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File: 561-02-46490

Citation: 2024 FPSLREB 87

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

MARC KEMP

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Kemp v. Public Service Alliance of Canada

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

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

For the Complainant: Mitchell R. Hayward, counsel

For the Respondent: Sandra Gaballa, Public Service Alliance of Canada

Decided on the basis of written submissions, filed January 16, February 28, March 31, and June 8 and 9, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] Marc Kemp ("the complainant") has been part of the federal public service for more than 30 years. He occupied different positions with several departments before joining Public Safety Canada ("the employer") in 2016 as a regional program officer. When he made this complaint, his position was classified at the PM-04 group and level and had the Public Service Alliance of Canada as the certified bargaining agent. The complainant is a member of the Union of Safety and Justice Employees (USJE), which is a component of the Public Service Alliance of Canada. In this decision, "the union" and "the respondent" refer to either or both entities.

[2] In March 2022, the complainant filed a grievance, alleging that the employer breached the collective agreement between the respondent and the Treasury Board for the Program and Administrative Services group, which expired on June 20, 2021 ("the collective agreement"). Specifically, the grievance alleges that the employer discriminated against him by not providing him with a safe and harassment-free workplace and that it violated the collective agreement article related to employees' performance reviews.

[3] Initially, the respondent supported the grievance, but it withdrew its support after the grievance was referred to the third level of the grievance process. Therefore, the complainant made this complaint, alleging that the respondent breached its duty of fair representation under s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The respondent denies the complainant's allegations and requests that the Federal Public Sector Labour Relations and Employment Board ("the Board") summarily dismiss the complaint because it is reportedly untimely or does not demonstrate an arguable case.

[4] 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 (see *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68 at para. 4). Since the parties were given the opportunity to file additional submissions, I am satisfied that it is possible to decide the respondent's preliminary request to dismiss the complaint on the basis of the documents on file as well as the parties' written submissions.

[5] For the following reasons, I conclude that the complaint does not demonstrate an arguable case that the respondent breached its duty of fair representation set out in s. 187 of the *Act*.

II. The context of the complaint

[6] The complainant claims that he suffers from mental health issues resulting from his work on military front lines some years ago. In fact, he states that in 2004, the Canadian Armed Forces and Veterans Affairs Canada medically assessed him and that he was diagnosed with several disabilities, including post-traumatic stress disorder (PTSD).

[7] In 2021 and 2022, the complainant's doctor provided multiple medical opinions to the employer over the course of his employment as he had requested accommodation. Some medical opinions were also given to the employer in response to a fitness-to-work evaluation of him that it required in 2021. He affirms that those medical opinions would have been provided to the union and at least some of this medical documentation was submitted to the Board to support the complaint.

[8] The complainant alleges that throughout his employment with the employer, he was continuously subjected to harassment and bullying by other staff members. He also explains that he was subjected to sexual and personal harassment by some of his managers. Moreover, he allegedly was subjected to discrimination in some internal and external staffing or promotion processes. Those incidents would have exacerbated his stress and triggered his PTSD.

[9] When he reported those situations to the employer, his superiors allegedly mostly refused or neglected to take any steps to address them. Eventually, it hired an external investigator in 2021 to conduct a workplace assessment, to address long-standing conflicts and concerns raised by its staff and management in 2018 and 2019. A report concluded that although some issues were identified, the long-standing conflicts and concerns appeared to have been mainly resolved. However, the complainant believes that the conditions that prompted the external investigation were not resolved by the employer and still existed as of when he made the complaint.

[10] Due to being adversely impacted by his disability, the complainant had to take intermittent leaves of absence between February 2021 and January 2022, sometimes

for extended periods. Allegedly, on a verbal assurance from a union representative that some effort would be made to resolve the toxic workplace, he returned to work in 2022, only to find the employer presenting him with a performance evaluation stating that his work performance needed improvement. He qualifies his work throughout his tenure with the employer as exemplary, which is supported by an instant award and recognition of his 30 years of public service, both of which he received in February and March of 2021.

[11] In March 2022, the union, on the complainant's behalf, filed a grievance under the collective agreement to address the situations related to the discrimination that he suffered and to the performance evaluation that he received from the employer. The employer denied it at the first level of the grievance process.

[12] In August 2022, with the employer's consent, the union transmitted the complainant's grievance to the third level of the grievance process. At that point, the complainant's union representative changed to Jean-Yves Lebel, as he normally handles grievances at the third level for the respondent. However, the complainant states that from that point, he experienced persistent issues with Mr. Lebel.

[13] The complainant and Mr. Lebel would have had multiple conversations between August 12 and October 16, 2022. The complainant felt that Mr. Lebel did not understand his disability and that Mr. Lebel's behaviour was overly and unnecessarily hostile. He would have communicated that impression to Mr. Lebel, but those concerns were allegedly ignored and dismissed.

[14] To accommodate his disability, the complainant states that he requested that Mr. Lebel communicate with him by email, since he had trouble remembering the details of their phone conversations. Mr. Lebel apparently refused that request and required the complainant to only have phone conversations with him.

[15] While s. 190(2) of the *Act* clearly establishes that only the facts that happened in the 90 days before the complaint was made can be part of it, the Board may consider the facts that preceded those 90 days in its analysis of the complaint's context (see *Perron v. Customs and Immigration Union*, 2013 PSLRB 13 at para. 23). That is how most of the facts and information set out so far in this section will be considered in the course of this decision on the complaint.

[16] However, with respect to the timeliness of the complaint itself, in their submissions, both parties recognize that under s. 190(2) of the *Act*, only the facts and allegations that occurred between October 18, 2022, and January 16, 2023, are relevant to the present matter. Therefore, no actual debate remains as to the complaint's timeliness per se.

III. The facts and allegations relevant to the complaint

[17] Within the timelines set out in the application of s. 190(2) of the *Act*, the submissions on file refer mainly to four specific dates and identify specific facts related to those dates.

[18] On October 18, 2022, the respondent notified the complainant that due to Mr. Lebel's reassessment, it intended to withdraw its support for the grievance. However, it offered the complainant the possibility to provide additional information and documents before it made its final decision.

[19] On October 20, 2022, the complainant called Mr. Lebel, who, according to him, did not want to speak with him on the phone. Then, the two would have had a heated discussion.

[20] On November 7, 2022, the respondent communicated to the complainant its decision not to assign him a different union representative. The complainant made that request earlier on October 20, 2022, as he suggested that Mr. Lebel's attitude toward him had exacerbated his stress and had adversely impacted his disability. The complainant also alleged that Mr. Lebel did not understand his disability and that Mr. Lebel refused to accommodate him in the grievance process.

[21] The complainant asked for a new union representative in the hope that a different person could approach the matter with more compassion and support. He refers to that request as an accommodation request that the respondent denied. However, the respondent disputes that characterization of the request and takes the position that no such accommodation request was ever presented by the complainant.

[22] On November 30, 2022, after reviewing the additional information that the complainant provided, the respondent confirmed its decision to withdraw its support for the grievance and to close its file. That decision, as well as the alleged refusal to

recognize and accommodate the complainant's disability, form the basis of this complaint.

IV. Summary of the arguments

A. For the respondent

[23] The respondent submits that the complaint does not demonstrate the existence of an arguable case of a breach of its duty of fair representation toward the complainant. It reminds the Board that its discretion with respect to grievances alleging a collective agreement breach is broad and is enshrined in the *Act*. As the Supreme Court of Canada recognized in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 at 527, there is no absolute right to adjudication and a union has considerable discretion on that aspect.

[24] The union may consider the entire bargaining unit's interests, including with respect to its decisions, such as how to allocate its resources. It can weigh and balance its interests against the significance of the issues raised by and the consequences to an affected employee. The duty of fair representation does not oblige a union to proceed with a grievance every time a member asks it to.

[25] For the respondent, the complainant did not establish a *prima facie* case of a breach of its duty of fair representation. The complaint is largely about his disagreement with its decision to withdraw its support for his grievance. However, it suggests that its decision was made after a thorough and considered assessment of the chances of success of the complainant's grievance.

[26] The respondent provided a principled and transparent rationale for its decision and allowed the complainant to respond before finalizing its decision and closing its file. Its decision was well within the scope of its discretion, and his disagreement with it is not a valid ground for the Board to reach a conclusion that the respondent breached its duty of fair representation.

[27] The respondent further suggests that the representation does not have to be perfect and that it does not necessarily require that its communication style be "warm". The representation must simply be fair, and a direct communication style does not always equate to hostility amounting to bad faith. Therefore, the allegations of arbitrariness and bad faith are without merit.

[28] As for the discrimination allegations, they also must be seen as having no merit as the complaint does not demonstrate that the union treated the complainant adversely in a manner connected to his disability. Furthermore, the complainant failed to establish that he made the union aware of his disability-related needs, which would have triggered the duty to accommodate him in the grievance process.

[29] Ultimately, the respondent takes the position that the complaint includes several "sweeping generalizations" about its motive and conduct, without tying them to specific facts. Therefore, the complaint is not supported by the alleged facts and does not demonstrate an arguable case that the respondent breached s. 187 of the *Act*.

B. For the complainant

[30] As the complainant notes in his submissions, the primary issue in his complaint is that the respondent abruptly withdrew its support for his grievance. That exercise of its discretion was arbitrary, discriminatory, and in bad faith. The respondent allegedly also acted in bad faith and discriminated against him by refusing to acknowledge and consider his disability as a factor in his case, by denying him the accommodation he needed and requested and by treating him with some form of disrespect and hostility.

[31] The complainant considers that the union made no effort to discover the circumstances surrounding his grievance. Its investigation of the events leading to the grievance was perfunctory and did not demonstrate that it took the grievance seriously. The union failed to consider whether people or witnesses had to be spoken with to better understand the information that the employer relied on in its defence. In sum, the union simply failed to properly assess the facts and the legal merit of the case and to evaluate the probable outcome of a potential adjudication before withdrawing its representation with respect to the grievance.

[32] Furthermore, for the complainant, the union acted arbitrarily and in bad faith as it never informed him of the reasons for the decision to withdraw its support. According to him, the union merely stated that it would not proceed with the grievance as there was no discrimination, but it did not explain how it came to that conclusion. The complainant affirms that the union never apprised him of the information it relied on when it made its decision, which therefore made it impossible for him to respond to its position.

[33] Nonetheless, the complainant takes the position that the union acted on incomplete, uninformed, and erroneous information and that it failed to take real steps to verify its accuracy and legitimacy. The union appeared overly concerned with the employer's view of the matter rather than with representing the complainant's interests. The union would have also failed to advise him of his rights to proceed to adjudication personally without its assistance.

[34] The complainant is of the opinion that with all the information and the medical documentation that he gave the union during his grievance process, it ought to have been apparent that he had been discriminated against in the workplace. However, the union accepted assertions from the employer that no discrimination was present, without properly investigating it. The complainant argues that ultimately, the union failed to understand or consider his perspective of the case.

[35] The complainant also questions the fact that the union's decision to withdraw its support for his grievance happened conspicuously immediately after he complained against his union representative for treating him with disrespect. According to the complainant, this would demonstrate bad faith by the respondent.

[36] On the discrimination aspect of his complaint, the complainant further argues that throughout the grievance process, he was adversely impacted by the respondent's actions as it simply failed to accommodate him. For him, this adverse impact was due in whole or in part to his disability.

[37] Specifically, the complainant affirms that the union refused to acknowledge the severity of his disability and that it failed to treat it with the seriousness that it deserved. For him, a higher degree of scrutiny by the Board of the union's action is warranted when a complainant, like him, suffers from a disability.

[38] Even though the complainant would have discussed his condition with the union multiple times and would have provided numerous medical notes to substantiate his accommodation requests, the respondent ignored or denied those requests.

[39] According to him, the medical documentation provided to the union clearly indicated that his disability makes telephone calls difficult to the extent that he cannot fully remember all their details. For that reason, the union should have accommodated him through his request that they communicate only by email. It did not.

[40] It is clear to the complainant that the union representative found his accommodation requests taxing and annoying. Therefore, he argues that instead of addressing them, the representative unilaterally withdrew from representing him.

V. Reasons

A. The applicable framework

[41] This complaint was made under s. 190(1)(g) of the *Act*. Overall, it alleges that the respondent breached its duty of fair representation with respect to the complainant's rights under the collective agreement; therefore, the respondent allegedly contravened s. 187.

[42] When it comes to questions of representation for grievances related to the application or the interpretation of a collective agreement, the jurisprudence has long recognized that a bargaining agent's discretion is quite broad (see *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70 at para. 126; *Payne v. Public Service Alliance of Canada*, 2023 FPSLREB 58 at para. 62; and *Kruse v. Public Service Alliance of Canada*, 2023 FPSLREB 74 at para. 60).

[43] The Board's role is not to second-guess the union with respect to the merit of its analysis of the case but rather to assess the decision-making process that led to the decision to cease its representation, such as in this case (see *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28 at para. 17; *Kruse*, at para. 70; *Drouin v. Professional Association of Foreign Service Officers*, 2023 FPSLREB 3 at para. 69; *Berberi v. Public Service Alliance of Canada*, 2017 PSLREB 49 at para. 48; and *Corneau v. Association of Justice Counsel*, 2023 FPSLREB 16 at para. 94).

[44] As the complainant noted in his submissions, while the union's discretion is broad, it is not absolute (see *Jutras Otto v. Brossard*, 2011 PSLRB 107 at para. 62), and its representation must still be fair, genuine, and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility toward the employee (see *Payne*, at para. 62; and *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141 at para. 29).

[45] In short, to be successful in a matter raising the union's duty of fair representation, the complainant bears the burden of demonstrating that the union acted in a manner that was either arbitrary, discriminatory, or in bad faith (see

Holloway v. Professional Institute of the Public Service of Canada, 2015 PSLREB 55 at para. 56).

[46] An arbitrary decision would have to be made superficially, without a true examination of the facts, or would have to result from a union's serious negligence in that it would have treated a complaint in a careless manner (see *Corneau*, at para. 100; *Beniey v. Public Service Alliance of Canada*, 2020 FPSLREB 32 at para. 61; and *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 at para. 50).

[47] Discriminatory conduct by a bargaining agent in the context of its duty of fair representation under s. 187 of the *Act* would occur if it were to treat one of its members (or group of members) adversely or differently than its other members for a reason not validly or reasonably related to labour relations, such as a personal characteristic or a prohibited ground of discrimination (see *Corneau*, at para. 109; *Beniey*, at para. 69; *Payne*, at paras. 84 to 86; and *Noël*, at para. 49).

[48] To constitute bad faith, a union's actions, decisions, or behaviours would have to demonstrate a form of personal hostility toward one of its members or a behaviour that could be qualified as oppressive, dishonest, malicious, or spiteful (see *Corneau*, at para. 110; *Beniey*, at para. 67; *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLREB 30 at para. 97; and *Noël*, at para. 48).

[49] As can be seen from the applicable jurisprudence, the necessary burden, to demonstrate on the merits a union's breach of the duty of fair representation, has historically been recognized as high (see *Collins v. Public Service Alliance of Canada*, 2023 FPSLREB 29 at para. 94; *Nkwazi v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 93 at paras. 34 and 35; and *Ennis v. Meunier-McKay*, 2012 PSLRB 30 at para. 48).

[50] However, when the Board deals with a preliminary request to summarily dismiss a complaint without holding an oral hearing, as in this case, it applies what is commonly referred to as the "arguable-case" analysis. This test is also well established in the Board's jurisprudence and requires determining, if the facts of the complaint are taken as true, whether they could demonstrate the existence of a breach of the duty of fair representation (see *Corneau*, at para. 17; and *Osman v. Public Service Alliance of Canada*, 2021 FCA 227 at para. 9).

[51] This burden is recognized as being much lower for the complainant to meet at this stage. In fact, the real burden sits with the respondent, which raises the point that the complaint reveals no arguable case of a breach of s. 187 of the *Act*, but the complainant must still put forward all the factual allegations supporting his complaint and addressing all the breaches alleged in it (see *Payne*, at paras. 59 and 60).

[52] While the facts presented by the complainant are to be taken as true for the purpose of this arguable-case analysis, a close review of the Board's jurisprudence in that context allows making certain nuances that must be applied to that principle.

[53] Firstly, only facts, and not arguments or opinions, must be taken as true (see *Beniey*, at para. 57; *Archer v. Public Service Alliance of Canada*, 2023 FPSLREB 105 at para. 29; and *Corneau*, at para. 34). Secondly, factual allegations must be taken as true unless they are manifestly incapable of being proven or simply do not have an air of reality (see *Payne*, at paras. 60 and 91; and *Sganos*, at para. 81, citing *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 25). Thirdly, assumptions, accusations, and speculations need not be taken as true as they, by nature, cannot be proven (see *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at para. 27, cited in *Sganos*, at para. 80; see also *Payne*, at para. 60). Finally, rhetorical questions, alone, cannot support a duty-of-fair-representation complaint, and a complainant cannot simply rely on the possibility that new facts substantiating their allegations may turn up as the case progresses or on the respondent's inability to disprove their allegations (see *Payne*, at paras. 60 and 91; and *Sganos*, at para. 81, citing *Imperial Tobacco Canada Ltd.*, at para. 25).

[54] In summary, to be taken as true in the context of an arguable-case analysis, factual allegations must be the following:

- be provable and have an air of reality;
- not be arguments or opinions in nature;
- not be mere assumptions, speculations, or accusations;
- not be based solely on possible future supporting evidence;
- not rely solely on the respondent's inability to disprove them; and
- not solely take the form of rhetorical questions.

[55] As an example, if the complainant alleges that specific things were told or done to him and that they could potentially be considered hostile, I must take such alleged facts as true and determine whether they could constitute bad faith. However, if the complainant simply states that someone was being hostile to him, it is a bald affirmation that reflects his view, his feeling, or his interpretation of a relationship or an interaction with that person. That affirmation per se does not have to be taken as true on its own, without specific supporting facts, and it must be assessed against all the remaining information or documentation that the parties provided to see if it demonstrates an air of reality. The same can be said for a bald affirmation of discrimination (see *Payne*, at para. 87).

[56] On a final note, the Board has also recognized that if the respondent's assertions and explanations for its actions are unchallenged, then the Board can also rely on them, in addition to the complainant's factual allegations (see *Andrews* (2021 FPSLREB 141), at para. 3).

[57] In this case, when the alleged facts from the complainant are isolated from his arguments, opinions and interpretation of those facts, the matter revolves around these very few specific actions or inactions of the respondent:

- the decision to withdraw its grievance support;
- the failure to provide reasons or supporting information for its decision;
- the failure to provide information respecting the option for the complainant to continue the process without its support; and
- the failure to provide or consider accommodation requests, despite the complainant's disability.

[58] Therefore, the following analysis will address each of those points, to determine if an arguable case could be made that the respondent acted in a way that was arbitrary, discriminatory, or in bad faith.

B. The decision to withdraw grievance support

[59] The complainant submits that the primary issue in this case is that according to him, the respondent exercised its discretion arbitrarily, discriminatorily, or in bad faith by abruptly withdrawing its support for his grievance. Clearly, he disagrees with the respondent's decision. He also takes issue with the fact that initially, it supported the

grievance, but that it unexpectedly later withdrew its support. He submits that had the respondent conducted a real and sincere review of his file, it would not have made that decision.

[60] As discussed earlier in this decision, the union's discretion is broad as to whether to represent one of its members in the course of a collective agreement grievance process. A complainant's disagreement with a decision that a union makes when exercising its discretion is not sufficient to establish a breach of the duty of fair representation (see *Sganos*, at para. 102; and *Abdi v. Public Service Alliance of Canada*, 2022 FPSLREB 62 at para. 38). If the decision is not made arbitrarily, is not discriminatory, or does not result from bad faith, the Board should not interfere with the union's exercise of its discretion (see *Nkwazi*, at para. 33; and *Osman v. Canada Employment and Immigration Union*, 2020 FPSLREB 40 at para. 22).

[61] A careful review of the submissions and the documentation on file set out that the factual allegations, even if taken as true, do not demonstrate that the respondent made a careless or an ungenuine assessment of the complainant's case.

[62] As it transpires from the complainant's emails, Mr. Lebel had multiple phone conversations with him and had the opportunity to review all the documentation that he submitted. They also exchanged some emails that allowed him to bring to Mr. Lebel's attention every detail of his situation that he believed should have been considered in the analysis of his grievance.

[63] Ultimately, Mr. Lebel reached the decision that the grievance had no reasonable chance of success and that no meaningful remedy could be achieved. Once again, the Board's role is not to determine if the union's conclusions on a grievance's chances of success are correct but simply to determine if the process that the union followed to reach that conclusion was within the boundaries of s. 187 of the *Act* (see *Cousineau v. Walker*, 2013 PSLRB 68 at para. 29; and *Rudakov v. Public Service Alliance of Canada*, 2015 PSLREB 69 at paras. 59 and 63).

[64] The fact that the union initially supported the grievance has no bearing on its discretion to later withdraw its support after a more comprehensive analysis was completed (see, for example, *Boudreault v. Public Service Alliance of Canada*, 2019 FPSLREB 87 at para. 34). As for the suggestion that the decision was made abruptly and

that it was unexpected for the complainant, once more, the documentation on file does not support that proposition.

[65] In his submissions, the complainant recognizes that the respondent notified him that it was considering withdrawing its representation as early as October 18, 2022. This is also confirmed by the supporting documents that he provided. That verbal notification was followed on the same day by an email from Mr. Lebel confirming that following his recommendation, the respondent decided to remove itself from representing the complainant's grievance and offered him a last opportunity to provide any new information that would convince it to change its position.

[66] In an email dated October 20, 2022, the complainant wrote that while Mr. Lebel "might be right about his recommendations", he asked the respondent to provide him with a new representative. Therefore, he seems to have been fully cognizant of Mr. Lebel's recommendation. From that date to November 7, 2022, a series of emails from the complainant sets out that he continued asking for a new representative but that he also submitted supplementary information to the respondent and inquired as to the next steps in his file.

[67] On November 7, 2022, the union's director of labour relations confirmed that after reviewing the file, she was confident in Mr. Lebel's ability to represent the complainant and that she relied on his assessment of the file. On the same day, in response to that email, the complainant explained that Mr. Lebel "… already indicated he would not be moving forward …" and suggested that he could seek external representation or even use available complaint mechanisms with respect to the respondent's position.

[68] Finally on November 30, 2022, via email, Mr. Lebel confirmed that the union's decision to withdraw its representation would not change and that it would close its file. This whole chain of events and email exchanges do not support the complainant's suggestion that the respondent abruptly and unexpectedly withdrew its support for his grievance. Rather, it demonstrates that it exchanged with him for over a month to inform him of its position with respect to his grievance and to give him the opportunity to have it change its position. Mr. Lebel's final email, on November 30, 2022, simply closed the loop of that exchange and cannot in any way be considered an

abrupt or unexpected expression of the respondent's intention to withdraw its representation of the complainant.

C. Not providing reasons or supporting information for its decision

[69] While the complainant alleges that the respondent did not provide the reasons for its decision to withdraw its support for his grievance, I disagree. In his submissions, he sets out his appreciation of some of the reasons that the respondent provided in his explanation of how its reasons were not founded. By doing so, he already gives a sense that in fact, the union did provide reasons for its decision.

[70] Also in the documentation that the complainant provided to support his complaint are some emails that he received from at least two senior union representatives that explain their reasoning and provide a rationale for their decision. As an example, they specifically refer to a legal test and some jurisprudence applied in discrimination cases and state how they believe those things impact the complainant's case. Other information was provided as well as to how the union representative weighed the available evidence before making a determination.

[71] Once again, the complainant might very well disagree with the respondent's reasons, but the Board's role is not to determine if the union's decision was right or wrong, only if it was the result of arbitrariness, discrimination, or bad faith. Therefore, the Board does not assess the rightfulness or the sufficiency per se of the union's reasons for withdrawing its representation but rather examinates whether the reasons provide a sense that it turned its mind to the issue and the facts and that it made a reasoned decision based on the available information and documentation (see *Holloway*, at para. 58; *Hancock v. Professional Institute of the Public Service of Canada*, 2023 FPSLREB 51 at para. 94; and *Cox v. Vezina*, 2007 PSLRB 100 at para. 131).

[72] Several times in his submissions, the complainant reiterates that the respondent failed to further investigate his allegations or the events surrounding the grievance and that it failed to inform him as to the specific information or documents it relied on when making its decision. Respectfully, the complainant cannot dictate to the union how and what to investigate (see *Baun v. National Component, Public Service Alliance of Canada*, 2010 PSLRB 127 at para. 51). The complainant is not necessarily entitled to the best possible investigation, only to a fair and reasonable investigation of his case by the respondent (see *Noël*, at para. 50). In its decision, the union is also entitled to

consider if resources should better be devoted to other cases (see *Boulos v. Public Service Alliance of Canada*, 2011 PSLRB 69 at para. 47; *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52 at para. 44; *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13 at para. 69; and *Noël*, at para. 50).

[73] Moreover, it seems that the complainant mischaracterized the respondent's justification for its decision, making it almost impossible for him to be satisfied with its explanations. While he questions the "links" that the respondent made or did not make to reach its conclusion, Mr. Lebel's explanation clearly articulates that the union's decision was primarily based on the lack of evidence, according to his analysis, to meet the burden that was required to succeed in the grievance under its control.

[74] In fact, the complainant's submissions revolve significantly around reviewing the union's decision, in an attempt to demonstrate that its finding was wrong. As the jurisprudence reminds with respect to a complaint like this one, the Board is not sitting in appeal of the union's decision; nor will it assess the merits of the grievance that is the source of the complaint (see *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159 at para. 31; *Corneau*, at para. 94; *Baun*, at para. 44; and *Boulos*, at para. 44). Even if the union might have made a mistake in its assessment of the case, this would not necessarily make the resulting decision arbitrary, discriminatory, or in bad faith (see *Jakutavicius*, at para. 125; and *Pothier v. Public Service Alliance of Canada*, 2023 FPSLREB 101 at para. 121).

[75] The complainant's submissions and arguments also often relate to the numerous allegations he makes against the employer's actions, behaviours, and decisions. The Board cannot address those allegations, as this complaint is against the respondent and should not be used to obtain the Board's positions on his different, existing conflicts with the employer (see *Mangat*, at para. 40; *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at para. 164; and *Corneau*, at para. 95).

[76] Therefore, based on the factual allegations and the complainant's documentation, this allegation related to the lack of reasoning or supporting information for the respondent's decision does not demonstrate that its assessment of his case could be considered a breach of s. 187 of the *Act*. Clearly, he disagrees with its conclusions, but right or wrong, they were explained in sufficient detail to allow him to understand their foundation.

D. Not providing information respecting the option to continue the process without the union's support

[77] From time to time, the jurisprudence has recognized a potential obligation for a union, despite withdrawing its support, to inform its members of the possibility that they may continue their grievance recourse on their own (see *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79 at paras. 147 and 148) or of the possibility that they may apply for judicial review when that option is available to them (see *Jakutavicius*, at para. 144). The complainant alleges that the respondent failed to meet that obligation. I disagree.

[78] Contrary to the facts in *Savoury*, in this case, the grievance at the source of the complaint is against the interpretation and application of a collective agreement, not a disciplinary measure. Section 208(4) of the *Act* specifically bars a grievor from continuing with such a grievance unless supported and represented by a bargaining agent. Therefore, there could have been no failure of that obligation in this case, as the respondent no longer supported the complainant's grievance and ended its representation in the grievance process.

[79] As for the existence of some other alternate or potential recourses, I note from the complainant's documentation that he seemed to be aware of some of them, as he expressed as much to the union in their exchanges. No matter what, I was not presented with specific information or submissions suggesting that any other recourses were ever open to or contemplated by the complainant or that he would have been prevented from using any of them due to the lack of information he received from the respondent.

[80] I was certainly not informed of a missed opportunity to make a judicial review application or that it was an option ever open to the complainant at any time relevant to this matter. I was also not provided with any submissions or decisions suggesting that there is a general duty or an obligation for the respondent to provide information with respect to every possible form of recourse available to the complainant, and I do not believe that such a general obligation exists on its own (see *Roberts v. Union of Canadian Correctional Officers - Syndicat des Agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2010 PSLRB 129 at para. 26).

E. Not providing or considering accommodation requests, despite a disability

[81] The complainant alleges that the union acted contrary to s. 187 of the *Act* by discriminating against him in several instances. Specifically, he suggests that the respondent failed to appreciate the seriousness of his grievance as it ought to have been apparent that he had been discriminated against in the workplace. He also suggests that the respondent failed to accommodate his disability by denying his requests to communicate with him mainly by email and to assign a new representative to his case.

[82] To support his position, the complainant refers to *Bingley v. Teamsters Local Union 91*, 2004 CIRB 291, for the principle that a higher degree of scrutiny of the union's actions is warranted when a member suffers from a disability, as it owes an extra measure of care to such a person.

[83] In *Bingley*, at para. 74, after a review of the jurisprudence, the Canada Industrial Relations Board concluded that when a member has some kind of disability, the union must not only handle a duty-to-accommodate grievance in an "ordinary" manner but also put some extra effort into the case. It must be proactive and more attentive in its approach. The Board has already considered that decision, in *Tyler v. Public Service Alliance of Canada*, 2021 FPSLREB 107 at para. 133.

[84] However, *Bingley* recognizes that that approach must still respect certain principles normally applicable to duty-of-fair-representation complaints. The union should still be given wide latitude with its duty of fair representation, despite the requirement to address human rights issues, and the Board should still be careful not to substitute its own view for that of the union (see *Bingley*, at para. 82).

[85] In short, as valuable as it is, this approach should not raise the bar to such a level that the union would be held to perfection (see *Tyler*, at para. 185). Even if the union is required to take an extra measure of care and show an extra measure of assertiveness when handling the case of a member alleging human rights violations, to the extent that it demonstrates that it was reasonably careful and reasonably assertive, the union will have fulfilled its duty of fair representation (see *Bingley*, at para. 83; and *Tyler*, at para. 198).

[86] In *Murphy v. Unifor Local 4606*, 2021 NSSC 323, the Supreme Court of Nova Scotia reviewed and confirmed the provincial Labour Board's application of *Bingley*, in which it conducted a two-fold analysis: substantive and procedural. On the substantive side, the analysis was specifically centred on the union's decision to refuse its assistance to a disabled member or to stop such assistance at a certain point, to ascertain that it was not discriminatory in and of itself. As for the procedural aspect, it related to the process that the union in that case followed to reach that decision, to determine if it had an adverse impact on the complainant as it failed to take account of and therefore accommodate his disability. I will take that approach.

[87] As a starting point, for the complainant to benefit from the approach taken in *Bingley*, the following elements must be present. Firstly, the complainant must demonstrate the existence of a disability. Secondly, the disability or limitation must be known, or ought to have been known, by the union, as it could not be found faulty for not considering or accommodating something that it was not aware of. Finally, the situation underlying the duty-of-fair-representation complaint must be based on allegations of a breach of the employer's duty to accommodate (see *Bingley*, at paras. 57, 62 to 64 and 74).

[88] In this case, in his submissions, the complainant clearly states that he has a disability, as he suffers from diagnosed PTSD that has serious effects on his physical and mental health. That affirmation is supported by the medical evidence that he provided to support his complaint.

[89] Furthermore, the documentation that both parties provided indicates that the respondent acknowledged the fact that the complainant is disabled and that he suffers from mental illness. The corrective measures that he sought in his grievance referred to his disability. Therefore, as a respondent representative signed that grievance and filed it on his behalf, it is obvious that it was aware of his disability when it handled his case during the period relevant to the complaint.

[90] While the grievance refers primarily to the fact that the employer allegedly did not provide the complainant with a harassment-free workplace and breached the collective agreement provisions related to his performance review, the corrective measure he seeks specifically asks that the employer fulfil its duty to accommodate by accommodating his medical restrictions and limitations.

[91] Once again, the respondent's representative signed and filed that grievance, and its submissions even suggest that Mr. Lebel reviewed it himself before it was signed. Therefore, the grievance aimed at obtaining some form of accommodation for the complainant, and the respondent could not have ignored it during the time relevant to this complaint.

[92] Therefore, since the necessary elements to apply *Bingley* are present, I will turn my analysis to the substantive and procedural aspects of the respondent's handling of the complainant's case.

[93] On the substantive side, it appears from Mr. Lebel's October 18 and November 30, 2022, emails that he considered the complainant's disability and the possible harassment and bullying he alleged that the employer had subjected him to. However, Mr. Lebel's rationale clearly explains that the main reason behind the union's decision to withdraw its support was that it did not believe that evidence supported discrimination on any prohibited ground.

[94] While the information shared with the respondent could have indicated a possible harassment or bullying tactic from management, the respondent concluded that it would not be able to demonstrate that the complainant's 2020-2021 performance assessment violated the collective agreement's "no discrimination clause" as there was no concrete evidence of discrimination by the employer based on the complainant's disability. Mr. Lebel also considered the fact that the disability had not been disclosed to the managers assessing the complainant's work and that a neutral external consultant had reviewed the assessment.

[95] The different positions that the complainant advanced with respect to his performance are also difficult to reconcile. Overall, he suggests that since he was harassed and bullied, it triggered his PTSD, which therefore impacted his performance. While his grievance is related to a performance review that the employer conducted for the period covering April 1, 2020, to March 31, 2021 ("the 2020-2021 period"), the incidents that he considers were harassment and that he refers to in his submissions happened from July 2017 to sometime "between 2019-2020".

[96] However, the supporting documentation he provided sets out that his mid-year assessment for the 2020-2021 period stated that he was "on track to meet expectations", and he also submits that throughout his employment with the

employer, he was an exemplary employee who diligently and faithfully executed his job responsibilities. Additionally, he provided copies of two awards that he received from the employer during the 2020-2021 period that he suggests support his exemplary performance.

[97] Once more, even when applying the approach suggested in *Bingley*, the Board's role is not to rule on the rightfulness, even less the correctness, of the respondent's decision. The complainant suggest that his case is comparable to *Jutras Otto*. I respectfully disagree, as the facts of his complaint are far from the obvious carelessness that the Board's predecessor observed in *Jutras Otto* (see paragraphs 74 and 77 to 79).

[98] On the procedural side, the complainant suggests that the union failed to respect his accommodation request to correspond exclusively in writing and to assign a new representative to his case.

[99] The complainant alleges that he requested to communicate exclusively in writing with the respondent or its representative. He does not provide much detail as to how, when, and to whom those requests would have been made in the context that would be relevant to this complaint.

[100] In response to the respondent's position that such a request was never made and that the documents that the complainant provided are silent on that point, the complainant clarifies that he made the request verbally to Mr. Lebel on October 20, 2022, in a telephone conversation. Mr. Lebel would have then denied his request and asked that communications be done only by phone.

[101] Even if I am open to taking that fact as true, I still must consider all the facts that the complainant submitted, to determine if it has an air of reality. In this case, instead, the complainant's submissions and documents contradict that factual allegation.

[102] The request came after Mr. Lebel initially suggested that the union might remove its support for the grievance on October 18, 2022. It is possible that other requests were made before that date, but as explained earlier in this decision, those facts could not be considered to substantiate this complaint as they occurred outside the 90-day period prescribed by the *Act*.

[103] All the alleged facts and documentation that I was presented with and that fall within that 90-day period do not demonstrate that that request was ever made during that time and do not support this idea. The documents provided show that the complainant received an email on October 18, 2022, from the respondent, not a phone call. He then called Mr. Lebel on October 20, 2022, and interestingly, he questions the fact Mr. Lebel was not happy with him calling. At any rate, after that call, everything was done in writing, as the complainant had deemed necessary.

[104] The complainant also refers to a medical assessment from his personal physician that was carried out in response to a fitness-to-work evaluation that the employer had required of him and that was allegedly shared with the union. For him, it would support his need to communicate in writing.

[105] However, the report states only that he would benefit from receiving directions and explanations in writing. Be that as it may, this is exactly what Mr. Lebel and others did, at least from October 20 to November 30, 2022. All the union's explanations or requests for further information were provided to the complainant in writing.

[106] The complainant refers to another medical certificate supposedly supporting his alleged need for accommodation. It states this: "… I request he have access to a private bathroom and time and a half for writting [*sic*] any exams". The respondent was also aware of the existence of this certificate. However, it is not intended to address the relationship between the complainant and the respondent but is rather related to some specific staffing or assessment process that he was going through at some point.

[107] At any rate, its application to the relevant facts of this complaint is questionable. While the private bathroom is certainly not applicable, one could understand that the complainant potentially needs more time to process information or to answer requests. The documentation before me demonstrates that while Mr. Lebel gave him 10 days to provide supplementary information that would convince the union to change its mind, the final decision was made only on November 30, 2022. Nothing in the submissions or the documentation suggests that the respondent did not consider any information that he provided at any point before that final decision was made or that he ever asked for more time to respond.

[108] Even when considering that he might have needed more time than usual to provide information to the respondent, he was given practically more than 40 days to

present, in writing, any further documentation to support his case. As Mr. Lebel confirmed in his November 30, 2022, final email, the respondent considered all the supplementary information, but it did not change the result.

[109] As I understand it, the accommodation and extra care that the complainant seeks from the respondent would help him understand what is going on and be able to put forward his case. From the information that I was provided, it is obvious that he understood clearly what was going on but that he did not agree with it.

[110] The suggested fact that the respondent would not have agreed to communicate with him solely in writing should not have prevented him from doing so when he communicated information to it. But in his submissions, he confirms that he used the phone more often than not, to the point that Mr. Lebel complained about the fact that he called repeatedly without an appointment. This allegation, when assessed against all the other available alleged facts and documents, does not have an air of reality.

[111] The complainant also alleges that the respondent failed to accommodate him when it denied his request for a new representative to be assigned to his case. I do not believe that his request could be qualified as an accommodation request, and it seems more of a preference from him, as he was facing resistance from Mr. Lebel.

[112] No submissions were made as to how exactly that would relate to the complainant's limitations or the benefits that would result from that request, were it accepted. Furthermore, nothing in the documentation suggests that the request was ever made before October 18, 2022, when it was communicated to him that the union decided to remove itself from representation on his grievance. As the complainant puts it in his email exchanges with the respondent, he simply believes that he needs "… someone a little more compassionate and supportive …".

[113] The complainant suggests that Mr. Lebel treated him capriciously and with hostility. As explained earlier in this decision, this is the expression of an opinion or a feeling that I do need not take as true unless I can find or be referred to specific facts that would support it. I found none.

[114] I find that the Board's following statement in *Hancock*, at para. 93, applies to the present situation:

> *[93] … However, the duty of fair representation does not require a bargaining agent to follow the direction of a bargaining unit member when deciding either whether to support a grievance or how it should approach a grievance, including who is to provide that representation (see* Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13). A bargaining agent is entitled to decide how it allocates its resources if it exercises this judgement fairly, without discrimination or being arbitrary. The alleged facts do not show that the respondent breached its duty of fair representation when it denied the complainant's requests for a new representative ….*

[115] Again, despite the complainant's suggestions, I could not find real signs of hostility between him and Mr. Lebel but only some clear signs of disagreement in their respective analyses of the case. In an email, the respondent's director of labour relations recognized that Mr. Lebel's communication style might not be as warm as others, but the evidence does not tantamount to hostility.

[116] Consequently, for me to find that the respondent could have acted in a discriminatory manner, a determination must be made as to the presence of any evidence or alleged fact suggesting that the union treated the complainant differently due to a personal characteristic or a protected ground when it made the decision not to further assist him with his grievance. In this case, even when considering *Bingley*, I conclude that the complainant did not demonstrate an arguable case that the respondent discriminated against him.

[117] For the respondent to normally fulfil its duty of fair representation, it would have had to demonstrate only that absent bad faith and discrimination, it reasonably turned its mind to the complainant's case and based its decision on relevant facts (see *Holloway*, at para. 58; *Hancock*, at para. 94; and *Cox*, at para. 131). Even when expanding that obligation following the principles established in *Bingley* because the complainant is disabled and his case is related to the duty to accommodate, the respondent had only to also have reasonably considered the disability in its decision-making process, on the substantive as well as on the procedural side (see *Bingley*, at para. 83; *Tyler*, at para. 198; and *Murphy*, at para. 31). In this case, based on my review of the facts and my analysis of the respondent's decision, actions, and behaviour as explained in this decision, I believe that it did.

VI. Conclusion

[118] For the reasons set out in this decision, I cannot find anything that would suggest that the respondent's decision or actions were arbitrary, discriminatory, or made or done in bad faith. Therefore, I conclude that the complaint does not demonstrate an arguable case that the respondent breached its duty of fair representation set out in s. 187 of the *Act*.

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

(The Order appears on the next page)

VII. Order

[120] The complaint is dismissed.

July 2, 2024.

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