Date: 20250414

File: 561-02-50766

Citation: 2025 FPSLREB 38

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

KENTH COUND

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Cound 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: Joanne Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Tony Micallef-Jones, counsel

Decided on the basis of written submissions, filed September 30, November 6, 15, and 29, and December 19, 2024, and January 7, 2025.

REASONS FOR DECISION

I. Complaint before the Board

[1] On October 1, 2024, Kenth Cound ("the complainant") made a complaint under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") against the Professional Institute of the Public Service of Canada ("PIPSC" or "the respondent"), alleging that it breached its duty of fair representation.

[2] Section 190(1)(g) of the *Act* requires the Federal Public Sector Labour Relations and Employment Board ("the Board") to examine and inquire into a complaint that an employee organization committed an unfair labour practice. The nature of the alleged unfair labour practice in this complaint is set out in s. 187 of the *Act* 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.*

[3] The respondent responded to the complaint to request that it be dismissed without a hearing on the basis that it has no reasonable prospect of success, as it does not reveal an arguable case that PIPSC acted in an arbitrary, discriminatory, or bad-faith manner.

[4] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) permits the Board to decide "… any matter before it without holding an oral hearing."

[5] In the circumstances of this case, I am satisfied that I can decide the complaint based on the parties' written submissions.

[6] For the reasons that follow, I have determined that the events described do not establish an arguable case. The complaint is dismissed.

II. Summary of the facts

[7] The complainant was a member of PIPSC. On January 15, 2020, the Treasury Board of Canada Secretariat ("the employer") terminated his employment. On February 15, 2020, he filed a grievance against the termination. PIPSC supported his grievance.

[8] On December 21, 2020, the employer denied the grievance at the final level. It was referred to adjudication before the Board, which consolidated it with three earlier disciplinary grievances.

[9] On March 23, 2023, the complainant, PIPSC, and the employer agreed to settle the four grievances. Their agreement is reflected in a terms of settlement document ("the settlement agreement") that they signed on March 30, 2023.

[10] Documents provided to the Board demonstrate that after they signed the settlement agreement, the complainant and PIPSC engaged in an email exchange about the implementation of its terms. The exchange includes the following:

1) On September 13, 2023, the complainant confirmed to the respondent that the employer had fulfilled a term of the settlement agreement.
2) On September 25, 2023, he contacted the respondent to advise that he wanted to write a book about his experience as a federal public service employee.
3) He wrote to PIPSC's Office of the President on September 25, 2023, to express dissatisfaction with his representation.
4) On October 6, 2023, PIPSC responded, stating, in part, this:

   > *… while we recognize that you are not satisfied with the service you received, we are confident that the appropriate support was provided by Institute representatives over a period of several years, as evidenced by the termination settlement that you signed. As such,* [PIPSC] *considers the matter closed.*

5) On October 16, 2023, the respondent cautioned him against sharing his workplace experiences, as "[d]iscussing matters that were deemed to be resolved by the Settlement may result in a negative consequence for him."
6) On October 27, 2023, he followed up with the respondent on an outstanding obligation in s. 2 of the settlement agreement.
7) On November 2, 2023, it confirmed that it was looking into the matter.
8) On November 8, 2023, it sought clarification of any matters that remained outstanding.
9) On November 16, 2023, the complainant confirmed that the employer fulfilled one of its two obligations under s. 2 of the settlement agreement.
10) On November 17, 2023, the respondent indicated that it would speak with the employer the following week. Later that day, it confirmed that the employer considered that it had fulfilled its obligations under s. 2 of the settlement agreement.

11) On November 27, 2023, the respondent provided the complainant with the most recent update from the employer s. 2 of the settlement agreement. He replied on November 28, 2023.
12) On November 29, 2023, the respondent wrote to him about his contact with a management representative.

[11] On January 24, 2024, PIPSC wrote to the Board to confirm that the settlement agreement's terms had been satisfied. The termination grievance and the three disciplinary grievances were withdrawn. The Board closed its files.

[12] On June 10, 2024, the complainant emailed the respondent, asking by what means he could be released from the settlement agreement.

[13] On June 27, 2024, the respondent's counsel replied to indicate that contracts are generally binding, unless duress or incapacity can be proven, and added this: "… but as far as I know that wasn't the case here."

[14] On July 5, 2024, the complainant responded, stating that he had been ill when the settlement agreement was signed but that he had not known the degree to which his illness had affected his cognition. He stated that he would contact his doctor for information. He raised concerns about freedom of speech and the feeling that the settlement agreement was unfair. He expressed remorse for signing it.

[15] On July 21, 2024, the complainant provided a physician's letter dated July 17, 2024. It described the medical condition for which he was being treated and included the following passage:

> *… His diagnosis was not made until December 2024* [*sic*]*. In the time leading up to this diagnosis, patients often suffer from a variety of symptoms including fatigue and issues affecting their concentration and focus. Mr. Cound has done well with his treatments at present and such symptoms have resolved.…*
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> …

[16] On August 9, 2024, PIPSC responded to state that the medical letter did not demonstrate that the complainant lacked capacity or was unable to make a clear decision when he signed the settlement agreement. PIPSC viewed it as a binding contract. It declined to take any steps toward dissolving the settlement agreement.

[17] On August 10, 2024, the complainant wrote to PIPSC to allege that he had been pressured to sign the settlement agreement. He provided information on his medical

condition in 2019, which was four years before he signed it. He indicated that his circumstances in 2019 might have contributed to the employer's termination decision.

[18] On September 11, 2024, PIPSC wrote to the complainant, indicating that it had reviewed the information that he had provided. It maintained the position it took in its correspondence with him on October 6, 2023, that the settlement agreement was valid and enforceable. It stated that it would take no further action. It reiterated this decision in another email to him on October 1, 2024.

III. Summary of the arguments

A. For the complainant

[19] The complainant argues that he was unwell when he signed the settlement agreement. His illness was diagnosed on December 22, 2023. Fatigue is a documented effect of his illness. His ability to understand the settlement agreement's content was impeded by fatigue and the pressure for him to accept the settlement process.

[20] Any contact with PIPSC from the time of signing the settlement agreement to that time should not be taken as proof that he agreed with it.

[21] The complainant's position is that PIPSC's October 6, 2023, response, indicating confidence in the support that it had provided to him, demonstrates that it acted in an arbitrary manner. It ignored the medical arguments and the condition that impaired his ability to understand the settlement agreement. It refused to act at that time and gave him no further consideration when he made the actual request to nullify the settlement agreement some months later.

B. For the respondent

[22] The respondent denies that it failed its duty of fair representation and states that there were no compelling reasons to assist the complainant in an attempt to nullify the settlement agreement. It argues that the complaint lacks an air of reality.

[23] The respondent considers that during the 15 months after he signed the settlement agreement, the complainant's communication was clear and cogent. It related to expectations surrounding implementation.

[24] When the complainant then raised the issue of a medical condition, the respondent considered the medical information that he provided and determined that

it was not sufficient to support an argument to nullify the settlement agreement on the basis that he lacked capacity. It responded promptly to advise the complainant of its decision. When asked to reconsider its decision, it advised him that the decision was final.

[25] The respondent argued that it evaluated the complainant's circumstances, investigated the merits, and made a reasoned decision. It did not act arbitrarily.

IV. Analysis

[26] This complaint raises the issue of whether the complainant established an arguable case that PIPSC breached its duty of fair representation in a manner that would justify an oral hearing before the Board.

[27] When the Board considers an application to dismiss a complaint summarily on the basis that there is no arguable case, the decision maker assumes that the information in the complaint is true. The Board set this out as follows in *Reid v. Public Service Alliance of Canada*, 2024 FPSLREB 100 at paras. 29 and 30:

> *[29] In a complaint like this one, the burden rests with the complainant to demonstrate a breach of the duty of fair representation. However, when the Board is seized with a request to summarily dismiss such a complaint without holding an oral hearing, the factual allegations that the complainant submitted must be taken as proven for the sake of determining if they could demonstrate the existence of a breach of s. 187 of the* Act*. This is often referred to as the "arguable-case" analysis.*
>
> *[30] However, this principle must be nuanced. To be taken as true in the context of an arguable-case analysis, factual allegations must be provable and have an air of reality. Arguments and opinions need not be taken as proven; nor need mere assumptions, speculations, or accusations be so taken (see* Payne v. Public Service Alliance of Canada, *2023 FPSLREB 58 at paras. 60 and 91;* Sganos v. Association of Canadian Financial Officers, *2022 FPSLREB 30 at paras. 80 and 81;* Beniey v. Public Service Alliance of Canada, *2020 FPSLREB 32 at para. 57;* Archer v. Public Service Alliance of Canada, *2023 FPSLREB 105 at para. 29; and* Corneau v. Association of Justice Counsel, *2023 FPSLREB 16 at para. 34).*

[28] That means that the facts alleged in the complaint are not deemed proven. I express no opinion on the truth of those facts.

[29] The complainant has the burden of proof in a complaint made under s. 187 of the *Act*. It requires the complainant to present evidence sufficient to establish that the

respondent failed to meet its duty of fair representation. As expressed in s. 187, this required the complainant to put forward a factual foundation that supported his position that the respondent acted in a manner that was arbitrary, discriminatory, or in bad faith.

[30] In a complaint under s. 187 of the *Act*, the burden of proof falls on the complainant to present sufficient evidence to establish that the respondent failed to meet the duty of fair representation by conducting itself in a manner that was arbitrary, discriminatory, or in bad faith. As noted in *Manella v. Treasury Board of Canada Secretariat*, 2010 PSLRB 128, "The bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high".

[31] The Board will examine the actions of the respondent in handling the complainant's grievance and related matters, to determine whether they were "… fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee" (*Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 at 527).

[32] Further, the Board has consistently held that a complainant's disagreement with a respondent's handling of the grievance is not the gauge of whether the respondent's actions constitute an unfair labour practice. (See *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52; *Bergeron v. Public Service Alliance of Canada*, 2019 FPSLREB 48; *Boudreault v. Public Service Alliance of Canada*, 2019 FPSLREB 87; and *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141.)

[33] The crux of the complaint before me is the respondent's failure to act on the complainant's request to nullify the settlement agreement. He provided information to support his contention, and PIPSC assessed it as insufficient for a claim that he lacked capacity when it was signed.

[34] Based on the facts alleged in the complaint and the information before me, I am unable to find a basis for an arguable case of arbitrary conduct, discriminatory treatment, or bad faith that would establish a breach of s. 187 of the *Act*.

[35] Rather, I find that when the complainant approached the respondent to express his concern for his capacity, it prudently asked for medical evidence, to support the claim. The document he provided speaks generally to issues of fatigue, concentration,

and focus that may be suffered by persons awaiting a diagnosis. It makes no statement about the complainant's specific symptoms, deficits, or abilities at the time he signed the settlement agreement.

[36] I find that the respondent considered and assessed the information when arriving at its decision. It was a reasoned decision based on the content of the medical information that the complainant provided, which does not demonstrate that PIPSC acted in a way that was arbitrary or in bad faith.

[37] As such, there is no basis for the Board's intervention. I find that the complainant did not establish an arguable case that the respondent breached its duty of fair representation, and I dismiss the complaint.

V. Sealing order

[38] The respondent requested that the Board issue a sealing order for Appendix E of its written submission, which is the settlement agreement.

[39] The respondent noted that paragraph 10 of the settlement agreement states that it is confidential among the parties, the complainant, the respondent, and the employer.

[40] The respondent argued that it is important for the administration of justice to protect the confidentiality of settlement agreements. Disclosure could have a chilling effect on settling future disputes.

[41] The complainant opposed the sealing order on the basis of the open court principle. He argued that sealing the settlement agreement "chipped away" at the Board's jurisdiction. He had no issue with it being made public.

[42] In *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38, the Supreme Court of Canada set out the test for an order sealing a document filed with a court. The party seeking the order must establish that:

1) not sealing the document poses a serious risk to an important public interest;
2) 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) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[43] In *Reid v. Deputy Head (Library and Archives of Canada)*, 2021 FPSLREB 104 at para. 84, *Ross v. Public Service Alliance of Canada*, 2017 FPSLREB 13 at para. 12, and *Valderrama v. Deputy Head (Department of Foreign Affairs, Trade and Development)*, 2020 FPSLREB 86 at para. 12, the Board concluded that there is an important public interest in preserving the confidentiality of settlement agreements and that sealing is necessary to protect that interest.

[44] I also note the Board's decision in *Catahan Niles v. Professional Institute of the Public Service of Canada*, 2024 FPSLREB 169, in which it held at para. 80 that "… the public interest in encouraging settlement justifies a sealing order and outweighs the public interest in an open and transparent justice system."

[45] Accordingly, I am satisfied that sealing the settlement agreement in this case is necessary to protect an important public interest. The benefit of a sealing order outweighs any negative effect, including the potential damage to the willingness of parties to settle disputes if the Board can breach their agreements to confidentiality.

[46] Paragraph 10 of the settlement agreement is a succinct statement of the parties' intention that confidentiality should extend to all aspects of their settlement, including the settlement agreement. Therefore, consistent with that provision, and as agreed by the parties, the sealing order will extend to the complete settlement agreement.

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

(The Order appears on the next page)

VI. Order

[48] The complaint is dismissed.

[49] The settlement agreement found at Appendix E of the respondent's submission of November 6, 2024, is ordered sealed.

April 14, 2025.

Joanne Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board