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File: 561-02-47225

Citation: 2024 FPSLREB 154

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

OLIVIA WATKIN MCCLURG

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
McClurg v. Canadian Association of Professional Employees

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

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Fiona Campbell, counsel

Decided on the basis of written submissions, filed May 18 and 31 and September 1, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] On April 21, 2023, Olivia Watkin McClurg ("the complainant") made a complaint against the Canadian Association of Professional Employees (CAPE or "the respondent") under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[2] The details of her complaint are as follows:

> *Arbitrary decision not to file a policy grievance regarding health and safety of the return to office policy as a violation of the occupational health and safety section of the collective bargaining agreement in the context of COVID-19. I met with Pierrette Landry December 14th, 2022 and January 26th, 2023 to request such a grievance and she told me in the second meeting that COVID-19 is no longer a concern, that deaths due to COVID-19 are very rare, and that my concerns are opinions and beliefs reflective of mental health issues. I cited statistics evidencing my concerns, which were not considered, and my offer to send the government data I was referring to rebutting what I was told was refused. I was not given a clear answer on whether a grievance would be filed in either meeting, even after following up by e-mail, for clarification following the second meeting on January 27th, 2023. I had a phone call and email correspondence with Claude Archambault where he confirmed to me by email on April 20th, 2023 that a grievance would not be filed.*

[3] The complainant stated in her complaint that the date on which she knew of the act, omission, or other matter giving rise to the complaint was April 20, 2023.

[4] The relief sought by the complainant was the following:

> … [The respondent] *should either file a policy grievance on the basis that the return to office policy violates occupational health and safety duties of the collective agreement, or to demonstrate consideration of relevant facts of the risks posed by COVID-19 in the office in deciding not to file such a grievance.*

[5] On May 18, 2023, the respondent responded to the complaint ("the CAPE response"). As part of the CAPE response, the CAPE submitted that the allegations do not establish a *prima facie* violation of the *Act* and that consequently, the complaint should be dismissed summarily, without a hearing.

[6] The complainant replied to the CAPE response and its motion to dismiss on May 31, 2023 ("the May 31 reply").

[7] After reviewing the complaint, the CAPE response, and the May 31 reply, I concluded that the matter could be decided on the basis of the written submissions, pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), which reads as follows: "The Board may decide any matter before it without holding an oral hearing."

[8] The issue to be decided is whether there is an arguable case that the respondent breached s. 187 of the *Act*. In other words, taking all the complainant's factual allegations as true, could they show that the respondent failed its duty of fair representation as defined by the *Act* and the jurisprudence?

[9] Both the complainant and the CAPE filed additional submissions on September 1, 2023, which I will refer to respectively as "the complainant's Sept. 1 submission" and "the CAPE Sept. 1 submission".

II. Summary of the events leading to the complaint

[10] At the time of the complaint, the complainant was a member of the Economics and Social Science Services (EC) group. The CAPE was at that time and still is the certified bargaining agent for that group. At the time relevant to the facts set out in the complaint, members' of the EC group terms and conditions of employment were governed by a collective agreement entered into between the Treasury Board ("the employer") and the CAPE that was signed on August 28, 2019, and that expired on June 21, 2022 ("the collective agreement").

[11] The complaint refers to the failure of the CAPE to file a policy grievance with respect to the health-and-safety provision of the collective agreement. The health-and-safety provision of the collective agreement is article 37, and it states as follows:

Article 37: health and safety	***Article 37: santé et sécurité***
37.01 *The employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Association, and the*	***37.01*** *L'employeur prend toute mesure raisonnable concernant la santé et la sécurité au travail des fonctionnaires. Il fera bon accueil aux suggestions de l'Association à cet égard, et les parties s'engagent*

parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.	*à se consulter en vue d'adopter et de mettre rapidement en œuvre toutes les procédures et techniques raisonnables destinées à prévenir ou à réduire les risques d'accidents de travail.*

[12] Over the course of several months during 2022, the employer signalled through several communications that it would require employees who had been working from home or teleworking to return to work in the office. This signalling culminated on December 15, 2022, with the employer's "Return to Office Directive" ("the RTO directive"). A copy of the directive was not provided.

[13] In an email sent to all its members on March 2, 2022, the CAPE stated as follows:

> …
>
> *CAPE has been informed that all Departments and Agencies will be resuming their plans for a gradual return to the workplace which were paused during the Omicron peak.…*
>
> …
>
> *CAPE will continue to advocate on behalf of its members in the elaboration of return-to-workplace plans and to ensure the ability to work remotely remains in place in all Departments and Agencies for those members who wish to do so.*
>
> …

[14] Attached as part of the March 2, 2022, email was a further questionnaire to CAPE members. It stated as follows:

> …
>
> *CAPE is eager to hear from you, its membership, on the impacts of the federal government's return-to-office policies!*
>
> *This is a reminder of the upcoming consultation sessions on June 28 and July 10, from 5:30pm to 7:30 pm (EDT).*
>
> ***CHANGE IN FORMAT: ONLINE ONLY***
>
> *In response to the substantial preference for virtual participation, this consultation will be held completely virtually.*
>
> ***GOAL OF THIS CONSULTATION***
>
> *The goal of this consultation is to collect feedback from members belonging to various equity-deserving groups on the impacts of the return-to-office policy on equity-deserving groups, in view of*

> *building a stronger case with government to show more flexibility around telework.*
>
> *Bring your notes and your good ideas!*
>
> ***DEFINING EQUITY DESERVING GROUPS***
>
> *For the purposes of this meeting, members of equity-deserving groups include those who self-identify as, for example, Indigenous peoples, people with disabilities, visible minorities, members of the 2SLGBTQIA+ community, women, and caregivers.*
>
> …

[15] The CAPE maintains a website on the Internet. Information is posted on that website that is accessible to its members and the public. From the website, several documents have been submitted by the CAPE about issues pertinent to the employer's decision to have employees return to work in the office, the RTO directive, and this complaint. The following articles were published on the CAPE's website before the complainant's first contact with the CAPE, which eventually led to her complaint:

> **[June 14, 2022: suspension of mandatory vaccination policy:]**
>
> *The Government has announced today it is suspending its Mandatory Vaccination Policy, effective Monday, June 20. It also announced that unvaccinated employees on administrative leave could be reinstated the same day.*
>
> …
>
> ***Advocating for telework to manage ongoing health risks***
>
> *CAPE is aware that there is still an ongoing pandemic — the Government noted that the policy could be reinstated should the situation escalate in the fall.*
>
> *The sudden and abrupt change from one extreme to the other without a clear and sound transition plan is unsettling. CAPE will push for prudent and realistic transition measures that consider foreseeable safety risks.*
>
> …
>
> *Furthermore, as is our long-standing practice, CAPE will continue to raise the issue of remote work and advocate for the adoption of telework/hybrid arrangements as the future of work, wherever possible.*
>
> *We have been advocating for the Government to show flexibility around remote work arrangements for some time and will continue to do so.*
>
> ***Supporting members with grievances***
>
> *CAPE will continue supporting members with grievances.*
>
> …

[July 12, 2022: the CAPE calls for a suspension of the return-to-office plan:]

With the announcements by Public Health Officials in the Federal, Ontario and Quebec jurisdictions confirming that we are entering a seventh wave of COVID-19 infections, CAPE has made a request to the Treasury Board Secretariat that all return to office plans be immediately suspended until the situation improves.

CAPE is concerned with the serious and unnecessary risk to the health and safety of our members being required to return to the workplace amidst this seventh wave.…

…

[August 11, 2022: health and safety concerns related to return-to-office plans during COVID-19:]

Many of you have reached out to us with concerns about the return-to-office plans while the country is experiencing another COVID-19 wave. CAPE has prepared a brief outline of your rights, how you can inquire about preventative measures and the actions you can take with your employer.

…

Know your rights

If you notice a situation related to your employer's return-to-office plans that you believe is a danger to yourself, or that could be likely to result in an accident, injury, or illness, we advise you to consider the following options:

Inform yourself of the preventative measures in place

Ask your manager for a copy of the preventative measures that have been put into place to ensure the health and safety of all employees in the workplace. Ask questions if any of the information is unclear.

Report your concerns to your manager

If, after reviewing the preventative measures, you feel unsafe, share your concerns with your manager so that the matter can be looked into. Ensure you follow-up [*sic*] *to obtain a response.*

Report your concern to the Local Health and Safety Committee

In addition to the above, you can report your concerns to the Local Health and Safety Committee. Your manager is responsible for ensuring the names of the Committee members are posted and available to employees.

Hazardous Occurrence Report

If you have contracted COVID-19 as a result of being exposed in the workplace, complete a Hazardous Occurrence Investigation Report (Form 874) and submit it to your manager. The Employer is obligated under the Health and Safety provisions under the Canada Labour Code *to investigate the issue to ensure remedial action is taken to prevent a reoccurrence.*

…

Work refusals

You always have the right, under the Canada Labour Code*, to refuse to perform work that constitutes a danger to yourself or to another employee. The procedure for exercising this right is as follows ….*

…

[September 2, 2022: the CAPE's survey of members on the employer's return-to-office plans]

[September 29, 2022: the CAPE's survey results of members on the employer's return-to-office plans:]

…

Respondents have been clear that while COVID-19 remains a top concern and a reason to avoid the office, their attitude vis-à-vis telework is also shaped by a perceived boost in productivity and performance combined with the ability to achieve greater work-life-balance.

…

[December 15, 2022: the RTO directive, position and advocacy:]

On December 15, 2022, the Treasury Board Secretariat issued a directive for all federal employees to be back in the office two to three days a week starting January 16, 2023, and by no later than March 31, 2023.

CAPE will be joining the Public Service Alliance of Canada (PSAC), the Professional Institute of the Public Service of Canada (PIPSC) and other bargaining agents in a coordinated joint response, but in the meantime, here is more information on CAPE's position on telework, what we're doing about it and what you can do.

CAPE's position

…

>>Directive doesn't solve issues of in-office work

One thing this directive does not solve are the issues we've been hearing about since various members have begun returning to the office: pandemic health and safety concerns (ventilation, masking, etc.) ….

>>Pandemic

Now is not the time to force employees back into the workplace. Some government offices have poor ventilation, poor air quality, and are in dire need of renovations.

Government employees, in great numbers, answered the call to get vaccinated because of the serious health risk that COVID-19 poses. The virus that threw the world into turmoil has not gone away nor has the risk of serious side effects. Recently the media has been reporting that hospitals continue to be overwhelmed not only by

> *COVID patients, but those with the flu. Given this, what is the urgency to force employees into the office, especially over the winter? We have been open in our invitation to sit down with the Employer to discuss the issue.*
>
> *We have been relentless in advocating for the Employer to show more flexibility around telework since well before the pandemic forced it to adopt it for the safety of its employees.*
>
> …
>
> ***What you can do***
>
> *The Employer can ask its employees to return to the office, however, they also must ensure that your health and safety are maintained and that the request isn't discriminatory. If you feel that the requirement for you to work in the office doesn't meet one or more of these criteria, we recommend that you speak to your manager and/or request an accommodation. If your request for accommodation is denied, you may file a grievance.*
>
> *If the concern is around health and safety in the office, you can contact your manager and your health and safety committee representative.*
>
> …
>
> ***>>Requesting accommodation***
>
> *You can email your manager to request an accommodation. Legally you must disclose the reasons why you need to be accommodated and cooperate by providing supporting documentation.*
>
> *A denial of an accommodation for a disability, medical reason, or family situation could be seen as discriminatory, and therefore violate your collective agreement. The burden of proof in an accommodation situation lies with you — both to prove the grounds of discrimination and to confirm your specific restrictions or functional limitations.*
>
> …

[16] According to the complainant, she initially met with a CAPE labour relations officer (LRO), Pierrette Landry, on December 14, 2022. The CAPE response to the complaint states that the complainant spoke to Ms. Landry about how she was upset about the impending return to work in what she referred to as an unsafe environment because of health risks associated with COVID-19. The CAPE further states that while the complainant referred to a possible grievance at that time, nothing was firmed up, and there was no discussion at that time about a follow-up.

[17] The CAPE response states that on or about January 26, 2023, the complainant contacted the CAPE's general email address and was eventually referred to CAPE LRO

Walter Belyea. It further states that the two exchanged several emails on that date, in which the complainant raised concerns about returning to the office in light of medical and health-and-safety concerns arising from COVID-19. According to the CAPE, Mr. Belyea provided detailed responses to the complainant's questions about possible accommodations for disabilities, options for dealing with health-and-safety issues in the workplace, and work refusals under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *CLC*") in emails on January 26, 2023, at 09:48, 11:24, and 12:24. None of the emails between Mr. Belyea and the complainant were produced.

[18] According to the CAPE response, in the email at 11:24, Mr. Belyea stated, in part, this: "Based on what you have shared with me, CAPE doesn't consider it prudent to engage in a work refusal. Should you provide additional information, that advice might change." In the 11:24 and 12:24 emails, Mr. Belyea advised the complainant that she had the option of making a complaint to the departmental health and safety committee at any time.

[19] According to the CAPE response to the complaint, on January 26, 2023, the complainant contacted Ms. Landry at 14:06 and spoke with her ("the Jan. 26 conversation"). During this conversation, she told Ms. Landry that she had dealt with Mr. Belyea and that he had not addressed her concerns. She also wanted to speak to an LRO who was a statistician. According to the CAPE, it had no LROs who were statisticians. Also, the complainant referred to some information that she said showed that people were "dying like flies" from COVID-19. The CAPE states that Ms. Landry told the complainant that the information that the CAPE had from Health Canada was different.

[20] In the May 31 reply, the complainant stated that she did not dispute that the CAPE's LROs met with and corresponded with her on several occasions. She states that her complaint involves the CAPE's refusal to engage with the data in their discussions on which she said her concerns were based. She said that this included refusing her offer to send information from Public Health Ontario's COVID-19 data portal, which she said she was referencing in communicating her concerns. She confirmed that her complaint did not include claims that correspondence did not occur.

[21] In the CAPE response, it states that at no time did Ms. Landry refuse to accept information or statistics from the complainant and that she would have been willing to review and consider information provided to her by the complainant.

[22] The CAPE response states that during the Jan. 26 conversation, there was some general discussion about a possible policy grievance. Ms. Landry advised the complainant that the President of the CAPE local at Statistics Canada (Ann Kurikshuk-Nemec) had initiated a health-and-safety policy grievance. It states that Ms. Landry encouraged the complainant to speak with Ms. Kurikshuk-Nemec about it. As far as the CAPE is aware, the complainant did not speak with Ms. Kurikshuk-Nemec. It was later determined that it was not a policy grievance but a complaint under Part II of the *CLC*, which had been made in September of 2022.

[23] The CAPE response states that on January 27, 2023, the complainant emailed Ms. Landry, which the complainant alleged summarized the Jan. 26 conversation. The CAPE states that this email in no way reflects the actual conversation. No copy of this email was provided as a part of the submissions.

[24] The CAPE response states that in February of 2023, officials within its organization explored options for addressing health and safety, as well as other issues surrounding the RTO directive.

[25] The CAPE response states that its officials determined that the best option to protect the interests of its members was to make a statutory-freeze complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 107 of the *Act* and to address health-and-safety concerns through the "Occupational Health and Safety Directive" as they arose. On March 13, 2023, the CAPE made a statutory-freeze complaint with the Board, alleging among other things that the RTO directive violated s. 107, as it changed a term and condition of employment. Among the remedies sought was that the RTO directive be rescinded and that the terms and conditions of employment be restored to what existed before the December 15, 2022, announcement.

[26] This information was provided to CAPE members by a newsletter posted to the bargaining agent's website and dated March 16, 2023. The relevant portions of the newsletter stated as follows:

> *Monday, CAPE filed a complaint against Treasury Board for its return-to-office mandate during the statutory freeze period while negotiating the renewal of the EC collective agreement.*
>
> *CAPE continues to oppose the return-to-office mandate's timing and lack of operational rationale, but especially during the collective agreement negotiation period, as this fundamentally changes the working conditions during the statutory freeze period.*
>
> …

[27] On March 24, 2023, the complainant emailed CAPE LRO Claude Archambault, indicating that she wished to discuss filing a policy grievance and that she did not wish to speak with Ms. Landry. In a call with Mr. Archambault on April 4, 2023, she indicated to him that she wished to file a policy grievance about health and safety in the office. After some investigation, Mr. Archambault determined that the complainant had spoken with his colleagues about similar matters and that the complainant had not provided them with anything new. In an email dated April 20, 2023, Mr. Archambault told the complainant that the CAPE would not file a policy grievance on the health-and-safety matter. Mr. Archambault's email was not produced.

[28] In the May 31 reply in reference to the CAPE's statement that bald allegations against Ms. Landry do not show that the CAPE's advice or actions in providing advice to the complainant were arbitrary, the complainant states that this aspect alone, outside the surrounding context, would not demonstrate an arbitrary violation of the *Act*. She states that it is an example of refusing to engage with the information informing her concerns. The complainant also stated that she agrees with paragraph 24 of the CAPE response, although she states that she disputes that the information was readily available, as she said that she made several attempts to find the information and did not find it. Paragraph 24 of the CAPE response states as follows:

> *24. … CAPE officials have, during the relevant time period, carefully considered the option of a policy grievance under the health and safety provision of the EC Collective Agreement and based on detailed advice, decided to pursue a different route to protect the interests of its members. This is information that is all readily available on CAPE's web site* [*sic*] *and would have been accessible to the Complainant when she approached Mr. Archambault in April 2023.*

[29] In the May 31 reply, referencing the CAPE's statement about her not referring to her discussion with Mr. Belyea in her complaint, the complainant states that there is a

written record of the discussion that she had with Mr. Belyea and that it was about individual options to keep herself safe in light of the RTO directive, such as medical accommodations and work refusals. She states that this differs from the discussions that she had with Ms. Landry. She further stated that she did not like Mr. Belyea's advice.

[30] In the May 31 reply, in reference to the CAPE response, stating that she did not seek any further information from Ms. Kurikshuk-Nemec about the collective actions that the CAPE was taking to address the health-and-safety issue of its members, the complainant states that she recalls a brief discussion with Ms. Landry of a pending grievance but that she does not recall specifically being advised to contact Ms. Kurikshuk-Nemec; however, she does not necessarily dispute that it happened.

[31] The complainant states in her May 31 reply that the reason she contacted Mr. Archambault was not to get advice but to gain clarification on the CAPE's position and to present actions relating to her health-and-safety concerns, stating that Ms. Landry did not respond to her follow-up email seeking clarification.

[32] In the complainant's Sept. 1 submission, she states that at the Jan. 26 meeting, Ms. Landry told her that COVID-19 was no longer a concern, that deaths due to it were rare, and that her concerns were opinions and beliefs reflective of mental-health issues.

III. Summary of the arguments

A. For the respondent

[33] The respondent submits that the Board should summarily dismiss the complaint as it does not disclose a *prima facie* violation of its duty of fair representation.

[34] *Exeter v. Canadian Association of Professional Employees*, 2009 PSLRB 14, states that a *prima facie* basis exists for an allegation "… where the purported facts — assumed for this preliminary purpose to be true — reveal an arguable case that there has been a breach of the statute."

[35] *Therrien v. Canadian Association of Professional Employees*, 2011 PSLRB 118 states, at paragraph 52, as follows:

> *52 To ensure that that initial onus is met, a complainant must produce enough evidence on all elements of his or her complaint to support his or her claim. This consists of an "at-first look" of the requirement to adduce sufficient material facts to establish a violation of the* Act. *That evidentiary foundation must be legally sufficient to make out a case that the* Act *was in fact violated. In other words, I must consider whether, if all the complainant's allegations are true, the Board could find that the* Act *was in fact violated.…*

[36] The respondent submits that the allegations set out in the complaint do not disclose how the CAPE purportedly acted in a manner contrary to s. 187 of the *Act*, namely, in a manner that was arbitrary, discriminatory, or in bad faith in its dealings with the complainant.

[37] Assuming that the complainant's allegations are true, it is clear that the CAPE LROs met and corresponded with the complainant on a number of occasions, listened to her concerns, and provided advice on the best way to proceed. The complainant obviously did not agree with the advice, but that did not make it arbitrary.

[38] The complainant cannot create an arguable case by making bald allegations against an LRO; however, even if they are true, they do not show that the CAPE's advice or actions when providing advice were arbitrary.

[39] During the relevant time, CAPE officials carefully considered the option of a policy grievance under the health-and-safety provision of the EC collective agreement and that based on detailed advice, they decided to pursue a different route to protect the interests of the CAPE's members. This information is readily available on the CAPE's website and would have been accessible to the complainant when she approached Mr. Archambault in April of 2023.

B. For the complainant

[40] The complainant submits that the complaint should not be dismissed. She submits that some statements mischaracterize events preceding the complaint and that statements made by the CAPE are not responsive to the complaint.

[41] The complainant submits that her complaint involves a refusal to engage with the data upon which her concerns were based in the discussions that she had with the CAPE LROs, including the refusal of her offer to send information from Public Health

Ontario's COVID-19 data portal. Her complaint does not include claims that correspondence did not occur.

[42] The complainant acknowledges that disagreeing with advice provided by the CAPE representative does not constitute a violation of the duty of fair representation and states that this is why she did not include Mr. Belyea in her complaint.

[43] The complainant states that the complaint relates to acting arbitrarily with respect to the conduct of the bargaining agent and the process by which the CAPE made its decisions and not whether the decision was correct.

[44] The complainant states that she agrees that she did not like Mr. Belyea's advice; however, her complaint relates to the duty of fair representation, and she confirms that disagreeing with advice received does not constitute a violation of this duty. She states that this is why she did not include Mr. Belyea in her complaint.

[45] With respect to paragraph 31 of the CAPE response, which refers to the actions that the CAPE was taking and in particular information from Ms. Kurikshuk-Nemec, the complainant states that she recalled the discussion of a pending grievance with Ms. Landry but that she does not specifically recall being advised to contact Ms. Kurikshuk-Nemec and does not dispute that it occurred. She states that she sought further information on the CAPE's website and in its communications to get more information about ongoing processes but that she did not find anything related to her concerns. She states that the existence of a pending policy grievance relating to the concerns that she raised was not brought up to her during subsequent correspondence. She states that she spoke to several officers at the CAPE, and this reflects her efforts to better understand the CAPE's ongoing steps and options moving forward.

[46] With respect to paragraph 32 of the CAPE response, which claims that there is no indication that the complaint made attempts to inform herself of the legal steps that CAPE had already taken to address the interests of its members, the complainant submits that she disagrees with two aspects of that statement. First, she contacted Mr. Archambault not for advice but to clarify the CAPE's position and actions that it was taking relating to her health-and-safety concerns, and second, she had made many attempts to inform herself of the legal steps that the CAPE had already taken.

[47] The final two paragraphs of the complainant's May 31 reply to the motion to dismiss state as follows:

> *Sections I did not specifically address in this response include sections 19-21, which simply express the position that is argued in sections 22-24 that the complaint should be dismissed summarily, and section 25 which summarizes this position. Similarly, I did not address sections 26 and 27, which express the position on the merits of the complaint argued in sections 28-32, with sections 33 and 34 summarizing these arguments. Section 29 expresses a similar argument to that in section 28 involving the standard of duty of bargaining agents. Finally, sections 35-37 are not addressed as they are concluding statements on the arguments made.*
>
> *Aside from disputing facts of the case, I do not believe the respondent has demonstrated that the complaint does not demonstrate a violation of the Act. The arguments provided in the submission include many statements which I would consider to be mischaracterizations of events preceding my complaint as well as statements with which I agree yet do not address the complaint made in this case.*

C. The CAPE Sept. 1 submission

[48] The CAPE submits that when determining whether an arguable case has been made out by the complainant, the Board can look at undisputed facts referred to by the parties in the pleadings and submissions or the documents attached to the pleadings and submissions. This can include evidence about a bargaining agent's public communications with its members.

[49] The Board has applied the arguable-case analysis in the dismissal of cases involving bargaining agent responses to policies relating to COVID-19 over the past few years. While some of these involve bargaining agent responses to an employer vaccination policy, as opposed to the RTO directive, they involve similar considerations to the issue in this case and provide helpful guidance on how to go about determining whether a complainant has made out an arguable case that the bargaining agent breached its duty of fair representation under s. 187 of the *Act*.

[50] The CAPE referred to *Corneau v. Association of Justice Counsel*, 2023 FPSLREB 16, which states as follows:

…

> *[26] … In a complaint such as this, the exchange of particulars following the making of a complaint is an essential part of the intake process. This exchange, which has been an established part of the Board's practice for many years, assists the Board in understanding the issues giving rise to the complaint. This can assist the Board in resolving complaints in the most expeditious way possible.*
>
> *[27] Through this exchange, the respondent is invited to provide its version of events, and the complainant is invited to respond to those assertions. As was the case here, the parties often provide documents in support of their version of events. Through this exchange, the Board can be satisfied that certain facts are not in dispute. This is particularly so if the facts have been mentioned by both parties or are supported in uncontested documentation supplied by the parties.*
>
> …

[51] In *Fortin v. Public Service Alliance of Canada*, 2022 FPSLREB 67, the Board noted that a bargaining agent's communications with its members by a variety of means can be useful in assessing the bargaining agent's conduct as they provide an overview of the bargaining agent's thinking and decision-making processes.

[52] *Payne v. Public Service Alliance of Canada*, 2023 FPSLREB 58, holds that while the respondent has the burden of establishing that the complainant has not made out an arguable case of a breach of s. 187 of the *Act*, the complainant must "… specify the factual allegations on which the complaint is based and address the issues alleged to constitute a breach of the duty of fair representation …". In *Payne*, the Board also held that the allegations in the complaint must have "an air of reality" and cannot be "mere accusations or speculation". Additionally, a complainant may not throw out accusations and rely on the respondent's inability to disprove them.

[53] The complainant's allegation in this matter is that the CAPE acted in an arbitrary manner by deciding not to file a policy grievance against the RTO directive as a violation of the health-and-safety provision of the collective agreement, in the context of COVID-19. The complainant does not appear to allege that the CAPE acted in bad faith or in a discriminatory manner. While the complaint does refer to the complainant's alleged communications with Ms. Landry in December of 2022 and January of 2023, in the May 31 reply, she clarified that that aspect of her complaint outside the surrounding context would not demonstrate an arbitrary violation of the

Act, stating this: "… it was included as an additional example of refusing to engage with the information informing my concerns."

[54] The question in the arguable-case analysis is whether, based on the facts set out in the complaint was well as the undisputed facts provided as part of the intake process, there is an arguable case that the CAPE acted arbitrarily by deciding not to file a policy grievance against the RTO directive as a violation of the health-and-safety provision of the collective agreement.

[55] The facts alleged by the complainant do not provide any information about the CAPE's process and rationale in deciding not to file a policy grievance against the RTO directive. The CAPE did provide an explanation in the CAPE response, which is a description of the process that the CAPE went through when deciding how to respond to the RTO directive on behalf of its membership, including its consideration of the possibility of a policy grievance based on a violation of the health-and-safety provision of the collective agreement. The complainant did not dispute paragraphs 14 to 16 of the CAPE response, where it provided this explanation, and it is the CAPE's position that these can be treated as undisputed facts for the purpose of whether the complainant has made out an arguable case.

[56] The CAPE's public communications to its members make it clear that the CAPE was taking issues surrounding the RTO directive seriously and that it communicated to its members that it had consulted other bargaining agents about a joint response, that it opposed the timing and lack of justification for the RTO directive, and that it ultimately decided to make a complaint against the RTO directive as a violation of the statutory freeze.

D. The complainant's Sept. 1 submission

[57] The complainant's Sept. 1 submission was in response to the jurisprudence referred to by the CAPE, specifically the Board's decisions in *Musolino v. Professional Institute of the Public Service of Canada*, 2022 FPSLREB 46, *Fortin*, *Corneau*, and *Payne*.

[58] The complainant states that all four decisions were very similar and were dismissed on the grounds that the complainant or complainants in them did not provide *prima facie* evidence that the bargaining agent behaved arbitrarily, in bad faith, or in a discriminatory manner. All these cases refer to the decision of the

Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509. The complainant then sets out excerpts from *Musolino*, *Fortin*, *Payne*, and *Corneau*.

[59] The complainant states that when the application of s. 187 of the *Act* is considered, along with the reasoning in *Canadian Merchant Service Guild* and its application in *Musolino*, *Fortin*, *Payne*, and *Corneau*, the CAPE has not demonstrated evidence that relevant information was carefully reviewed in the decision not to file a policy grievance. She states that there is evidence to the contrary. She also states that she was given false information by Ms. Landry when she inquired about a policy grievance. She states that no explanation of the steps was provided as to why it was decided not to file a policy grievance; nor was she provided with any data challenging her view that the RTO directive posed a risk to occupational health and safety, in contravention of the collective agreement and the *CLC*.

[60] The complainant states that she verbally provided data from the Public Health Ontario COVID-19 data tool and that when she offered to send a link to the data she was citing, she was told not to. She further states that the CAPE stated that she was making claims that were inconsistent with the Public Health Agency of Canada while its data for Ontario is provided by the province and is thus the same, aside from a lag in the transmission of the data. She states that this demonstrates that the data that she presented was not considered despite no explanations as to why this data or her interpretation of the data was incorrect. Therefore, the CAPE has failed to demonstrate a careful review of the situation and relevant issues, and the complaint should not be dismissed.

IV. Reasons

[61] In the recent decision *Brooke v. Professional Institute of the Public Service of Canada*, 2024 FPSLREB 20, the test for a summary dismissal is set out at paragraph 93, where the Board states as follows:

> *[93] The test for summary dismissal on the basis that the case reveals no arguable case is usually worded as follows: Taking all the plaintiff's factual allegations as true, is there a case to be made for a violation of the law? In other words, is there any indication that the respondent might have failed its duty of fair representation?*

[62] The task of the Board is to determine if there is an arguable case that the respondent acted contrary to s. 187 of the *Act*, which states 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.*

[63] At paragraph 96 of *Brooke*, the Board reiterated the scope of the duty of fair representation as set out in *Canadian Merchant Service Guild* at page 527, stating 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.
>
> …

[64] At paragraphs 97, 98, and 99 of *Brooke*, the Board stated as follows:

> *[97] As reflected in the legislation, the bargaining agent must not act in an arbitrary way. It must show that it seriously considered the interests of its member. That does not mean it is bound to follow the direction that the member would like it to adopt. As the*

> *Supreme Court of Canada stated, the bargaining agent "enjoys considerable discretion".*
>
> *[98] In* Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52 at para. 44, a predecessor Board quoted the following extract from* Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.):*
>
> …
>
> 42. When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of [the duty of fair representation].
>
> …
>
> *[99] A situation similar to the one in the present case occurred in* Watson v. CUPE*, 2022 CIRB 1002, in which a complaint was made against the union for failing its duty of fair representation by not filing a policy grievance against the employer's mandatory vaccination policy. The Canada Industrial Relations Board (CIRB) dismissed the complaint, stating that the union had turned its mind to the issue and properly evaluated its chance of successfully challenging the policy. Moreover, in that case too, the union had supported the vaccination policy as an effective means to ensure employees' health and safety. The CIRB concluded that there was no evidence of bad faith on the part of the union in supporting vaccination for its members.*

[65] At paragraphs 69, 78, 89 and 91 of *Laquerre v. Professional Association of Foreign Service Officers*, 2024 FPSLREB 83, the Board stated as follows:

> *[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).*

…

[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.

…

[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.

…

[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.…

…

[66] At paragraph 52 of *Therrien*, the Board states that a complainant, in a duty-of-fair-representation complaint, "… must produce enough evidence on all elements of

his or her complaint to support his or her claim. This consists of an 'at-first look' of the requirement to adduce sufficient material facts to establish a violation of the *Act*."

[67] Recently, in *Payne*, the Board held at paragraph 59 that while the respondent has the burden of demonstrating that the complaint reveals no arguable case of a breach of s. 187 of the *Act*, "… the complainant must, when responding to the respondent's preliminary objection, specify the factual allegations on which the complaint is based and address the issues alleged to constitute a breach of the duty of fair representation …". The Board went further and stated at paragraph 60 as follows:

> *[60] The threshold that the complainants must meet is low. However, to meet it, the factual allegations that they present must have an air of reality. They cannot be mere accusations or speculation; nor can the factual allegations be based on some future possibility that evidence supporting the claims could emerge during the hearing … Similarly, a complainant may not throw out accusations and rely on the respondent's inability to disprove them ….*

[68] At paragraph 42 of *Joe v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 10, which dealt with a complaint under s. 190 of the *Act*, the Board stated as follows:

> *[42] … To establish an arguable case, a complainant must demonstrate that there is substance to the complaint upon which a contravention of the* Act *can be found. It is not enough for a complainant to throw out accusations and rely on the inability of the respondents to disprove them.…*

[69] The initial facts put forward by the complainant do not meet the test set out in *Therrien* and *Payne*.

[70] It is clear based on the complaint, the May 31 reply, and the complainant's Sept. 1 submission that the allegation being made against the CAPE is that its action or inaction amounted to an arbitrary decision; it is not one that is alleged to have been either discriminatory or in bad faith.

[71] The complaint is that the CAPE did not file a policy grievance as against the RTO directive. The complainant, when responding to the motion to dismiss, is required to "… adduce sufficient material facts to establish a violation of the *Act*" (see *Therrien*). In doing this, what the complainant puts forward "… cannot be mere accusations or

speculation; nor can the factual allegations be based on some future possibility that evidence supporting the claims could emerge during the hearing …" (see *Payne*).

[72] The complainant's submissions are thin on facts. What she appears to be basing her allegation of an arbitrary position by the CAPE by not filing a policy grievance, amounting to a breach of the health-and-safety provision in the collective agreement, is a statement in her complaint that she alleges was made by Ms. Landry on January 26, 2023, stating that the complainant's concerns about COVID-19 are "… opinions and beliefs reflective of mental health issues" and that the complainant "… cited statistics evidencing [her] concerns, which were not considered, and [her] offer to send the government data … was refused." In the May 31 reply, the complainant stated this about her complaint:

> … [it] *involves a refusal to engage with the data on which my concerns were based in our discussions, including by refusing my offer to send the information from Public Health Ontario's COVID-19 data portal which I was referencing in communicating my concerns.*

[73] Based on the very limited information provided by the complainant, I can surmise only that the essence of the complaint lay in the data that she said she had in her possession that would suggest that the employer's decision to have employees return to the office would in some way be a health-and-safety risk generally; generally, because her complaint is the alleged failure by the CAPE to bring forward a policy grievance as opposed to an individual grievance.

[74] The complainant stated that she had this data at the time of her discussions with Ms. Landry. None of this data was produced; nor was any sort of summary provided of what the data was stating. Without this basic information, the complainant has put forward nothing more than mere accusations and speculation.

[75] Even if I were to accept as true that the CAPE failed to engage with the complainant's alleged data, I find that this alone is not sufficient to ground a complaint that the bargaining agent acted arbitrarily in this case. The complainant does not dispute that she spoke with Mr. Archambault two months later about filing a policy grievance about health and safety. There is no indication that when she spoke to Mr. Archambault that she offered to provide him with the alleged data or that the

CAPE failed to consider her concerns at that time. Nor does the complainant take issue with Mr. Archambault's decision at that time not to file a policy grievance.

[76] The complainant also does not take issue with the other interactions she had with the CAPE with respect to her concerns and her desire to file a policy grievance. Overall, the complainant only disputes and takes issue with one small aspect of all the interactions she had with the CAPE over health and safety and its decision not to file a policy grievance. That entire context, as outlined by both parties, includes conversations with three different LROs and an outline of the options available to her to pursue her health and safety concerns. In those circumstances, I do not accept that the one issue alleged by the complainant constitutes an arguable case that the bargaining agent treated her in a superficial or careless manner, or breached its duty of fair representation.

[77] As I find that the complainant has not discharged her initial burden as set out in *Therrien* and *Payne*, the complaint does not meet the threshold necessary to move forward, and I need not consider anything further.

[78] The CAPE's motion to dismiss is granted, and the complaint is dismissed.

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

(The Order appears on the next page)

V. Order

[80] The respondent's motion to dismiss the complaint is allowed.

[81] The complaint is dismissed.

November 14, 2024.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board