Date: 20241206

File: 561-23-50039

Citation: 2024 FPSLREB 169

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

SHEILA CATAHAN NILES

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Interested Party

Indexed as
Catahan Niles v. Professional Institute of the Public Service of Canada

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Tony Micallef-Jones, counsel

Decided on the basis of written submissions, filed July 26, August 14, and September 6, 13, and 19, 2024.

REASONS FOR DECISION

I. Overview

[1] On October 18, 2021, the Office of the Superintendent of Financial Institutions (OSFI) implemented its *Policy on COVID-19 Vaccination*. The policy required employees to be vaccinated against the COVID-19 virus unless they were granted an exception; if not, they were placed on leave without pay. Sheila Catahan Niles ("the complainant") was unvaccinated. She sought an exemption to the policy but was denied and was placed on leave without pay from January 20 to June 20, 2022, when OSFI suspended the policy. She grieved. The Professional Institute of the Public Service of Canada (PIPSC) represented her in this grievance and referred it to adjudication.

[2] Shortly before the grievance was scheduled to be heard, OSFI offered to settle it. PIPSC recommended that the complainant accept OSFI's offer. She refused. PIPSC stated that if she would not accept the offer, it would withdraw her grievance. She ultimately refused to accept the offer, so PIPSC withdrew her grievance. She alleges that it violated its duty of fair representation by doing so and in the way in which it represented her. She also complains about how PIPSC treated two other harassment grievances.

[3] This complaint raises two issues.

[4] The first issue is whether the complainant has an arguable case that PIPSC breached its duty of fair representation. She does not. None of the alleged faults she ascribes to PIPSC raise an arguable case that PIPSC acted in a way that was arbitrary or in bad faith.

[5] The second issue is whether OSFI's settlement offer should remain confidential. I have concluded that it should. The public interest in protecting settlement privilege outweighs the public interest in open and transparent proceedings at the Federal Public Sector Labour Relations and Employment Board ("the Board").

[6] Therefore, I dismiss the complaint and issue a sealing order for parts of the Board's file.

[7] My reasons follow.

II. There is no arguable case made out in the complaint

[8] PIPSC has asked the Board to dismiss the complaint without holding an oral hearing. The Board is empowered to decide a matter on the basis of written submissions because of its power to decide "... any matter before it without holding an oral hearing", in accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365); see also *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68. No party objected to proceeding in writing.

[9] In these circumstances, the Board conducts what it calls an "arguable case" analysis. The Board will treat the factual allegations in a complaint as if they were proven and consider whether those facts could demonstrate a breach of a bargaining agent's duty of fair representation. This presumption that factual allegations are true does not extend to arguments, opinions, or facts without an air of reality (see *Reid v. Public Service Alliance of Canada*, 2024 FPSLREB 100 at paras. 29 and 30, and the cases cited in those paragraphs).

[10] To establish a breach of the duty of fair representation codified in s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), the complainant must demonstrate that PIPSC acted in a discriminatory or arbitrary manner or in bad faith; see *Kruse v. Public Service Alliance of Canada*, 2023 FPSLREB 74 at para. 7.

[11] The complainant's initial complaint was roughly one page long. In response to PIPSC's request to dismiss her complaint because she did not disclose an arguable case against it, she filed a 41-page submission that expanded well beyond her initial complaint and, for the first time, raised the issue PIPSC's representation of her in two harassment complaints. The complainant never submits that PIPSC has discriminated against her (although she claims that OSFI has, several times). She uses the term "bad faith" in her submissions; however, she never identifies any personal hostility against her and does not allege that PIPSC was motivated by ill will, malice, or hostility towards her; in fact, she admits that she "… did not demonstrate an arguable case specific to personal hostility …". Therefore, my reasons focus on whether PIPSC acted arbitrarily.

[12] The complainant relied upon paragraphs 66 to 68 of *Drouin v. Professional Association of Foreign Service Officers*, 2023 FPSLREB 3 to describe the content of

PIPSC's duty of fair representation and what constitutes arbitrary or bad-faith behaviour. I agree that that decision is an accurate description of the duty of fair representation, so I will quote those paragraphs in their entirety, along with paragraph 69, which further explains the duty:

> *[66] First, a union must exercise its duty of fair representation in good faith, objectively and honestly, and only after thoroughly considering a grievance while taking into account the employee's interests on one hand and its and those of its membership on the other. It must not act in an arbitrary, discriminatory, capricious, or wrongful manner and must act without serious negligence or hostility toward the employee; see* Canadian Merchant Service Guild v. Gagnon*, 1984 CanLII 18 (SCC) at 526; and* McRaeJackson*.*
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> *[67] What does "arbitrary" mean?* The Canadian Oxford Dictionary *(1998) defines "arbitrary" as follows: "**1** based on the unrestricted will of a person, not according to a scheme or plan; capricious. **2** established at random. **3** despotic."*
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> *[68] A union that conducts a grievance in a perfunctory fashion, merely going through the motions simply to preserve appearances, is acting in an arbitrary fashion; see* Gagnon*, at 526. The British Columbia Labour Relations Board commented that "… a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter." It went on, stating, "Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations." The Supreme Court of Canada adopted those comments in* Gagnon*, at 520, in its discussion of a union's duty of fair representation; see also* Canadian Union of Public Employees, Local 3912 v. Nickerson*, 2017 NSCA 70 at para. 43. As long as a union does not conduct its preparation for a grievance in a perfunctory or cursory fashion, and as long as it has gathered sufficient (not all) information necessary to arrive at a sound (not perfect) decision, then its duty of fair representation is satisfied; see* Cadieux v. Amalgamated Transit Union, Local 1415*, 2014 FCA 61 at paras. 30 to 33.*
>
> *[69] Second, and flowing from the first, the assessment of whether a union acted in an arbitrary fashion does not involve armchair quarterbacking. It does not involve second-guessing the decisions that the union made when processing a grievance. As a general rule, the question of whether, in retrospect, the union was right or wrong in its assessment of a grievance's merits is irrelevant; see, for example,* Vilven v. Air Canada Pilots Association*, 2011 CIRB 587 at para. 36. All that matters is whether the union acted reasonably when it made its decisions.*

[13] I will begin by providing the factual backdrop to the complainant's complaint. I will then go through the seven allegations she makes about PIPSC's representation of her.

A. Background facts to the complaint

[14] The complainant's factual allegations are as follows. These basic facts are largely uncontested.

[15] As I stated in the overview to this decision, OSFI's vaccine policy required employees to be vaccinated against COVID-19 unless they were granted an exception; if not, they were placed on leave without pay. The complainant did not receive a COVID-19 vaccine. She sought an exemption to the policy on two grounds: religious and medical. OSFI denied her request for an exemption on both grounds. OSFI concluded that the complainant's religious belief did not prevent her from being fully vaccinated and that she did not provide a note from a qualified medical professional to support her contention that taking the vaccine was medically contraindicated. As a result, she was placed on leave without pay from January 20 to June 20, 2022, when OSFI suspended its vaccine policy.

[16] In the meantime, the complainant grieved OSFI's decision on January 5, 2022. PIPSC represented her throughout the grievance process. OSFI denied her grievance at the final level on February 22, 2022. PIPSC referred the grievance to adjudication on March 28, 2022. The Board scheduled the hearing of this grievance for November 9 and 10, 2023. The Board informed PIPSC of this hearing in early July 2023, and PIPSC informed the complainant on July 10, 2023.

[17] PIPSC assigned an employment relations officer (Kim Veller) to represent the complainant at this adjudication. Ms. Veller and the complainant worked together to prepare for this hearing. The complainant makes a number of allegations about this preparation and why it was inadequate; I will address those allegations more carefully later in this decision.

[18] On October 16, 2023, OSFI offered to settle the grievance. In light of the confidentiality order that I grant later in this decision about the terms of this offer, I will not discuss its contents further. PIPSC and OSFI jointly requested that the Board

postpone the grievance hearing to allow them to try to settle this matter, and the Board did so.

[19] Ms. Veller shared OSFI's offer with the complainant and recommended that she accept it. The complainant refused. Ms. Veller wrote to the complainant to provide her written recommendation to accept OSFI's offer and to state that if the complainant refused, PIPSC would not proceed with the hearing.

[20] PIPSC's *Policy on Representational Services* permits a member to request the reconsideration of an employment relations officer's recommendation first to the director of regional labour relations and then to its general counsel, who makes a recommendation to its president. The complainant exercised this reconsideration. The director denied the request for reconsideration, as did the president on the advice of the general counsel.

[21] After receiving the president's decision, the complainant agreed to accept OSFI's offer to settle on December 22, 2023. PIPSC informed OSFI, which then prepared formal "Minutes of Settlement" on March 1, 2024. The complainant reviewed those minutes and refused to sign them. PIPSC gave her more time to consider and consult her own lawyer, but the complainant reaffirmed her decision not to sign the Minutes of Settlement on April 24, 2024. PIPSC withdrew the complainant's grievance on May 3, 2024, and the complainant made this complaint on June 12, 2024.

B. Six allegations about PIPSC's conduct in the vaccination grievance

[22] Six of the complainant's seven allegations against PIPSC concern this vaccination grievance. I have concluded that she has not demonstrated an arguable case for any of those six allegations.

1. Referring the grievance to adjudication under s. 209(1)(a) of the *Act* instead of s. 209(1)(b)

[23] The complainant argues that PIPSC breached its duty of fair representation by referring her grievance to adjudication under s. 209(1)(a) of the *Act* instead of s. 209(1)(b).

[24] Paragraph 209(1)(a) grants the Board the jurisdiction to hear a grievance alleging a breach of a collective agreement (in this case, the no-discrimination clause). Paragraph 209(1)(b) grants the Board the jurisdiction to hear a grievance against a

disciplinary suspension. The complainant states that during her grievance presentation, her PIPSC representative (Claude Vézina) argued that placing her on leave without pay "… can be considered disciplinary without just cause." The complainant states that this should have led PIPSC to refer her grievance to adjudication under s. 209(1)(b) instead of (or in addition to) s. 209(1)(a) — or at least to explain that alternative and give her the option. This is important because a bargaining agent may unilaterally withdraw a collective agreement grievance (as it did in this case), but the complainant would have the sole discretion to withdraw or pursue a disciplinary grievance.

[25] The problem with this argument is that the complainant has misapprehended the Board's decision in *Rehibi v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSLREB 47. The complainant says that *Rehibi* stands for the proposition that individual grievors who grieved the vaccine policy can proceed to adjudication without the support of a bargaining agent. That is not what *Rehibi* says. On the contrary, *Rehibi* says that the vaccine policy was not disciplinary and that a leave without pay flowing from not being vaccinated is not a disguised disciplinary action; therefore, the Board had no jurisdiction to hear those grievances.

[26] The complainant never suggests that she asked Mr. Vézina about s. 209(1)(b) of the *Act*. Instead, she argues that he should have raised it with her on his own initiative. Her case boils down to this: it was arbitrary of PIPSC to not think of and discuss with her a strategy that the Board later confirmed was a losing one. She has not demonstrated that I should second-guess PIPSC's decision not to consider s. 209(1)(b).

[27] Finally, the complainant also argues that PIPSC concealed the presence of s. 209(1)(b) of the *Act* from her and its other members. The collective agreement between PIPSC and OSFI spells out a grievance process and still refers to the *Public Service Labour Relations Act*, even though that Act was renamed; it also does not refer to specific section numbers of the *Act*. The complainant states that she had a hard time looking up s. 209(1)(b), and further argues that her difficulty means that PIPSC "… deliberately omitted this information [about s. 209(1)(b)] from the *Collective Agreement* to prevent members from knowing their rights." The complainant has not provided a scintilla of evidence to support this claim, and there is no arguable case that PIPSC has concealed a publicly available statute from its members.

2. Not advancing medical issues at the adjudication

[28] The complainant applied for an exemption from vaccination on two grounds: religious and medical. She says that Ms. Veller pressured her to drop the medical argument before adjudication, and she reluctantly agreed. PIPSC agrees that it was not going to advance the medical argument at adjudication because the complainant provided no medical information stating that she is unable to be vaccinated against COVID-19.

[29] The complainant says that she did provide supporting medical evidence, and she has provided copies of that evidence to the Board in her submissions. I reviewed it carefully and concluded that PIPSC did not act unreasonably by concluding that they do not support her claim.

[30] The complainant has a medical note from her family health centre stating as follows:

> …
>
> *… Our doctors cannot provide letters of exemption or fill out exemption forms for COVID-19 vaccines unless an allergist/immunologist-confirmed severe allergy or anaphylactic reaction to a previous dose of COVID-19 vaccine or to any of its components that cannot be mitigated; a diagnosed episode of myocarditis/pericarditis after receipt of an mRNA vaccine.*
>
> …

[31] The complainant argues that this medical note supports her argument to be exempted from taking the vaccine. It does not — quite the opposite. The complainant states that she had a rash or lesions at some point in the past (she included in her submissions a prescription for prednisone to treat those symptoms from 2016 and a hospital record from 2013) that went undiagnosed; therefore, she must have allergies, and further, this means that she cannot take the COVID-19 vaccine. The complainant also points out that she had a tumour removed at some point in the past and that she was told that the tumour was cancerous despite having been initially told that it was not (and despite providing no documents that say that it was). The complainant reasons that this means that people should listen to her instead of doctors when it comes to her health.

[32] The complainant's argument is most clearly set out in this email that she sent to OSFI (copying Mr. Vézina), which she asks it to consider in her grievance:

> *Physical Disability – I have hospital and dermatologist records that provide evidence that I have severe allergies and an ongoing chronic illness (which I have redacted based on the privacy act). Knowing my physical limitations and the risk to injecting my body with an unknown substance that is invasive and can cause danger to my health and body is careless and risky; especially given the fact that I have 3 children that rely on me.* ***I do not need a Dr. to support my decision.*** *In fact, my medical team willing providing me with this information to support my decision of not taking the vaccine.*
>
> [Emphasis added]
>
> [*Sic* throughout]

[33] PIPSC did not act arbitrarily by convincing the complainant that these lines of argument would not be successful. Further, it did not act arbitrarily by advising the complainant that her argument that she does not need a doctor to support or justify her medical diagnosis would detract from her argument that she is entitled to an exemption for religious reasons.

[34] In any event, the decision not to proceed with a medical argument had no consequence to the complainant because OSFI offered to settle her grievance anyway, and PIPSC withdrew the grievance before it was heard because of that offer. She did not lose the opportunity to make her medical argument because PIPSC convinced her to drop it; she lost the opportunity because PIPSC withdrew her grievance.

3. Not being properly prepared for a pre-hearing conference

[35] In advance of the adjudication scheduled to take place on November 9 and 10, 2023, the Board scheduled a pre-hearing conference. The complainant states that she was told that the pre-hearing conference would be largely procedural and "troubleshooting tech." The complainant states that the Board member conducting the pre-hearing conference asked about her dropping the disability argument. She was not prepared to respond and so said "yes", to confirm that it had been dropped.

[36] The complainant had previously discussed the disability argument with Ms. Veller and had already agreed to drop that argument. The fact that the complainant was caught off guard having to answer a question that she had already discussed with

her representative does not raise an arguable case that PIPSC's representation was arbitrary.

4. Not spending enough time discussing strategy

[37] The complainant complains that she had only two phone calls with Ms. Veller that lasted between 40 minutes and 1 hour and that most of those phone calls were taken up with convincing her to drop her disability claim.

[38] The Board's role in a duty-of-fair-representation complaint is not to second-guess or micromanage the time spent by a union preparing for a case or the topics that it chose to discuss with a member. The hearing was still weeks away by the time OSFI offered to settle this case, so the more time-intensive witness preparation was still to come. Finally, the bulk of the preparation for this case would be based on a review of the documents that the complainant sent to the employer initially to support her claim for an exemption to the vaccine policy because "[t]he sincerity of an employee's belief must be assessed at the time they made their request and not on the basis of additional information provided at a hearing …" (from *Bedirian v. Treasury Board (Department of Foreign Affairs, Trade and Development*, 2024 FPSLREB 58 at para. 60).

[39] As the Board said in *Drouin* (cited by the complainant), the threshold is whether the union reviewed the matter in more than a "perfunctory fashion". The complainant has not shown an arguable case that Ms. Veller's review of her grievance was perfunctory.

5. There was no "revised" grievance

[40] The complainant argues that PIPSC abused its authority by submitting a "revised initiating document" that modified her grievance without her consent. The so-called "revised initiating document" that she is complaining about is the Form 24 filed alongside her reference to adjudication. This is not an initiating document.

[41] To explain, s. 210(1) of the *Act* requires a party to give notice to the Canadian Human Rights Commission when it refers a grievance to adjudication that involves the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). This notice is provided using the Board's Form 24 (see the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79) at s. 92). The purpose of this form is to give the Canadian Human Rights Commission an opportunity to "… review the matter and

determine if it will make submissions" about the grievance (from *Alexis v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLREB 9 at para. 186). Form 24 is not an initiating document. The complainant's grievance was also filed with the Board, and it remained in its original form. The fact that the Form 24 phrased the corrective action differently from her grievance is irrelevant to her case.

6. Recommending she accept the settlement and then withdrawing the grievance when she did not

[42] The complainant's main complaint is that PIPSC refused to take her grievance to adjudication because it received what it considered an appropriate settlement of her grievance.

[43] A union has every right to negotiate a settlement of a collective agreement grievance without the permission or consent of the grievor. In this case, PIPSC did not go so far as to unilaterally settle the complainant's case without her permission. Instead, it recommended that she accept OSFI's offer and then withdrew her grievance only after she refused to.

[44] As stated in *Ouellet v. St-Georges*, 2009 PSLRB 107 at para. 32, "[t]he Board will not usually allow a complaint where the bargaining agent obtained a reasonable settlement that the complainant subsequently rejected." I have reviewed the settlement terms, and they are more than reasonable — particularly because the settlement "achieves the remedy sought" in the complainant's grievance (see *Gazit v. Ontario Public Service Employees Union*, 1996 CanLII 11116 (ON LRB) at para. 17; see also MacNeil, Lynk & Engelmann, *Trade Union Law in Canada* at paragraph 7:78).

[45] In most cases, when a grievor rejects a settlement, it is because they believe that they may obtain a better financial result at adjudication. In this case, the complainant does not argue that she could do better at adjudication. When she first asked PIPSC to reconsider its decision on October 23, 2023, she admitted that the settlement offer was the "best financial outcome". She identified these four reasons that PIPSC should proceed with the case anyway:

> *1. **CLARITY** - for members that are uncertain of the benefits of being a PIPSC/union member. Seeing the Institute support a member's human rights is critical in building trust*
>
> *2. **COMMITMENT & LOYALTY** - it shows that the Institute not only talks the talk but it walks according to their talk*

> *3. **STEWARDSHIP** - as a new steward, it will give me practical experience and knowledge to better serve members; taking pressure off the EROs*
>
> *4. **RESPECT** - Employers will recognize the power of a collective voice; hopefully leading to less grievances*

[46] The complainant argued that the collective interests of PIPSC's membership would be better served by a hearing than a settlement. To be blunt, that is for PIPSC to decide, not the complainant. She argues that PIPSC has prioritized its interests over hers, but she admits that the settlement takes care of her interests. She is the one trying to tell PIPSC where its interests lie.

[47] After PIPSC denied her request, she escalated it to the president (through the general counsel) on October 29, 2023. In that letter, she said again that "this is not about corrective measures" and that "… the settlement is the best financial outcome for all parties involved …". This time, she says that she wants a hearing out of her "desire to share [her] testimony" about her religious beliefs and adds this: "… all I ask is to be heard and to receive some type of acknowledgement that what they [OSFI] did was wrong …". In essence, the complainant does not want to settle under any circumstances: she wants a hearing, no matter what.

[48] PIPSC did not act in an arbitrary manner by refusing to proceed with adjudication in the face of a settlement offer that the complainant admitted was the best financial option for her. The complainant's argument amounts to an argument that a union is required to take every case to adjudication because every case would meet those four purposes (i.e., every case would provide clarity, show that the union is taking grievances seriously and should be respected, and give stewards hands-on training). The duty of fair representation does not require a union to take every case to adjudication; nor does it ever require it to take a case to adjudication simply to show off to its members or teach a grievor or steward what hearings are like.

[49] After the complainant relented and agreed to settle her grievance, she recanted that agreement after reading the Minutes of Settlement. She argues that the Minutes of Settlement are unreasonable because they contain a release that would restrict her from making more formal complaints about this matter. As the Board recently pointed out in *Teodorescu v. Deputy Head (Canada Border Services Agency)*, 2024 FPSLREB 111 at para. 35, "[a] release is an implied term of any settlement of a grievance …". I have

reviewed the release carefully, and it is a standard release and not a "Cadillac" release, such as the Board was concerned about in *Teodorescu*. Ms. Veller told the complainant that those paragraphs are "standard language", and she was right.

[50] The complainant also argues that the Minutes of Settlement prevented her from speaking out against what she calls "the discrimination and harassment occurrences." The complainant refers to the release language as what prevents her from speaking out. The release prevents her from making another complaint about the events that she was to have settled; it says nothing about speaking out. The Minutes of Settlement had a confidentiality clause, but that clause only prevented her from disclosing the settlement — it did not prevent her from speaking out about her experiences. PIPSC did not try to muzzle the complainant because the Minutes of Settlement do no such thing.

[51] The complainant complains that she agreed to accept OSFI's offer on December 22, 2023, but it did not provide the Minutes of Settlement until March 1, 2024. This was OSFI's delay, not PIPSC's delay; she has not raised an arguable case that PIPSC is responsible for this relatively short delay preparing settlement documents that she refused to sign anyway.

[52] In her submissions before the Board, the complainant now argues that the settlement "… did not resolve the corrective action related to abiding *by the articles of the collective agreement and the Canadian Human Rights Act* – which was the main purpose of the complainant's grievance" [emphasis in the original]. I admit that I am confused by the complainant's submission. The vaccine policy is over, and she is back at work. If OSFI breached the collective agreement, its breach ended when she returned to work, and it is currently abiding by the collective agreement.

[53] The complainant has been unable to set out any concrete relief that she wants from an adjudication hearing. PIPSC did not act arbitrarily by refusing to take a case to adjudication simply for the sake of going ahead with a hearing.

[54] Finally, this case is similar to that of *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44. I reach the same conclusion as the Board member did in that case, and her summary of that case matches mine:

…

> *64 The respondent's representatives negotiated a settlement with the employer's representatives and recommended that the complainant accept the proposed settlement. The fact that the complainant was not satisfied with the proposed settlement does not imply that the respondent's recommendation was arbitrary. Before concluding and recommending the proposed MOA, the respondent analyzed the situation and pondered all relevant considerations, including the merits of the grievances in the context of the complainant's resignation. The grievances and the proposed MOA were analyzed by three different representatives, including the manager of Regional Representations Services and the respondent's president. To alleviate the complainant's dissatisfaction with the proposed MOA, the respondent even had further discussions with the employer. The complainant may well believe that the proposed settlement was not satisfactory, but it cannot be said that the respondent took the complainant's interest lightly or that it did not commit to finding an acceptable resolution of the outstanding issues. I will go further by saying that I see nothing unreasonable about the proposed MOA. The complainant strongly disagreed with the discharge clauses that it contained. He was free to refuse to sign it, and I do not want to express an opinion of his decision. However, I will say that discharge clauses are fairly standard and not uncommon in a context where the employment relationship is discontinued and where parties try to resolve all outstanding issues and at the same time prevent any other potential dispute.*
>
> …

[55] All of that is true in this case too. PIPSC had three different people analyze the situation: Ms. Veller, the director of regional labour relations, and the president (on the advice of the general counsel). This is the antithesis of taking the complainant's case lightly. Like in *Sayeed*, I will also go further and say that there was nothing unreasonable about this settlement or the release that it contained. If the complainant would rather have her case withdrawn than agree to this settlement, then that is her right — but PIPSC did not act arbitrarily by refusing to proceed with the grievance.

C. New allegations about harassment grievances

[56] The complainant's complaint to the Board was largely about the vaccination grievance. When she filed her submissions addressing whether her complaint raised an arguable case, she made allegations about PIPSC's representation of her in two harassment grievances. PIPSC objected to what it characterized as her expanding the scope of her complaint in this way.

[57] Despite PIPSC's objection, I have reviewed her submissions thoroughly. I have concluded that she has not made an arguable case about PIPSC's representation of her in the harassment grievances. Therefore, I do not need to rule on PIPSC's objection and decide whether she improperly expanded the scope of her complaint.

[58] The complainant complains about PIPSC's representation of her in two harassment grievances.

1. The complaint about the first harassment grievance is out of time

[59] The first grievance arose from a "notice of occurrence" that she filed under the *Work Place Harassment and Violence Prevention Regulations* (SOR/2020-130) on February 16, 2021, and a grievance on May 6, 2021. OSFI hired an outside investigator, who concluded that the responding party's conduct did not amount to harassment or violence. The complainant disagreed and continued with her grievance. OSFI dismissed her grievance at the final level on June 12, 2023. PIPSC represented her in this grievance. The complainant now says that PIPSC breached its duty of fair representation by refusing to file another grievance on her behalf about that harassment and by failing to point out s. 209(1)(b) of the *Act* to her (presumably so that she could refer her grievance to adjudication). PIPSC informed her of its decision not to go further on June 19, 2023.

[60] A duty-of-fair-representation complaint must be made within 90 days after the date a complainant knew, or ought to have known, of the action or circumstance giving rise to it; see s. 190(2) of the *Act* and *Reid*, at para. 27. The complainant is complaining of an event that took place on June 19, 2023. She made her complaint on June 12, 2024 — well more than 90 days beyond the event that she is complaining about. Even were the Board to allow her to expand her complaint to encompass this harassment grievance, the complaint would be out of time. Therefore, she has not raised an arguable case for that element of her complaint.

2. The complaint about the second harassment issue does not raise an arguable case

[61] The second harassment complaint is about the complainant's activity as a shop steward for PIPSC. She attended a meeting on February 6, 2024, to represent a member. She alleges that during that meeting OSFI's human resources officials acted improperly by "putting words in her mouth." The complainant wanted to file a grievance. She

contacted a PIPSC official who referred her to Mr. Vézina, even though she did not want to deal with him. She drafted a grievance. Mr. Vézina recommended that she remove a paragraph about her health. The complainant did not want to. Instead, the complainant made a complaint with the Canadian Human Rights Commission. The complainant does not say whether she also filed a grievance, either as she drafted it or as Mr. Vézina recommended, although she has provided an email to Mr. Vézina dated March 1, 2024, in which she says that she will proceed with "alternate routes" first (i.e., before she files a grievance).

[62] The complainant's submission does not allege any facts that raise an arguable case that PIPSC violated its duty of fair representation in respect of this second alleged incident of harassment. In her submissions, the complainant quotes from an email from Mr. Vézina in which he states this: "I am supportive of filling [*sic*] the grievance with the proposed language that I forwarded to you. From there we will look at our options before proceeding to the grievance hearing." The complainant does not allege that PIPSC was unwilling to represent her or to file a grievance on her behalf, and the evidence that she filed indicates that it was willing to.

[63] The only thing that the complainant alleges that PIPSC did wrong was that Mr. Vézina never responded to her email dated March 1, 2024, in which she says that she is going to contact the Canadian Human Rights Commission directly (as well as thanking him for his advice to pursue a workers' compensation claim). Even if Mr. Vézina did not respond to that email, that single failure to respond would not violate PIPSC's duty of fair representation.

[64] For these reasons, I have concluded that the complainant has not raised an arguable case that PIPSC violated its duty of fair representation, and I dismiss her complaint.

III. Sealing order

[65] In her complaint made with the Board, the complainant set out the terms of OSFI's offer to settle her vaccination grievance. PIPSC raised an initial concern about whether by doing so, the complaint text violated settlement privilege and asked for a delay in responding until I had addressed that issue. Rather than delay its response to this complaint, I issued an interim sealing order pending submissions about whether I

should seal the terms of the proposed settlement. I also provided notice to OSFI about the sealing order issue and gave it the opportunity to provide its position.

[66] In *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38, the Supreme Court of Canada set out the test for an order sealing documents filed with a court. The party seeking the order must establish (1) that not sealing the document poses a serious risk to an important public interest, (2) that the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk, and (3) that as a matter of proportionality, the benefits of the order outweigh its negative effects. The Board has stated that the test outlined in *Sherman Estate* applies to it as well; see *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48 at para. 20.

[67] OSFI requested a permanent sealing order that would redact the terms of the offer that it made. It argued that a sealing order is necessary to the proper administration of justice because the offer is protected by settlement privilege. PIPSC took no position about this issue. The complainant opposed the sealing order on two bases. First, she stated that OSFI and other government agencies were required to disclose the total expenditures on settlements to employees who were impacted by the vaccine policy to the House of Commons, so the sealing order is irrelevant, because this will be public knowledge anyway. Second, she argues that the settlement offer is her personal information and she consents to its disclosure, so a sealing order is inappropriate in this case.

[68] Settlement privilege is a rule that "… wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible"; see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 ("*Sable*") at para. 2. This responds to the complainant's second argument. All parties involved in a negotiation are protected by settlement privilege, not just the party who may receive something as part of the settlement. The proposed settlement is not just her personal information.

[69] There are two lines of authority about whether settlement privilege applies to a case like this.

[70] The first line of authority says that there is an exception to settlement privilege that allows documents used in a settlement between Party A and Party B to be used in

unrelated litigation between Party B and Party C. This line of authority considers the purpose of settlement privilege to be to ensure that one party does not weaponize an offer to settle against the offering party by arguing that the fact that it made an offer, or the content of that offer, shows the weakness of its position. In this case, OSFI made an offer to settle. The complainant is not trying to use that offer against OSFI — she is using the offer as part of the factual background to her complaint against PIPSC.

[71] This first line of authority is summarized in *Mueller Canada Inc. v. State Contractors Inc. (H.C.J.)*, 1989 CanLII 4117 (ON SC), as follows:

> …
>
> *I take the ratio of I. Waxman and Sons Ltd. v. Texaco Canada Ltd., supra, to be that generally the public interest in promoting full and frank settlement discussions will protect communications for that purpose from production in subsequent litigation involving one of the parties to that correspondence and a third party. I. Waxman and Sons Ltd., supra also makes it clear that there are exceptions to the privilege which operates where one of the parties to the negotiations, or a stranger to those negotiations, seeks production. In discussing those exceptions, Sopinka and Lederman, op. cit., at p. 201 say:*
>
> > *The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.*
>
> *The reference to establishing "liability or a weak case" must refer to liability in relation to the matters which are the subject of the settlement -- in this case the alleged wrongs which led to the initial dispute between State and the Kellogg Companies.* ***Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production****.…*
>
> …
>
> [Emphasis added]

[72] The second line of authority focuses on the broader public interest in encouraging the settlement of disputes. The Supreme Court of Canada in *Sable*, at para. 11, oriented the purpose of settlement discussion towards the public interest in settling disputes because "[s]ettlements allow parties to reach a mutually acceptable

resolution to their dispute without prolonging the personal and public expense and time involved in litigation", avoiding the strain on an already overburdened court and tribunal system. This means that settlement privilege is not just about ensuring that offers are not weaponized against someone who makes an offer but instead about providing a privileged space that encourages parties to resolve their disputes without fear that anyone will learn about the content of their offers.

[73] *Lewis v. WestJet Airlines Ltd.*, 2024 BCSC 111 is a recent example of this second line of authority. That case was a class action, alleging that WestJet harassed its employees. The representative plaintiff asked for the disclosure of all negotiations and settlements that WestJet made with individual employees about harassment. The British Columbia Supreme Court refused to order WestJet to disclose information about those settlements and refused to apply the first line of authorities I just discussed because of the broader public interest in settlements described in *Sable*.

[74] This Board has followed the second line of authority. The clearest statement of that principle is in *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120, which predates but anticipates *Sable* in stating this:

> …
>
> *14 One of the objects of the* PSLRA *is the resolution of workplace complaints and grievances. Indeed, the Preamble to the* PSLRA *states that "collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest" and that "the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment". Mediation, through the PSLRB's dispute resolution services, is one of the means through which grievances can be resolved and it is clear that the resolutions of disputes is not just in the interests of individual employers and employees within the federal public service, but in the public interest.*
>
> …
>
> *16 It seems clear to me that allowing public access to the documents in question would jeopardize an important public interest in effective labour relations in the federal public service because they provide details of the settlement reached through the confidential discussions between the employer and the complainant and her union. The need for confidentiality in mediation outweighs the public interest in having access to the documents. Since no alternatives to sealing the documents were suggested, or are apparent, it seems to me that an order to seal the exhibits that refer to the substance of the negotiations is the most*

> *effective means of protecting the interest in question. Furthermore, these documents are not germane to my decision, since the complaint concerns the process used to try to reach a settlement rather than the settlement itself.*
>
> …

[75] While that case was about mediation, the same principle applies to settlements negotiated without mediation. Further, in *Basic*, the terms of the settlement were not the basis of the complaint, while in this case, they are; however, the privilege applies despite the settlement terms being relevant to my decision.

[76] The Board has also sealed the terms of a settlement in *Topping v. Deputy Head (Department of Public Works and Government Services)*, 2014 PSLRB 74 at para. 122; *Ross v. Public Service Alliance of Canada*, 2017 FPSLREB 13 at para. 12; *Wurdell v. Public Service Alliance of Canada*, 2020 FPSLREB 84 at para. 235; *Valderrama v. Deputy Head (Department of Foreign Affairs, Trade and Development)*, 2020 FPSLREB 86 at para. 12; *Reid v. Deputy Head (Library and Archives of Canada)*, 2021 FPSLREB 104 at para. 84; and *Fitzgibbon v. Deputy Head (Correctional Service of Canada)*, 2024 FPSLREB 112 at para. 19.

[77] I agree with those decisions and adopt the second line of authority that I set out earlier because that second line is more consistent with the purpose behind settlement privilege. Settlement privilege is not just about making sure that an offer is not weaponized against the person who made the offer. Settlement privilege encourages settlements because the public disclosure of offers to settle would make it more difficult for an institutional party such as OSFI or PIPSC (or any employer or bargaining agent) to reach an agreement on different terms for other cases. If I were to permit the disclosure of OSFI's offer to settle, every employee would expect the same offer, and every employer would expect acceptance of the same offer. No institution (employer or bargaining agent) would be willing to settle a case, knowing that its settlement would lock in the resolution of future similar cases.

[78] Finally, I considered the complainant's argument that her settlement was no longer private because of the House of Commons production order. For context, a Member of Parliament asked for the following information on February 7, 2024, and government departments are being asked to provide this information:

> *Q-2301 — February 7, 2024 — Mr. Falk (Provencher) — With regard to the government's requirement during the COVID-19 pandemic that federal public servants provide proof of vaccination: (a) what are the total expenditures on compensation, severance packages and settlements to employees who were impacted by the requirement, including, but not limited to, payments made to mediators, agents, lawyers, or for legal proceedings; (b) how many employees received payments mentioned in (a); and (c) what is the breakdown of (a) and (b) by reason for the payment and how the amount was arrived at (negotiated settlement, legal proceedings, etc.)?*

[79] This information is not about individual settlements such as the complainant's. Instead, it asks for the settlement amounts (plus other non-settlement payments) in the aggregate. Individual agreements are not being disclosed.

[80] In conclusion, the public interest in encouraging settlement justifies a sealing order and outweighs the public interest in an open and transparent justice system.

[81] With that said, the open court principle requires a tribunal to minimize the extent of a sealing order and to seal only the documents necessary to fulfil the public interest being protected by that sealing order. Therefore, I have sealed references to the precise terms offered by OSFI. I have included a list of those references in Appendix A to this decision. The remainder of the Board's file remains open.

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

(The Order appears on the next page)

IV. Order

[83] The complaint is dismissed.

[84] The documents listed in Appendix A are ordered sealed.

December 6,2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board

APPENDIX A

- Initial complaint filed June 12, 2024, first sentence of the fourth paragraph of the description of the facts of the complaint;

- OSFI submissions dated August 14, 2024, the underlined portion of paragraph 2(a) of the first page of those submissions;

- PIPSC submissions dated July 26, 2024:

    - paragraphs 20 (2nd sentence), 25 (first 14 words of that sentence), 26 (second and third line of the second offset quotation), 28 (second offset quotation), 42 (offset quotation), 43 (last eight words)

    - Appendix G (all)

    - Appendix I (4th and 6th paragraphs, and the first sentence of the 9th paragraph)

    - Appendix K (2nd sentence of 2nd paragraph on the 1st page, and 5th line of the 2nd paragraph on the 2nd page)

    - Appendix M, (2nd page, 2nd full paragraph, 3rd and 4th sentences, 3rd paragraph, 4th paragraph 1st and 2nd sentences)

    - Appendix N, 3rd page (email of March 4, 2024, at 2:17 pm, 3rd paragraph, 1st sentence)

- Complainant's submissions dated September 13, 2024, paragraphs 108, 111, 114 (first bullet point only), and the following from the books of documents filed the same day:

    - Tabs 27, 28, and 30 (these are documents already contained in PIPSC's submissions, and they will be sealed in their entirety rather than replicate the redactions already made for these documents)

- PIPSC reply submissions, paragraph 31, 4th line.