[22] The complainant was taken aback by the fact that he required the respondent's support to grieve the decision. He asked Mr. Raven to consider the whole of his arguments before deciding not to support the grievance.

[23] Mr. Raven answered promptly, stating that he was willing to listen to any further arguments. He also mentioned the timeline in which to file a grievance. According to his calculation, the grievance had to be filed by July 14, 2021.

[24] On June 17, 2021, the complainant provided detailed arguments to support his grievance.

[25] As the purpose of this decision is not to decide the grievance per se but rather to decide whether the respondent failed its duty of fair representation, I will only briefly summarize the arguments that the complainant made when he asked the respondent to support his grievance. At this point, I think that it is useful to reproduce the following relevant extracts of FSD 34, to understand the dispute between the complainant and the respondent:

> *FSD 34 - Education Allowances*
>
> *Scope*
>
> *Introduction*
>
> *This directive provides financial assistance to employees serving abroad to ensure that their dependent children obtain elementary and secondary education which approximates Canadian standards and which enables the child to re-enter the Canadian school system with as little disruption as possible.*
>
> *An education allowance is provided to employees assigned outside Canada who incur costs necessary to obtain education for dependent children, which would ordinarily be provided/obtained without charge in the public school system in Ontario or equivalent in other provinces. An education allowance will permit a student to complete a year of Junior Kindergarten, a year of Kindergarten, eight years of elementary education (six years of elementary in Quebec), and four years of secondary education (five years of secondary plus two years of general pre-university CEGEP I and II in Quebec) up to and including the school year of the 21st birthday.*
>
> …
>
> ***Compatible education*** *(*enseignement compatible*) means an education system which provides an educational curriculum and services compatible with those normally provided without charge in schools in Ontario from junior kindergarten to secondary school graduation, taking into consideration:*
>
> *(a) the desirability of continuation in the child's educational stream, and*
>
> *(b) the educational history and other personal factors pertinent to the child's education.*
>
> ***Education allowance*** *(*indemnité scolaire*) is an allowance for admissible education expenses, provided on an annual basis to employees outside Canada with dependent students/children to obtain compatible schooling that will enable the dependant to continue in the chosen educational stream and will facilitate re-entry into the next higher grade level at a provincial public school system upon return to Canada.*
>
> …

34.1.1 The deputy head, in accordance with this directive, shall authorize the payment of an education allowance to an employee to provide a dependent child/student with an education up to and including the school year of the 21st birthday, which corresponds to:

(a) junior kindergarten/kindergarten school *optional programs, as offered by the Ontario Ministry of Education, for students aged 3 years 8 months/ 4 years 8 months as of September 1 of the school year, or as of January 1 of the school year in the southern hemisphere;*

(b) elementary school programs *equivalent to Ontario grades 1 to 8, or to Quebec grades 1 to 6, as applicable; and*

(c) secondary school programs *equivalent to Ontario grades 9 to 12, or to Quebec Secondary I to Secondary V and general pre-university CEGEP [sic] and II, as applicable.*

…

34.1.5 Before authorizing an education allowance, the deputy head, on the recommendation of the appropriate foreign service interdepartmental coordinating committee, shall consider whether a foreign educational facility is compatible for a child. In forming an opinion on the compatibility of a school for a particular child, the deputy head shall take into account the advice of the senior officer at the mission, the relevant experience of other departments represented at the mission, and the opinion of the employee as to the compatibility of schools at the post, based on the educational history and other personal factors pertinent to the child's education. In particular, the deputy head shall be guided by the objective of providing access for the child of an employee to:

(a) instruction in the appropriate official language, i.e., English or French, consistent with section 23 of the Minority Language Educational Rights prescribed by the Canadian Charter of Rights and Freedoms*;*

(b) schooling in a safe, healthy and secure environment;

(c) a curriculum which is reasonably compatible with the Ontario Ministry of Education curriculum;

(d) a milieu free of problems arising from racial segregation or hostility to foreigners;

(e) schooling free from compulsory, incompatible religious instruction;

(f) Roman Catholic education, comparable to that provided by the Ontario Ministry of Education, which right is confirmed in the Constitution of Canada;

(g) schooling where there is no lack of confidence in the school staff, or in the prevailing climate of morality among the school's student population;

> *(h) schooling which will enable continuation in the child's educational stream.*
>
> …

[26] According to the complainant, FSD 34 does not necessarily require that education abroad be in French or English. By deciding solely on the basis of FSD 34.1.5(a), Working Group B made one of many criteria mandatory, without considering the other criteria.

[27] The intent of FSD 34, argued the complainant, is to ensure an education that approximates Canadian standards and that allows children to rejoin the Canadian school system with as little disruption as possible. The effect of the decision was to deny his stepdaughters that possibility.

[28] FSD 34 should be applied fairly and inclusively.

[29] The complainant emphasized that there is no requirement that education abroad be only in French or English. Rather, the education allowance is designed to ensure continuity in a child's education, to enable that child to re-enter the Canadian school system at level.

[30] The complainant points out that the criteria, while important, are not mandatory. At FSD 34.1.5(f), the criterion is Roman Catholic education, which is obviously an option to consider but is not mandatory. He added that there is no requirement in FSD 34.1.5 that education abroad be only in French or English. Rather, it states that the deputy head "… shall consider whether a foreign educational facility is compatible for a child."

[31] The complainant argued that since his stepdaughters were ineligible for schooling in French or English, he chose the best alternative to allow them to re-enter the Canadian school system, given the strong English program in the school and further sessions with a private tutor. The following extract reflects the complainant's reasoning (and the basis for his grievance):

> …
>
> *By denying my* Request to attend school not on List of Compatible Schools*, when my dependent could not attend any of the compatible schools at post Working Group B left me with no available options under FS 34 [sic]. I was faced with either sending*

> *them to a local free public school without a curriculum reasonably compatible with those in Canada, nor the same level of English to enable their re-entry in Canada, or to pay for an education more compatible with FSD 34 on my own. The purpose of an education allowance as defined in FSD 34 is "to obtain compatible schooling that will enable the dependant to continue in the chosen educational stream and will facilitate re-entry into the next higher grade level at a provincial public school system upon return to Canada." I chose the best option available to do this and as such, denying my* Request to attend school not on List of Compatible Schools *is not consistent with the intent of FSD 34.*
>
> …

[32] As a further argument, the complainant stated that had the children been in Canada, they would have been able to attend English or French public schools, with no proficiency requirement, as in the compatible schools in the list.

[33] Finally, the complainant stressed the importance of clarifying FSD 34's application through the grievance process.

[34] Mr. Raven answered in part as follows:

> …
>
> *The FSDs and the nine other directives overseen by the National Joint Council (NJC) are unique within the context of labour relations for a variety of reasons. Firstly, unlike collective agreements which are negotiated between an employer and a bargaining agent (union) representing a single bargaining unit or a small group of bargaining units, NJC directives are 'co-developed' (negotiated) by NJC committees which include representation from multiple departments and multiple bargaining agents… Secondly, unlike individual collective agreements which apply only to the bargaining unit whose bargaining agent negotiated and signed them, the NJC directives apply federal-public-sector-wide.*
>
> *The NJC directives are also quite different when it comes to the resolution of grievances. Whereas intent does sometimes come into play when resolving grievances pertaining to language found within collective agreements, a grievance pertaining to the administration of a [sic] NJC directive must be decided based on the intent of the directive in question. Article 15.1.2 of the NJC bylaws reads as follows:*
>
> > 15.1.2 All grievances as defined under the PSLRA presented under this grievance procedure shall be decided on the basis of the intent of the directive or policy being grieved.

> *With that in mind, there is a reason why, in addition to 'co-developing' the wording of each directive, the NJC committees are tasked with hearing grievances related to their own directives - while others can speculate about the intent of a particular passage within a particular directive (or the broad intent of an entire directive), only those who were actually at the table when the wording in question was negotiated can answer the questions 'what did we mean when we agreed to this particular wording?' and 'is this particular employee being treated as per the intent that we envisioned for that particular wording?'*
>
> *Within the context of PAFSO-member-FSD-related concerns, as a member of the NJC FSD Committee, I am well positioned to answer two key questions:*
>
> 1. *Is this member being treated as per the intent of the directive in question?*
> 2. *Should a grievance pertaining to the particular concern be eventually heard by the NJC FSD Committee, how would each committee member likely to [sic] react?*
>
> *With that said, while I continue to appreciate the points that you have made, I am unfortunately still not seeing a way forward in terms of a grievance. Unfortunately, my position remains that FSD 34 was not intended to offer education to dependants at an institution whose primary language of instruction is not French or English, as would be the case at any publicly-funded school in Ontario and I expect that my FSD Committee colleagues would agree with me. Another way of looking at it would be to ask the question 'Had you been repatriated back to Canada before your dependants were able to begin their studies at the institution now in question, would you have been able to enrol your dependants at school in Ottawa-Gatineau whose primary language of instruction was not French or English, at no cost?'*
>
> …

[35] Mr. Raven then added that FSD 56 - "Foreign Service Incentive Allowances" (which includes a Foreign Service Premium) could be used to cover unexpected costs, stating this:

> …
>
> *… the expenses incurred in relation to your dependants' education at a school whose primary language of instruction is not French or English could perhaps be considered as expenses stemming from your service abroad that are not otherwise covered by the FSDs and therefore suitable to be offset via funds provided via FSD 56.*
>
> …

[36] The complainant answered Mr. Raven's argument that had the children been in Canada, they would not have been able to enrol in a public school that was neither French nor English, in the following manner:

> …
>
> *Had I been repatriated to Canada before, which was probable, I would have been able to enrol my dependents in the public school system so that they can pursue their studies in English or French, a possibility which I did not have at mission. This is exactly why I had them enrolled at a school which provided good English courses. The effect of the decision to deny me of [sic] an education allowance is to put me in a less favorable situation than I would be serving in Canada, contrary to one of the core principles of the FSDs. I cannot be convinced that FSD56 compensates for this.*
>
> …

[37] The complainant asked what further steps he could take, to press his case. Mr. Raven told him that he could write to the respondent's executive director. In his submissions, the complainant mentioned that he was not told that he might have recourse with the Canadian Human Rights Commission.

[38] The complainant wrote to the respondent's executive director, arguing that the response that he had received from Mr. Raven was arbitrary. Mr. Raven had not turned his mind to any of the arguments that the complainant made. He repeated his fundamental argument, which was that the complainant was denied the education allowance for the option that best approximated the Canadian schooling standards and that would have allowed his children to re-enter the Canadian school system. The respondent's executive director maintained the decision not to pursue the grievance.

III. Summary of the arguments

A. For the complainant

[39] The complainant submits that Mr. Raven did not seriously consider his arguments. Rather, he repeated Working Group B's conclusion without attempting to provide a reasoned decision as to why the complainant could not put forward another interpretation of FSD 34.

[40] The complainant quotes from *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 (*Gagnon*), and emphasizes that when exercising its discretion in handling grievances, the union (under the *Act*, the bargaining agent) must perform a

thorough study of the grievance and the case, and its representation must be fair and genuine and not merely apparent.

[41] According to the complainant, by deciding not to go forward with a grievance, "… Mr. Raven did not consider the issue thoroughly, fairly, genuinely, reasonably and carefully." He acted in a manner that was arbitrary and discriminatory.

1. Arbitrariness

[42] The complainant cites case law to support his arguments. I will come back to the relevant case law in my analysis.

[43] "Arbitrariness" has been defined as insufficiency or lack of diligence on a bargaining agent's part in handling a grievance or a case or as not adequately considering an employee's interest. Bargaining agents have a duty to "arrive at a thoughtful judgement" (from *Gagnon*).

[44] Mr. Raven acted arbitrarily or negligently, as demonstrated by his following actions:

- failing to inform the complainant that the respondent's support was necessary for an FSD-related grievance;
- failing to sufficiently investigate the complainant's case;
- exaggerating his FSD expertise and experience while not substantiating his interpretation;
- erring in his interpretation of FSD 34 in terms of the language criterion and comparability; and
- failing to recommend recourse with the Canadian Human Rights Commission.

[45] The complainant submits that had he known from the start that the respondent's support was necessary, he would have presented all his arguments to Mr. Raven sooner.

[46] The complainant argues that Mr. Raven never truly addressed his concerns and arguments. The complainant also takes issue with Mr. Raven insisting that he was at the table when FSD 34 was negotiated, since it was negotiated long before the respondent hired him.

[47] In effect, Mr. Raven's refusal to file a grievance denied the complainant the possibility to argue his case before the NJC's Executive Committee. In so doing, Mr. Raven acted as member of the NJC's FSD Committee, rather than as a representative of the complainant's interests.

[48] The complainant contends that Mr. Raven erred in his interpretation of FSD 34 with respect to education abroad having to be in French or English and in his application of the principle of comparability.

[49] It is sufficient for the purposes of this decision to state that the complainant and Mr. Raven disagreed on those points. This is not the forum in which to argue those points, and I need not go any further to present the complainant's point of view.

2. Discrimination

[50] The complainant also maintains that the respondent's behaviour was discriminatory. Discrimination based on lack of fluency in either of Canada's official languages can be related to grounds found in the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), such as national or ethnic origin.

[51] The complainant argues that Working Group B's interpretation (which Mr. Raven endorsed) had a discriminatory effect as it deprived him of a benefit (the education allowance) based on his dependants' lack of proficiency in English or French. In other words, he argued that "… Mr. Raven chose to interpret and apply FSD 34, a text that is not in [*sic*] its face discriminatory, in a discriminatory manner."

B. For the respondent

[52] The respondent argues that its decision not to support the complainant's grievance was "well-reasoned and clearly communicated".

[53] The respondent objects to the complainant's allegations that Mr. Raven's expertise is in doubt. It maintains that since he played a lead role in the 2017-to-2019 FSD review, Mr. Raven has considerable experience negotiating and applying the FSDs.

[54] The respondent submits that its action to not pursue a grievance about reimbursing private-school tuition for the complainant's stepdaughters was neither arbitrary nor discriminatory.

[55] The respondent's view is that adopting the complainant's position on FSD 34 would have required it to significantly alter its interpretation of the directive, which agrees with Working Group B's conclusion. The purpose of FSD 34 is to ensure that dependent children obtain education abroad that approximates Canadian public education and that enables them to re-enter the Canadian school system.

[56] This simply does not apply to the complainant's stepdaughters, who will not re-enter the system when the complainant returns to Canada, as they never were in the Canadian school system. The respondent's position is explained as follows:

> …
>
> *… PAFSO's interpretation of the intent of FSD 34 is that the Directive is aimed at education where the language of instruction is English or French. It is not intended to allow employees to cover whatever private education on the assumption that the Spanish language instruction provided by the public school system in Buenos Aires is less comparable to Canadian public education than the complainant's preferred private school.*
>
> …

[57] The respondent defends its interpretation of FSD 34 with arguments to respond to the complainant's position, which I do not intend to summarize. I am not pronouncing on the correct interpretation of FSD 34 but rather on whether the respondent seriously considered the complainant's position.

[58] The respondent argues that the Board's role is not to second-guess a bargaining agent's interpretation of its collective agreement. Rather, it must consider whether the bargaining agent seriously considered the employee's situation and arguments.

[59] The respondent submits that it did so. It also argues that it has considerable discretion to determine which grievances should proceed and which should not. It may choose not to advance a grievance as long as it gives the grievance "rational and thoughtful consideration".

[60] A bargaining agent may wrongly interpret a collective agreement, and the employee may disagree with the bargaining agent's decision not to represent them — but those are not breaches of the duty of fair representation. The jurisprudence states that a breach will be found when the bargaining agent acts arbitrarily, discriminatorily, or in bad faith. It was not so in this case.

[61] The respondent's main argument to counter the complainant's claim of a breach of s. 187 of the *Act* is that "… even if the Complainant were correct about the intent of FSD 34, PAFSO provided a cogent rationale as to why it declined to advance the grievance."

[62] The dispute surrounding the interpretation of FSD 34 cannot ground a complaint under s. 187 of the *Act*; the bargaining agent must be given considerable discretion in its collective agreement interpretation. Its interpretation of FSD 34 is not arbitrary since it is based on the directive's language. Even if that point is mistaken, again, it would not be a breach of s. 187.

[63] It is unclear how the complainant has been a victim of discrimination. At most, he could assert discrimination based on family status. He was not discriminated against on the basis of ethnicity, national origin, or language proficiency. The allegation is that his stepchildren are victims of discrimination. In fact, the claim for education in neither French nor English is not an advantage offered to anyone. Therefore, it could not have been discriminatory not to extend it to the complainant's stepdaughters.

[64] To conclude, the respondent submits that it did not act in an arbitrary or discriminatory manner when it refused to advance the complainant's grievance. It considered his arguments seriously but believed that the grievance would have no chance of success.

IV. Reasons

[65] The duty of fair representation stems from 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.*

[66] This provision derives from the jurisprudence developed on the duty of fair representation that unions owe their members, starting with the seminal case of *Gagnon*. The oft-quoted passage (at page 527) from that decision reads as follows:

> *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.*

[67] In the context of the *Act*, the correspondence is not exact. Under s. 208, employees may grieve their terms and conditions of employment without bargaining agent representation and may refer disciplinary and termination grievances to adjudication, also without representation. Representation becomes a condition for a grievance (and for its referral to adjudication) if it involves collective agreement interpretation, as does this case.

[68] The respondent properly emphasized that a bargaining agent has a great deal of discretion when deciding whether to advance a grievance.

[69] Mere disagreement does not justify a finding that the bargaining agent breached its duty of fair representation (see *Collins v. Public Service Alliance of Canada*, 2023 FPSLREB 29). The bargaining agent may err in its collective agreement interpretation as long as the error is not made in an arbitrary or discriminatory manner (see *McFarlane v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 27).

[70] Returning to the text of s. 187, under the *Act*, the bargaining agent must 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."

[71] The complainant contends that Mr. Raven acted in an arbitrary and discriminatory manner.

[72] I do not agree that all the points that the complainant raised indicate arbitrary behaviour on the part of the respondent. The respondent not telling him immediately that he required its support for the grievance, and it not mentioning recourse with the Canadian Human Rights Commission are mistakes that do not amount to true negligence. He was informed early that he required representation to advance his grievance. A bargaining agent has no obligation to counsel recourse before bodies outside the realm of the *Act*.

[73] I cannot pronounce on whether Mr. Raven was right or wrong in his interpretation of FSD 34. I accept that he has in-depth knowledge of the FSDs, including FSD 34. However, I agree with the complainant that it seems that Mr. Raven did not turn his mind to the complainant's particular situation.

[74] Mr. Raven made the case to the complainant that the FSDs are a particular breed of provisions. They are not negotiated at the bargaining table between an employer and a certified bargaining agent but rather are codeveloped by representatives of federal-public-sector employers and bargaining agents.

[75] That said, the Board's jurisdiction over the FSDs arises from the fact that all NJC directives are deemed part of all collective agreements. Similarly, an employee's right to grieve the application of an NJC directive is set out under s. 208 of the *Act*, which requires bargaining agent support for any grievance involving the interpretation or application of a collective agreement.

[76] I believe that that condition increases the scrutiny that the Board will apply to a bargaining agent's representation. An employee who is aggrieved by the employer's interpretation of a collective agreement must have their bargaining agent's support. This is understandable, as it would be counter to the collective bargaining regime to have a grievor challenge terms that their bargaining agent negotiated. As for the FSDs, the grievance process is somewhat different, but the point is the same — a grievor

requires bargaining agent support, as all bargaining agents have agreed to the codeveloped NJC directives.

[77] In this case, the complainant wishes to challenge the application of FSD 34 to his situation. He contends that his employer's interpretation, based on Working Group B's recommendation, was contrary to the intent of FSD 34.

[78] It is not the Board's role to question the assessment that bargaining agents make of a grievance's strengths and weaknesses in a duty of fair representation complaint before the Board. The Board's standard is that as long as the bargaining agent has seriously turned its mind to an employee's situation, it is sufficient to fulfil its duty.

[79] In this case, I am not convinced that Mr. Raven truly considered the complainant's point of view.

[80] Mr. Raven states that the intent was to offer abroad the possibility of education in French or English. The complainant's point of view is that the intent was to ensure that the children of employees posted abroad would be able to re-enter the Canadian school system with as little disruption as possible.

[81] I find it telling that Mr. Raven's rationale is that the complainant would not be able to obtain public-school education in Canada in a language other than French or English. Therefore, the rule applies outside Canada too.

[82] The complainant's emphasis is not on language but on his stepdaughters' education. The principle of comparability, one of the FSDs' interpretation principles, should be given some weight. The complainant's argument that in Canada, his stepdaughters would be accepted at level, with remedial help in French or English, merits consideration.

[83] Although Mr. Raven did offer the complainant the opportunity to present all his arguments, and suggested the use of FSD 56, his conviction that he understood the intent closed his mind to any other possible interpretation.

[84] I understand that a bargaining agent's role is often to provide a reality check to employees who are convinced that they are right. But in this case, the respondent's action may have prevented a legitimate grievance from going forward.

[85] Mr. Raven's unwillingness to file the grievance was based on his failure to address the complainant's several arguments about his stepdaughters' education, with a view to re-entering (or in their case, entering) the Canadian school system, which he believed is FSD 34's true intent.

[86] I wish to measure my words because the disagreement between the complainant and the respondent is not the basis of my decision. The Board has dismissed numerous complaints made under s. 187 of the *Act* in which the complainants were convinced that they were right and bargaining agents refused to support their grievances as in their view, the grievances had little or no chance of success or did not warrant the necessary allocation of resources.

[87] The test is the seriousness with which the bargaining agent has considered the arguments of the employee who wishes to grieve an employer decision. In *Gagnon*, at 520, the Supreme Court of Canada quotes approvingly from a labour board decision to define the union's role in the following manner:

> …
>
> *… Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*
>
> …

[88] In this case, there is no doubt that Mr. Raven responded quickly to the complainant's requests and had in-depth knowledge of the matter at issue, which is the interpretation of FSD 34. Unfortunately, this very knowledge closed his mind and led to a superficial analysis of the complainant's point of view.

[89] The Board has often stated that it is not a matter of deciding whether the bargaining agent was right or wrong but rather if it seriously considered the matter at issue. As stated in *Fontaine v. Robertson*, 2021 FPSLREB 19:

> …
>
> *[26] The Board is not an appeal mechanism against a denial of representation at adjudication. Its role is not to question the bargaining agent's decision but rather to rule, based on the evidence submitted, on the bargaining agent's decision-making process and not on the merits of its decision. The Board's role is not*

> *to decide whether Ms. Robertson's decision not to represent the complainant at adjudication was correct. Rather, the Board must decide whether the respondents acted in bad faith or in a manner that was arbitrary or discriminatory during the decision-making process that led to that decision.*
>
> …

[90] It seems obvious from Mr. Raven's responses that he never seriously considered a grievance. It was dead on arrival because Mr. Raven was stuck on the French-English condition instead of considering education as a whole. That was not an example of a thorough study of the grievance, pursuant to *Gagnon*.

[91] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, the Supreme Court of Canada defined what it meant by arbitrary in the context of a duty of fair representation complaint:

> …
>
> *50 The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.…*
>
> …

[92] In this case, I find the cursory analysis to be arbitrary.

[93] I wish to state that this decision is not an indication of how the grievance would ultimately be resolved. However, the complainant is entitled to a thorough examination of his arguments. The respondent has the duty to properly represent the complainant's interests.

[94] The complainant also argued that by not pursuing the grievance, the respondent acted in a discriminatory manner.

[95] The respondent's reasoning was that FSD 34 did not apply to the complainant's dependants as they would not re-enter the Canadian school system, since they would

come to Canada for the first time for their schooling. At first view, this is discrimination on the basis of national origin and family status — the complainant was deprived of an advantage, i.e., the education allowance, because his stepchildren are of foreign origin, and that denial of advantage was directly linked to their foreign origin.

[96] The respondent's response to the discrimination claim is that the complainant is not a victim of discrimination and that the federal government's choice to fund education outside Canada only in Canada's official languages cannot be termed discriminatory.

[97] The respondent does not really address the discrimination based on family status and national origin. However, the apparent discrimination flows from its interpretation of FSD 34, that it cannot apply to foreign-born dependants who have not yet lived in Canada and have not mastered either of the two official languages.

[98] I would not conclude that the respondent's behaviour was discriminatory. The distinction made seems inherent to FSD 34, which speaks of **re-entering** the Canadian school system, not entering it. It may be that discrimination lies in the way FSD 34 is applied to the complainant, but that is not the respondent's decision.

[99] I have already concluded that the respondent did not do a thorough analysis of the situation, and thus breached its duty of fair representation.

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

(The Order appears on the next page)

V. Order

[101] The complaint is allowed.

[102] The respondent failed its duty of fair representation by not carrying out a thorough analysis of the complainant's arguments.

[103] The respondent is to reconsider its decision to not support the complainant's grievance.

June 21, 2024.

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