Date: 20250606

File: 561-02-43613

Citation: 2025 FPSLREB 69

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

ALINA KING

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
King v. Public Service Alliance of Canada

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

Before: Caroline Engmann, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Marie-Pier Dupont, counsel

Heard at Ottawa, Ontario,
October 3 to 5, 2023.
(Written submissions filed November 7 and December 5 and 15, 2023.)

REASONS FOR DECISION

I. Complaint before the Board

[1] It is a settled legal principle that a bargaining unit member does not have an absolute right to have his or her grievance referred to adjudication. The bargaining agent enjoys considerable discretion when deciding which grievances to refer to adjudication. If it exercises its discretion in good faith, objectively and honestly, it does not breach its duty of fair representation. This complaint is about a bargaining agent's decision not to refer two grievances to adjudication.

[2] At all relevant times, Alina King ("the complainant") worked for the Department of Employment and Social Development ("the employer" or ESDC) in the bargaining unit represented by the Public Service Alliance of Canada (PSAC) through its component, the Canada Employment and Immigration Union (CEIU; in this decision, both entities will be referred to interchangeably as "the respondent" or "the bargaining agent").

[3] On October 8, 2021, the complainant made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") that the respondent acted in bad faith and arbitrarily when it decided not to refer her two grievances to adjudication and that by so doing, it breached its duty of fair representation under s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[4] In this decision, "the Board" refers to the Board in its present iteration and to all its predecessors.

[5] The respondent denied that it breached its duty of fair representation and asked that the complaint be dismissed.

II. Summary and disposition

[6] The facts underlying this complaint are largely not in dispute. It is about two grievances. The first was filed on March 4, 2015, and the second was filed on January 7, 2016. Consistent with its internal grievance-processing policy, the union put both grievances in abeyance because the complainant was away from the workplace on sick leave.

[7] The first grievance was triggered on or about January 19, 2015, by the complainant's discovery that her employer had staffed two PM-04 positions in her work unit while she was on secondment to another department. Feeling slighted and excluded from the process, she asked the union to file a grievance on her behalf. The grievance alleged that the employer failed to provide her with a harassment-free work environment, contrary to her collective agreement's provisions.

[8] The second grievance alleged that the employer violated the sick leave provisions of the collective agreement between the PSAC and the Treasury Board for the Program and Administrative Services (PA) group that expired on June 20, 2014 ("the collective agreement") when it refused to advance her sick leave credits.

[9] The complainant's application for long-term disability benefits was approved in December 2015, retroactive to March 5, 2015. While receiving those benefits, she remained on sick leave without pay under the Treasury Board's D*irective on Leave and Special Working Arrangements*.

[10] In August 2017, the employer sent the complainant a letter outlining her options for resolving her leave-without-pay status ("the options letter"). In response, her doctor wrote to the employer, stating that she was not permanently disabled and that she anticipated returning to the workplace.

[11] The respondent received a letter dated August 7, 2018, from the complainant's doctor stating that her recovery was being hampered by the lack of resolution of her outstanding grievances. The doctor recommended that she be allowed to transfer to a different department.

[12] Between 2019 and 2021, while the complainant remained on sick leave and away from the workplace, she insisted that her grievances be moved forward through the internal grievance process. As a result, on November 14, 2019, the respondent scheduled them for a hearing at the second level of the internal grievance process. It had to be rescheduled due to a death in her family and the COVID-19 pandemic.

[13] The employer denied the grievances at both the second and final levels.

[14] The respondent sent two letters dated July 15, 2021, to the complainant, informing her that it would not refer the grievances to adjudication ("the non-referral decisions") and that it would close its files.

[15] The complainant unsuccessfully appealed the non-referral decisions.

[16] By letter dated September 2, 2021, the respondent confirmed its non-referral decisions.

[17] The complainant made this complaint on October 8, 2021.

[18] Based on the documentary and testimonial evidence, and for the reasons outlined in this decision, I dismiss the complaint. I did not find any bad faith or arbitrariness in the non-referral decisions.

III. Comments on the evidence

[19] The relevant facts underlying this complaint are largely not in dispute, although the parties might have had different views as to the inferences to be drawn from them. When I summarize the facts through both the documentary and testimonial evidence, I will highlight only the aspects of the evidence that I deem relevant to my decision.

[20] Although I allowed the complainant to lead evidence and present documents that predated the 90-day period before the date on which the complaint was made, they are narrated only to the extent that they provide an appropriate contextual background. The only salient facts underlying the complaint are those that fell within the 90-day limitation period, which started on September 2, 2021, when the respondent's national president wrote to the complainant to confirm the non-referral decision letters dated July 15, 2021.

[21] The complainant cited several sections of the *Act* as the basis for her complaint; however, the only relevant ones are ss. 187 and 190(1)(g).

[22] In addition to the documentary evidence, I heard testimony from three witnesses. At the complainant's request, I issued summonses for two respondent representatives, Marc Béland, Health and Safety Representative, CEIU; and Eric Boileau, National Union Representative, CEIU.

[23] For reasons beyond his control, Mr. Béland was unable to attend the hearing, and I released him from the summons. Mr. Boileau attended and testified on the complainant's behalf. She testified on her own behalf, and I heard testimony from Frédéric Dubois, National Union Representative, CEIU, who testified on the respondent's behalf.

IV. Summary of the complainant's evidence

A. Mr. Boileau

[24] Mr. Boileau was CEIU's local president from 2012 to 2015. In that capacity, he attempted to help the complainant mediate her issues with the employer.

[25] He had worked as a CEIU national union representative for five years. In that capacity, he briefly worked on the complainant's file. Her primary contact was Joanne Daniels. He was shown an email dated May 28, 2015, which Mr. Béland sent to the complainant, in which he advised her about the denial of her long-term disability benefits and suggested that her local union could provide her with guidance. Mr. Boileau explained that the local union did not deal with disability-insurance matters; PSAC dealt with them for its members.

[26] He testified that he tried to work with the employer to find a position for the complainant in a different department but that it was closed to the idea.

[27] He disagreed with the complainant's suggestion that the union failed to file her grievance in a timely manner and that the grievance statement was inadequate.

[28] On cross-examination, he stated that he took steps to help the complainant by recommending a mediated discussion with the employer.

[29] On re-examination, he was asked why the union did not investigate her allegations of harassment and exclusion and her other health-and-safety concerns in her workplace. He explained that the union does not conduct those types of investigations and that it is the employer's responsibility to run them. He also explained that the doctor's note was not the basis for a workplace investigation.

B. The complainant

[30] The complainant presented and adopted her comprehensive reply, dated March 18, 2022, to the respondent's response to the complaint as her evidence in chief. Much of the information in it predates the relevant 90-day period; therefore, I have not reproduced it in this decision, but I closely reviewed it as contextual and background information.

[31] Her educational background is in nursing and midwifery. When she emigrated to Canada, she completed a degree in psychology with a minor in anthropology at

Carleton University in Ottawa, Ontario. She started her public service career with Health Canada and then successfully applied to hiring processes that landed her at ESDC as a program officer classified at the PM-02 group and level in 2007. She testified that she experienced bullying and exclusion in her work unit; she was either not given meaningful duties or was assigned duties that were two or three grades higher than her pay level.

[32] I gathered from her testimony and her comprehensive reply that she was unhappy with her ESDC work environment to the extent that she embraced the opportunity in April 2014 to go on an assignment at Citizenship and Immigration Canada (CIC), to replace someone who was on maternity leave.

[33] She left on April 9, 2014, and, unbeknownst to her, management launched a staffing process on April 29, 2014, to staff two PM-04 positions in her work unit. According to her, management did it to exclude her. She had already qualified in a PE-03 pool, which was the equivalent of PM-04 or PM-05, so she would have been a prime candidate for any PM-04 positions in her section. She found out about the staffing process only on January 19, 2015, when she returned to her substantive position at ESDC. She did not have access to her ESDC email account during her CIC assignment, so could not have known of the PM-04 opportunities.

1. The first grievance

[34] On February 8, 2015, she emailed Mr. Boileau to find out how she could file a grievance about her exclusion from the PM-04 selection process.

[35] On February 23, 2015, she received a draft grievance form from the respondent that it asked her to print and sign. It stated as follows:

…

> *I grieve the Management's inability to maintain a harmonious and mutually beneficial relationship as per Article 1.01 of the Collective Agreement.*
>
> *I grieve that I have not been provided with a harassment-free work environment as is required by both my collective agreement and the employer's policies.*
>
> *I request appropriate action be taken and that I be immediately provided with as harassment-free work environment, and that I be made whole.*

> *I request a formal written apology from my immediate supervisor for the actions taken towards me while under his supervision.*
>
> *I request respectful treatment, assignment of meaningful work that will allow me to feel valued and respected as an employee of this department. In addition, I request fair and transparent consideration for any and all acting opportunities within the department as indicated in my Performance Agreement.*
>
> *Furthermore, I request the employer compensate me for personal and punitive damages causing stress and undue hardship on me and my family so that I can become whole.*
>
> …
>
> [*Sic* throughout]

[36] For a period, informal discussions took place between the complainant and the respondent on one hand and the employer on the other, to attempt to resolve her issues and concerns before she filed the grievance. On February 26, 2015, the local CEIU's president wrote to her, stating as follows:

> …
>
> *It appears management … will not be in a position to respond fully to the questions regarding the staffing process for the Acting PM-04s conducted last April and have asked to postpone the meeting to early next week (Monday or Tuesday). My sense (and Alina's as well) is that they are attempting to cover up any wrong doings* [*sic*] *regarding this process and are in need of extra time to lose documents or insert missing authorizations etc…*
>
> *While this is meant to be an informal process with the intent of trying to resolve the issue and perhaps garner an acting opportunity for Alina, would it be in our interests to "force" the employer to the table when answers will not be given?*
>
> *Alina, I leave the decision, as to whether you wish to meet with* [management] *today, with you…*
>
> …

[37] The complainant responded that she would like to proceed with the meeting and that she was ready to file her grievance.

[38] She filed the grievance on March 4, 2015, and went on sick leave with pay the next day. She was on it from March 5 to 13, 2015. She received employment insurance sick benefits from March 16 to June 4, 2015. Her claim for long-term disability benefits from the disability insurer was initially denied but was eventually approved, retroactively to March 5, 2015.

[39] The employer denied the grievance at the final level on July 5, 2021.

2. The second grievance

[40] The complainant asked the respondent to file the second grievance, to set out that the employer refused to advance her sick leave credits, in violation of the relevant collective agreement provisions. On January 7, 2016, the respondent filed the second grievance, which read as follows:

> …
>
> *I grieve the employer has violated Article 35 (Sick Leave With Pay), as well as other related Articles of the Collective Agreement, by denying my request for the advancement of sick leave credits under Article 35.04.*
>
> *I grieve the employer has discriminated against me (Article 19.1) and has failed to accommodate me to the point of undue financial hardship by denying my requests for the advanced sick leave credits and left me without income since March 2015 - No Discrimination of my collective agreement and the Canadian Human Rights Act as well all other related Articles.*
>
> *I grieve the employer has violated Article 18.06 in connection to my harassment grievance ONT-2015-0053.*
>
> *I rely on this and all other relevant provisions of my collective agreement, applicable employer policies and directives as well as applicable legislation and regulations.*
>
> ***Corrective Action requested***
>
> *I request:*
>
> *1. That the employer ceases discriminating against me on the basis of my disability.*
>
> *2. That the employer advance 187.5 hours of sick leave as allowed under Article 35.04 of the Collective Agreement.*
>
> *3. Any and all salaries, monies, leave and benefits lost as a result of the employer's decision be reimbursed to me retroactive to the date the action occurred with interest.*
>
> *4. Damages and interest.*
>
> *5. Damages under the Canadian Human Rights Act.*
>
> *6. Any and all other remedies deemed just in the circumstances; and*
>
> *7. To be made whole.*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[41] The employer denied it at the final level on July 5, 2021.

3. The complainant's dissatisfaction with the quality of the representation

[42] Throughout her testimony, the complainant stated constantly that she received very bad, misguided, and biased advice from respondent's representatives. In a letter dated June 12, 2019, she outlined her dissatisfaction with their representation for her application for long-term disability benefits and her two grievances being in abeyance.

[43] She testified that the respondent's representative told her that she could lose her grievances and her job as well, and she could not understand why the representative told her that. Eventually, she lost her grievances. The proper context for this allegation was captured in an email exchange on October 29, 2019, between her and Mr. Dubois in which he addressed certain of her questions. Responding to her insistence that her grievances proceed, he stated as follows:

> …
>
> *… it remains my opinion that this is not the best option to solve your work related issues. Even with the grievance process on, you will need to respond to the employer's options in the letter.*
>
> *Moreover, your option to move forward with the grievance assumes you will be successful in the end. From the information I have after reviewing in your case, it is rather optimistic to conclude such a success. You might lose on both ends (grievance, and your job) if not successful. I urge you to consider talking with the employer about foreseeable accommodation measures and consider other possible options to return to work.*
>
> …
>
> [*Sic* throughout]

[44] On cross-examination, she admitted that she wanted a financial component to resolve her grievances and that she could not consider a return to work in isolation. She affirmed her position, as stated in this email, dated October 11, 2019:

> …
>
> *In your email you focus entirely on my return to work and duty to accommodate. You also urge me to provide an up to date medical note. I am not clear why would I ask my doctor for such a note at this time when:*
>
> *1. The employer letter dated August 12, 2019 does not contain any medical forms to be filled out. All the forms*

> *provided by Nathalie Martel are strictly retirement options which are premature and not applicable in my case.*
>
> *2.* ***I am not ready to return to work at this time. What I need is to extend my Sick Leave Without Pay until you finally resolve my two grievances. Only then, after 4.5 years of waiting for the outcome, would I be in a position to finally take care of my health and have a chance to recover. Until now my energy is consumed by dealing with the employer, union, Sun Life, and my legal counsels*** [*sic*]***.***
>
> …
>
> ***If there is a willingness from the employer to address my financial losses (reflective of me being placed in a PM-04 role at the time of my disability), admit that a PM-04 position is now appropriate, and a willingness to return me to a different workplace, with a different supervisor, then we may be able to move forward. This can only happen if my grievances are resolved. Right now I am not in a position to be ready to return to work. I expect a guarantee*** *that once I am ready I will have a new, safe, and healthy work environment and a job to return to. It must be guaranteed that I will not be placed on a job waiting list and left without any income. Please engage the employer in a discussion about a global resolution of my grievances. If they are not receptive, I ask that you move my grievances forward.*
>
> …
>
> [Emphasis added]

[45] On cross-examination, she explained that if she were guaranteed a job, she would take it and still discuss financial compensation, but that she could not return to work until her grievances were resolved. The union did not provide her with a guaranteed position.

[46] She was asked about the contradiction in her statement that she was not permanently disabled and the fact that the disability insurer had transferred her file to long duration. She said that she did not understand why the disability insurer did that. A note on her employee file stated that she would not return to work until age 65, and she had no idea who put it there.

[47] On cross-examination, she confirmed that the first grievance had nothing to do with her medical condition and that she grieved harassment. Counsel then asked the complainant to confirm it, and she confirmed this statement in the final-level reply:

…

> *In your grievance and in your presentation, you alleged that the fact that management did not inform you of the acting PM-04 opportunity in March 2015 constituted harassment. During the grievance consultation of May 26, 2021, you clarified that at the time of the events, you did not suffer from a medical condition and were not on sick leave. This was contrary to the information that was provided at the previous consultation and to what was presented in the written submission. Although you mentioned that there were numerous other examples of harassment, you informed me that you would only provide this example. One incident and the normal exercise of management activities can normally not be construed as harassment.*
>
> …

V. Summary of the respondent's evidence

A. Mr. Dubois

[48] Mr. Dubois was the CEIU's national union representative from 2018 to 2022. He testified that the local CEIU and the employer had an arrangement under which they placed grievances in abeyance when a member went on sick leave. The rationale was to give the member the required space to recover; they waited until the member felt better before they handled the grievance. Consistent with that approach, they placed the complainant's grievances in abeyance.

[49] The local CEIU representatives had been elected and were responsible for filing and presenting grievances at the first level of the internal grievance process. They were federal government employees, and they acted in a volunteer capacity; they were not experts, so they often sought advice and guidance from the CEIU's national level.

[50] The union did not represent members on several workplace matters, including staffing complaints, health-and-safety issues, and workers' compensation claims. It was there only to provide guidance and support for such matters.

[51] The complainant insisted that the union move her grievances forward, even though she was on sick leave without pay. It did so. She had many misconceptions about the grievance process. She stated that she would not return to work until her grievances were resolved and that she sought financial compensation from the employer.

[52] He based his non-referral decision on the first grievance on two main grounds. First, the complainant insisted that the harassment and isolation she complained of

were not linked to any medical condition. Second, at its core, the grievance dealt with a staffing matter. Both grounds made the grievance not adjudicable. He explained it in the decision as follows:

> …
>
> *… you made a strong statement during the grievance hearing, and by doing so contradicting your union representative, on the fact that the alleged harassment was not on the basis of medical reasons, but on the sole reason of excluding you from the PM-04 job opportunity in March 2015. If such the case, you are claiming personal harassment, rather than discrimination based on your medical conditions. Grievance #2794 is therefore not related to Article 19, an article which was not, in all cases, mentioned in the grievance wording. In accordance with Article 209 of the* Federal Public Sector Labour Relations Act, *an individual grievance may only be referred to adjudication if related to the application of a provision of the collective agreement. I must conclude, due to the fact that personal harassment cases are not related to the application of a provision of the collective agreement, that grievance #2794* ***cannot be referred to adjudication****.…*
>
> *It was also noted that as per* Public Service Staffing Complaints Regulations, *it is possible to file a staffing complaint no later than 15 days after the day on which the complainant receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; or the date specified in the notice. Indeed, the personal harassment situation brought forward by your grievance remains a staffing issue, which could have rather been dealt through a formal staffing complaint. Staffing complaints are not heard through the same process of a process as a grievance.*
>
> *In these circumstances, I have the regret to inform you* ***that CEIU will not refer grievance #2794 to PSAC for further representation and therefore will close your file****.…*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[53] He explained his rationale for the non-referral decision on the second grievance as follows:

> …
>
> *… as per article 35.04, an employee who has insufficient or no credits to cover for sick leave with pay, may request up to 187.5 hours of sick leave to be advanced, and that such advanced remains at the discretion of the Employer. In regard to the discretionary powers of the Employer, the Union recognizes them*

> *to be quite considerable. Indeed, to interfere with an Employer's decision, an arbitrator would need to find evidence of bad faith on the Employer's part, or an absence of rationality so blatant and obvious that it can only be attributed to bad faith. Provided that you had been on SLWOP for almost a year at the time of request, with no prospect to return to work, which eventually led to SunLife accepting your claim of medical retirement, the Union does not have leverage to force the Employer to provide the 187.5 hours, nor does the Union has evidence of bad faith in the Employer's decision. Please keep in mind that, as Article 35.04 clearly stipulates, such sick leave advance is subject to be later deduced from any subsequently earned sick leaves credits, should you go back to work. In other words, the 187.5 shall have been pay back to the Employer at your return to work. On the simple fact that this return to work was not foreseeable, the Employer seems to be justified to reject your request.*
>
> …
>
> [*Sic* throughout]

[54] Counsel referred to an email exchange dated May 18, 2021, between the witness and the complainant, in which they discussed the strategy for the third-level hearing. Mr. Dubois outlined the chances of success of both grievances and opined that they would be rejected. He explained as follows:

> …
>
> *As for the 2nd level hearing, I will be presenting the general background of both grievances. As no new information has been provided, apart from the Employer's 2nd level response (which did not help your case), the elements I will be presenting are the same from 2nd level. You will be directly invited to share your experience to the ADM, and show where you claim discriminatory action against you took place.*
>
> …
>
> [The first grievance] *has been filed untimely. It was duly noted by the Employer. An untimely grievance cannot be transmitted for arbitration. Therefore* [the first grievance] *will inevitably be rejected. Moreover, the issue … should have been dealt with a staffing complaint, rather than a grievance process.*
>
> [The second grievance] *is solely concerned with sick leave advancement, for which the Employer was in no obligation to grant from the start. This fact alone is quite a challenge.*
>
> …
>
> *I suspect your grievances will be rejected. I maintain that sitting with the Employer, from the start, to think about a Return to Work Plan, would have been the wiser solution.*

> *The next step will be the Referal of your grievances to the PSAC Representation Section. Again,* [the first grievance] *has strong chances to be rejected, on the basis of the untimely aspect. In the end, I leave PSAC Representation with the final word. As a matter of fact, once we are done with 3rd level, and provided no satisfactory reply from the ADM, I'll transfer everything to PSAC, and I will have no more word to say in the matter.*
>
> …
>
> [*Sic* throughout]

[55] He was asked why the grievances were not transferred to the PSAC Representation Section, as stated in the email. He explained that the CEIU's grievance-processing guidelines changed in the summer of 2021. The CEIU's national union representative took over analyzing and assessing grievances and making decisions not to refer them to adjudication. That change in procedure resulted in him having to make the non-referral decision.

[56] With respect to his non-referral decision on the second grievance, on cross-examination, he was asked why he stated that the complainant's return to work was not foreseeable. He explained that up to that point, he had received no information from her that would have suggested otherwise.

[57] On cross-examination, he explained that the bargaining agent did not provide legal representation at the internal levels of the grievance process.

[58] He explained that he encouraged the complainant to reach out to the employer about her concern that she had been excluded from the workplace while she was on leave.

VI. Summary of the arguments

[59] After the oral hearing, I directed the parties to provide their final arguments in writing. I provided them with a template to use to craft them and a few of the seminal cases on the duty of fair representation. I also gave them a 40-page limit.

[60] The written-submissions process concluded on December 19, 2023. The parties' written submissions are retained on file.

A. For the complainant

[61] The complainant argued that had her union done something to have her employer transfer her, she would not have been in her current situation.

[62] As for the first grievance, she argued that the respondent forced the wording on her and that it failed to specify the type of harassment that was being alleged. It never informed her that that type of harassment had implications for the grievance's outcome.

[63] The respondent acted in bad faith by giving her bad advice on the issue of timeliness. It directed the grievances to be denied in management's favour.

[64] The respondent did not help her when she reported bullying and harassment.

[65] The respondent failed to help her apply for long-term disability through the disability insurer. Only through her personal physician's intervention did the insurer approve her benefits application.

[66] She filed her second grievance after the employer denied her repetitive requests for an advance of sick leave. She believed that it was retaliation for filing the first grievance and for exposing "an illegal competition process". The employer's reason for not advancing her the sick leave credits was contrived. She became very sick due to the enormous stress that it put on her and the respondent's lack of guidance.

[67] The complainant stated that the respondent acted out of "pure malice" by failing to guide her and provide her with all the options that were available to her. She particularized these issues in her letter dated June 12, 2019, as follows:

> …
>
> *Medical documentation from my psychiatrist from August 7, 2018 and April 25, 2019 support my concerns and the impact that the union's lack of engagement has had on me. This has compounded the impact of the employer's behaviour.*
>
> *Please allow me to briefly summarize my experience with union representatives to date:*
>
> > *1. I did not receive adequate assistance during my application for Long Term Disability. Besides receiving a booklet informing me that hiding the fact that my disability is work related is in my best interest and advising me to get my doctors to do the same, nothing else was done. I had to*

> *retain legal counsel on my own expense, while being 10 months without any income, to move in the right direction and finally be approved for LTD.*
>
> *2. My CSST file "disappeared" for 5 months without any explanation. There is supposed to be a procedure to follow in case of a submission of a CSST claim and informing Health & Safety officials about alleged bulling by my management. As I understand,* ***bullying is considered an act of violence in the workplace. The fact that Sun Life approved work related illness, which resulted in total disability, proves that these allegations had grounds****.*
>
> *3. Once my 24 month LTD period ended, I was repeatedly forced by my management to return to work, or to retire. Once again, I asked my union for help. My union's representative informed me that I cannot expect a healthy workplace and I will not last long on SLWP…*
>
> *Once again, I had to engage legal counsel on my own to help me to deal with extension of Sick Leave Without Pay. It was my doctor who had to finally write to ESDC Human Resources to ask for sick leave to be extended. I have not received a copy of my employer's decision to date and my union has not provided it either.*
>
> *4. My two grievances are kept in abeyance contrary to my wish to proceed since March 2015 and my doctor's later recommendations that they move forward. One more time, I would like to repeat that I am not grieving a series of incidents but* ***two instances*** *of wrongdoings that were presented to union with all the background documents.* ***Exclusion is harassment and discrimination, and my grievances prove that fact by all supporting documentation presented with my grievances.***
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[68] She was not permanently disabled, so she should have been transferred to another department. Over the years, she was forced to hire a lawyer to help her respond to continuous correspondence from management asking her to retire or resign because the respondent's several representatives were unavailable or unwilling to help her.

[69] Even though the respondent might not have been able to offer her another position in a different workplace, it had a duty to negotiate some kind of arrangement with the employer that would have permitted her to return to work. She felt that the

union representative's advice that medical retirement was the best option for her was very biased and in bad faith.

[70] As for the first grievance, the respondent misinformed her that while discussions were ongoing between her, the union, and management, the time was calculated as an extension of time to file a grievance. She had done everything in her power to file it within the 25-day period; the respondent postponed filing it. She believed that her evidence showed that she filed it on time; therefore, the respondent's decision, communicated to her in its letter dated July 15, 2021, was contrary to her legitimate interests and therefore was arbitrary.

[71] Specifically, she noted that the respondent's July 15, 2021, decision on the first grievance's timeliness was directly contradictory to its position at the third level of the grievance process, when it argued that the grievance could not "… be rejected as a whole on the basis of untimeliness."

[72] She argued that the respondent did not make genuine efforts to effectively represent her; it limited its efforts to formal gestures, simply to preserve appearances. It stood by and did nothing, which unnecessarily prolonged the process and continued to damage her health. Her doctor continued to send letters to the respondent about the impact on her health, but it ignored her doctor's advice.

[73] As for the second grievance, the respondent's decision not to refer it to adjudication was based on a false premise that there was no prospect of her being able to return to work in the foreseeable future. That was untrue, because when she filed it, she was only temporarily disabled. The respondent was negligent, arbitrary, and acted in bad faith by failing to check her leave records and entitlements before concluding that because she had no prospect of retuning to work, the employer could not recoup any sick leave advanced to her. Instead of offering support and options to accommodate her doctor's recommendations about her safe return to the workplace, the respondent went along with management's plans to terminate her employment in the foreseeable future. Her fate was sealed at the onset of the grievance process.

[74] According to the complainant, the respondent's advice about her options completely ignored her doctor's accommodation recommendations. The advice was not in her best interests, she felt. She wanted to return to work but not in the same workplace in which she had been the victim of prolonged psychological abuse from

management. Instead of negotiating with her management the most optimal arrangement to permit her to return to work, she received what she considered were threats from the respondent.

[75] According to the complainant, her "… union's role was to do everything to protect [her] rights and at least help [her] with a time for recovery from workplace injury." The respondent failed her by not investigating her situation thoroughly and not protecting her rights under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). The respondent was grossly negligent when it did not help her access temporary payments or financial help during a period in which she had no means to support herself.

[76] As for remedy, the complainant provided 19 items, which I have catalogued into the following table:

1	*That the extension of the time for revising my two interconnected grievances #3591 (**TAB 2**) and ONT-2015-0053 (**TAB 1**) be granted.*
2	*That the years I am on Long Term Disability be calculated as my pensionable years used for retirement calculations.*
3	*That the contributions to my Pension Plan be made since I am on Long Term Disability, i.e., since June 2015.*
4	*That I receive a pay-out, including interest, of my unused leave balance.*
5	*That the union be held solely liable for any compensation for the period between the date of my Long Term Disability and the date of this decision;*
6	*That I will be reimbursed for all financial losses since 2015 to-date in the difference between my Long term Disability benefits and my salary I would have earned if the union provided me wit a fair representation.*
7	*That I will be given the opportunity to be on PM-04 acting position for "4 months less one day", starting January 2015 since my management refused to remedy their exclusion of me in the information distribution and based their explanation on false grounds that the competition is required for such a appointment. Without a fair representation and demand of a fair remedy for illegal "exclusion", my earnings were less than on my assignment*

	as PM-03 (January 2015) and I was forced to return to the lower position of PM-02.
8	*I demand to resolve the situation as to what suppose to be my position in January 2015, and then submission of my then earnings to Sun Life for re-calculation of my LTD benefits.*
9	*I consider that not following my doctor's recommendations since 2015 and not providing me with a safe workplace is the cause of my disability and having no fair representation left me with a huge financial loss.*
10	*That the reasonable legal fees and expenses of my counsel be paid by the union upon submission of invoices;*
11	*That no amount be deducted from the above-mentioned compensation on the principle of mitigation of damages;*
12	*That an additional amount as a gross up for taxes be added to the compensation payable for the above-mentioned period, to be determined using the Canadian income tax calculation system for 2015 applied to the increase in my income that will result from payment of compensation in one single payment;*
13	*That a consideration be given whether the long Term Disability benefits received before grievance decision be exempted from the usual mitigation of damages principle;*
14	*That no amount be deducted by Sun Life Insurance Company providing the Long Term Disability payments;*
15	*That the withholding of estimated CPP Disability by SunLife Insurance Company since October 2019 will be removed since I am not permanently disabled and the whole amount will be reimbursed to me;*
16	*That the money withhold by Sun Life Insurance Company will be paid with at the legal rate on the compensation from October 2019 to-date;*
17	*Tant the union assume all legal fees and expenses incurred before the Board and these fees and expenses be paid upon submission of an invoice.*
18	*That my compensation for financial losses will include the years to my normal retirement date (approximately 3 years) when I will reach age 65;*

19	*I consider that the objective of remedial action in cases like mine is to return in the financial position I was in before the union's breach of its duty of fair representation occurred.*

[*Sic* throughout]

[77] The complainant argued that the respondent acted in bad faith and that it was motivated by ill will since she first reported harassment and bullying in 2012 and then harassment and discrimination, based on exclusion. She argued that it engaged in discriminatory actions based on biased decisions and in unfair treatment based on illegal and prohibited grounds, such as age and medical condition. She claimed that its actions were arbitrary because it did not consider her interests and the medical-professional recommendations during the entire process in which her two grievances were handled wrongfully.

[78] She ended her closing argument with the following: "Summarizing the union's representation I had over the last eight years, I can only cite the English proverb: 'The first faults are theirs that commit them. The second theirs that permit them.'"

B. For the respondent

[79] In addition to its written submissions, which have been retained on file, the respondent filed a book of authorities containing the following: *Pothier v. Public Service Alliance of Canada*, 2021 FPSLREB 139; *Éthier v. Correctional Service of Canada*, 2010 PSLRB 7; *Ferguson v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2022 FPSLREB 22; *Ouellet v. St-Georges*, 2009 PSLRB 107; *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13; *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100; *Langlois v. Public Service Alliance of Canada*, 2011 PSLRB 121; *Cox v. Vezina*, 2007 PSLRB 100; and *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 124.

[80] The respondent argued that except for the allegations relating to its non-referral decisions in July 2021, all the complainant's allegations fell outside the timelines for a complaint under s. 190 of the *Act*; therefore, the Board has no jurisdiction.

[81] The complainant made the complaint on October 8, 2021, so the earliest date for counting the 90-day deadline was July 9, 2021. Any event or allegation made before that date was outside the legislated timeline.

[82] The Board must assess the essential nature of the complaint to determine when the complainant knew or ought to have known of the circumstances that gave rise to it (see *Boshra*, at para. 23 and *Pothier*, at para. 29).

[83] The allegations relating to the nature and quality of the respondent's representation of the complainant were untimely because she started to complain about its representation as early as 2017 and 2018. Furthermore, from about 2017 to 2020, she had assistance from a lawyer she hired, who advised her of her rights related to her union. She also testified that she contacted 26 legal offices throughout Canada, to obtain assistance in her case; it was highly unlikely that none of those lawyers would have mentioned the possibility of making a duty-of-fair-representation complaint against the union.

[84] The respondent's non-referral decisions were made in good faith, without discrimination or arbitrariness. It analyzed the grievances' chances of success and all the other relevant elements before it made its decisions.

[85] The respondent summarized the complainant's allegations into five key points and argued that only one was timely, namely, the employer's denial of the grievances on the grounds of untimeliness, which she alleged was itself proof that the union acted in bad faith.

[86] The respondent reiterated the complainant's allegations in her argument, which I need not reproduce. Suffice it to say that those allegations dated as far back as 2012 and were about her dissatisfaction with the nature and quality of the representation that she received from several of the respondent's representatives.

[87] The respondent's counsel then outlined the relevant principles applicable to the duty of fair representation, relying on *Ouellet*, *Bahniuk*, *Langlois*, and *Cox*.

[88] Counsel argued that the complainant bore the burden of establishing through sufficient evidence that the bargaining agent failed to meet its duty of fair representation (see *Ouellet*).

[89] The bargaining agent enjoys considerable discretion when it decides whether to take a grievance to adjudication and an employee does not have an absolute right to have his or her grievance referred to adjudication (see *Ouellet*).

[90] The bargaining agent must exercise its discretion in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance to the employee on one hand and the bargaining agent's legitimate interests on the other (see *Ouellet*).

[91] The bargaining agent's decision must not be arbitrary, capricious, discriminatory, or wrongful, and it must represent the employee fairly, genuinely, and not merely apparently. It must undertake its duty with integrity and competence, without serious or major negligence, and without hostility toward the employee (see *Ouellet*).

[92] The Board's role is not to sit in appeal of the bargaining agent's decision; rather, it must evaluate how it handled the grievance. It must evaluate its decision-making process and not the merits of the decision itself.

[93] The Board must consider the complainant's behaviour because the duty of fair representation assumes that she would take all necessary measures to protect her interests. She failed to do so by not filing a staffing complaint and by not staying in touch with her department while she was on assignment.

[94] Counsel for the respondent submitted that it was evident in the complainant's arguments and allegations that she had a fundamental misunderstanding about its role in her employment issues. Rather than taking steps with her employer to protect and advance her interests, she simply reported incidents to the CEIU, expecting that it would initiate the necessary recourses for her.

[95] The complainant was mistaken in what she believed the CEIU owed her in terms of the measures to take to protect her interests and what fell on her shoulders. Certainly, she did not have an absolute right to the adjudication of her grievances, and the union retained high discretion to make those types of decisions.

[96] Counsel for the respondent argued that its decision on the first grievance was factually and legally correct. She stated that although the complainant's initial email to Mr. Dubois indicated that the harassment was based on her medical condition, which would have made the grievance adjudicable, she very clearly stated at the third-level grievance hearing that she did not allege that she was harassed because of her medical condition, stating this: "it is about exclusion from a distribution list that went to all

department [*sic*], including Service Canada, except me, the subject is secondary issue, and I didn't have any medical condition at that time", "please do not include medical condition because I was extremely healthy and very energetic and performing very well", and "no medical condition".

[97] The union explained its decision on the first grievance as follows:

> …
>
> *… You made a point during the third level grievance hearing stating that the fact the Employer has accepted to receive and to address the merits of your grievance should account for the Employer ignoring the untimeliness of your grievance. Your Union Representative did not contradict you during the hearing as to keep the appearance of a harmonious defence. Nevertheless, as rightfully pointed by the Employer in its response, your argument had no grounds. The Employer is in its full rights to reject your grievance on the untimely argument, which would subsequently lead an arbitrator to reject your grievance.*
>
> *In any instance,* ***you made a strong statement during the grievance hearing, and by doing so contradicting your union representative, on the fact that the alleged harassment was not on the basis of medical reasons, but on the sole reason of excluding you from the PM-04 job opportunity in March 2015. If such the case, you are claiming personal harassment, rather than discrimination based on your medical conditions. Grievance #2794 is therefore not related to Article 19, an article which was not, in all cases, mentioned in the grievance wording.*** *In accordance with Article 209 of the* Federal Public Sector Labour Relations Act*, an individual grievance may only be referred to adjudication if related to the application of a provision of the collective agreement.* ***I must conclude, due to the fact that personal harassment cases are not related to the application of a provision of the collective agreement, that grievance #2794 cannot be referred to adjudication. Please note that ADM Joseph Conrad raised this same fact during the hearing****.*
>
> *It was also noted that as per* Public Service Staffing Complaints Regulations*, it is possible to file a staffing complaint no later than 15 days after the day on which the complainant receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; or the date specified in the notice. Indeed, the personal harassment situation brought forward by your grievance remains a staffing issue, which could have rather been dealt through a formal staffing complaint. Staffing complaints are not heard through the same process of a process as a grievance.*
>
> *In these circumstances, I have the regret to inform you* ***that CEIU will not refer grievance #2794 to PSAC for further representation and therefore will close your file****. Shall you have*

> *any evidence or documents not priorly provided to the Union that could demand a reanalysis of our decision, please provide your Union Representative with those documents before July 23th, 2021.*
>
> …
>
> [Emphasis added and in the original]
>
> [*Sic* throughout]

[98] The bargaining agent would have recommended a referral to adjudication had the first grievance been strong on its merits because it could always have applied for an extension of time. The grievance was just not strong on the merits.

[99] The respondent's decision not to recommend referring the second grievance to adjudication was made in good faith and without discrimination and was not arbitrary. The grievance had very little chance of success at adjudication because the employer's decision not to advance sick leave credits to the complainant was highly discretionary. The union clearly explained its rationale in the non-referral decision as follows:

> …
>
> *The Union concurs with the Collective Agreement interpretation for which, as per article 35.04, an employee who has insufficient or no credits to cover for sick leave with pay, may request up to 187.5 hours of sick leave to be advanced, and that such advanced remains at the discretion of the Employer. In regard to the discretionary powers of the Employer, the Union recognizes them to be quite considerable. Indeed, to interfere with an Employer's decision, an arbitrator would need to find evidence of bad faith on the Employer's part, or an absence of rationality so blatant and obvious that it can only be attributed to bad faith. Provided that you had been on SLWOP for almost a year at the time of request, with no prospect to return to work, which eventually led to SunLjfe accepting your claim of medical retirement, the Union does not have leverage to force the Employer to provide the 187.5 hours, nor does the Union has evidence of bad faith in the Employer's decision. Please keep in mind that, as Article 35.04 clearly stipulates, such sick leave advance is subject to be later deduced from any subsequently earned sick leaves credits, should you go back to work. In other words, the 187.5 shall have been pay back to the Employer at your return to work. On the simple fact that this return to work was not foreseeable, the Employer seems to be justified to reject your request.*
>
> …
>
> [*Sic* throughout]

[100] In the two years preceding the non-referral decisions, the CEIU communicated numerous times with the complainant about the grievances and the recommended actions for her case. It provided detailed opinions about their merits. It also discussed and recommended a course of action. She did not have a return-to-work date, and she refused to discuss with the employer the modalities of a return to work, but she wanted it to negotiate a resolution, including a return to work, without her presence. The situation, as Mr. Dubois described it, was a catch-22.

[101] The reference in first grievance's non-referral decision to the complainant being on "medical retirement" instead of being on long-term disability was an innocent error, not a false statement, as she alleged. The respondent acknowledged that that error greatly upset her, but it was not evidence of arbitrariness or bad faith.

[102] Two senior PSAC representatives reviewed the non-referral decisions and sustained them at each level. Ultimately, the respondent did not agree that it was an appropriate use of resources to help the complainant by running two grievances that did not raise a collective agreement issue and for which the Board would not likely have had jurisdiction and that were assessed to have very little chance of success.

[103] Despite the non-referral decisions, the respondent continued to engage with the complainant, to explore different options to achieve a return to work, but she rejected all its recommendations and advice.

[104] The respondent asked that the complaint be dismissed.

VII. Reasons

A. The statutory framework

[105] Section 187 of the *Act* provides for a bargaining agent's duty of fair representation, 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*	***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.*

> *representation of any employee*
> *in the bargaining unit.*

[106] That provision codifies a fundamental principle of labour relations that is found in most labour relations statutes across Canada, and it is the corollary to the exclusive right granted to a bargaining agent to represent or act as the agent for all employees in an identified bargaining unit in dealings with the employer. The Supreme Court of Canada described the legal landscape of a union's representational obligations in *Bernard v. Canada (Attorney General)*, 2014 SCC 13, as follows:

> …
>
> *[21] It is important to understand the labour relations context in which Ms. Bernard's privacy complaints arise. A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country.* ***A union has the*** **exclusive** ***right to bargain on behalf of*** **all** ***employees in a given bargaining unit, including Rand employees. The union is the exclusive agent for those employees with respect to their rights under the collective agreement. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee, he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.***
>
> *[22] The nature of the union's representational duties is an important part of the context for the Board's decision. The union must represent all bargaining unit employees fairly and in good faith. The* Public Service Labour Relations Act *imposes a number of specific duties on a union with respect to employees in the bargaining unit. These include a duty to provide all employees in the bargaining unit with a reasonable opportunity to participate in strike votes and to be notified of the results of such votes (s. 184). According to the Board, similar obligations apply to the conduct of final-offer votes under s. 183 of the* Act.
>
> …
>
> [Emphasis added]

[107] In *Canadian Merchant Service Guild v. Gagnon*, 1984 CanLII 18 (SCC) at 527, the Supreme Court of Canada explained the union's obligation in the following terms:

> …
>
> *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.*
>
> …

[108] The bargaining agent's duty of fair representation assumes that employees will take steps to protect their own interests. Employees must take concrete steps to advance and to protect their own interests. In *Re McRaeJackson*, 2004 CIRB 290, the Canada Industrial Relations Board described employees' duties and responsibilities in the context of a duty-of-fair representation complaint as follows:

> ***15*** *The union's duty of fair representation is predicated on the requirement that employees take the necessary steps to protect their own interests. Employees must make the union aware of potential grievances and ask the union to act on their behalf within the time limits provided in the collective agreement. They must cooperate with their union throughout the grievance procedure, for example by providing the union with the information necessary to investigate a grievance, by attending any medical examinations or other assessments.*
>
> ***16*** *Employees must follow the union's advice as to how to conduct themselves while the grievance process is underway. Employees must attempt to minimize their losses, for example by seeking new employment if they have been dismissed, or attending retraining if this will increase their chances of re-employment.*

[109] In *Ouellet*, this Board held that the duty of fair representation assumes that the employee will take the necessary measures to protect his or her interests (see *Ouellet*, paras. 32 and 50).

[110] Bargaining agents have substantial latitude when representing their members, and the threshold or bar for establishing arbitrary, discriminatory, or bad-faith

conduct is high. The Board's role is not to determine the reasonableness or correctness of the bargaining agent's decision but to assess the integrity of the decision-making process that led to the impugned decision (see *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44 at para. 59; and *Bahniuk*, at paras. 49 to 51).

[111] In *Cousineau v. Walker*, 2013 PSLRB 68, the Board neatly summarized its jurisprudence relating to the concepts of arbitrariness, discrimination, and bad faith, within the context of s. 187, as follows:

> …
>
> ***30*** *What is required to sustain an allegation of bad faith or of arbitrary or discriminatory action has been the subject of a considerable number of Board decisions. In* Ménard v. Public Service Alliance of Canada, 2010 PSLRB 95, *the Board refers to some of the leading cases in the following manner:*
>
> …
>
> **22** With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of *Noël v. Société d'énergie de la Baie James,* 2001 SCC 39:
>
> *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…*
>
> …
>
> **23** In *International Longshore and Wharehouse* [*sic*] *Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.,* [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, "… a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."
>
> …
>
> ***31*** *A bargaining agent's determination as to whether it should provide representation was also examined by the Board in* Mangat v. Public Service Alliance of Canada, *2010 PSLRB 52, which offered the following guidance and useful concepts:*
>
> …

> **44** … It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (*Bahniuk v. Public Service Alliance of Canada,* 2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in *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].*
>
> …

[112] In *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at para. 77, the Board stated that a "… complaint cannot merely be about disagreements on strategy or dissatisfaction with communication between a complainant and the union; a complaint must be about the violation of the duty of fair representation set out in s. 187 of the *Act*."

[113] Again, in *Burns*, the Board stated this, at paragraphs 79 and 80:

> *[79] In all duty-of-fair-representation complaints, the issue before the Board is expressed in these questions:* ***Has the union violated the*** **Act***? Has the union performed its statutory representation role in a way that is arbitrary, discriminatory, or in bad faith? Is there, for example, a proceeding that the union did not carry out, and that it ought to have carried out, in the representation of an employee in the bargaining unit?*
>
> *[80] In* McRaeJackson *at paragraph 54, the CIRB provides this conclusion as to why most duty-of-fair-representation cases are not founded:*

> [54] **Ultimately, if the union has directed its mind to the employee's complaint, gathered the information relevant to making a decision, attempted to resolve the situation and reasonably exercised its discretion not to pursue a grievance or refer it to arbitration according to the criteria stated earlier, and informed the employee of its reasons for doing so, an employee will have little cause for complaint**.
>
> [Emphasis added]

[114] The employer's actions are not at issue in a duty-of fair-representation complaint (see *Burns*, at para. 81).

[115] I agree with the Board's statements in *Burns*.

[116] The burden of proof was on the complainant to present sufficient evidence to establish that the respondent failed to represent her fairly, in accordance with s. 187 of the *Act* (see *Ouellet*, at para. 31).

B. Bad faith

[117] Bad faith cannot be presumed. A complainant must demonstrate an intent to harm or conduct that was malicious, fraudulent, spiteful, or hostile toward him or her (see *Noel v. Société d'énergie de la Baie James*, 2001 SCC 39 at para. 48; and *Sganos v. Association of Canadian Financial Officers,* 2022 FPSLREB 30, at para. 95).

[118] The following are examples of conduct that may be evidence of bad faith: a decision based on personal ambition; treating two employees differently, who are similarly situated; and making decisions that are demonstrably harmful to an employee.

C. Arbitrariness

[119] In *Noël*, the Supreme Court of Canada explained that the concept of arbitrariness in the context of a union's duty of fair representation refers to the quality of the union's representation. The Court stated as follows:

> …
>
> *[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.…*
>
> …
>
> [Emphasis added]

[120] In *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70, the complainant alleged that the bargaining agent's failure to advise of her right to seek judicial review of the employer's final-level decision on her classification grievance in a timely manner was a breach of the duty of fair representation. The Board had to determine whether the bargaining agent's action or inaction of providing the complainant with timely information about her recourse was arbitrary. When it examined the concept of "arbitrariness" in the context of a duty-of-fair-representation complaint, the Board stated as follows:

> …
>
> *[133] The concept of "*arbitrariness*" is one of the most difficult to define and often appears to overlap with that of "negligence". In* Re City of Winnipeg and Canadian Union of Public Employees, Local 500*, 4 L.A.C. (4th) 102, the arbitrator summarized alternative definitions of "arbitrariness" found both in doctrine and jurisprudence to include:*
>
> …
>
> … "… capricious"; "… without reason"; "… at whim"; "… perfunctory"; "… demonstrate a failure to put one's mind to the issue and engage in a process of rational decision-making [*sic*]" … or a failure "… to take a reasonable view of the problem and arrive at a thoughtful judgment about what to do after considering the various relevant conflicting consideration [*sic*]"….
>
> …

[121] The Board further explained that when determining whether the bargaining agent's action was arbitrary, the complainant did not have to establish intent. Unintentional actions that transcend the limits of a reasonable exercise of discretion could be arbitrary (see *Jakutavicius*, at para. 141).

[122] In *Jakutavicius*, the Board closely examined the facts and concluded that the bargaining agent's failure to provide the complainant with information that she could file for judicial review from the final-level reply to her classification grievance was arbitrary. The Board reasoned as follows:

> …
>
> *[142] In the instant case, considering that the respondent knew as early as December 20, 2002 of the complainant's intention of contesting an expected unfavourable reply at the final level of the grievance process, considering her further correspondence and clear expression of that intention immediately following the issuance of the final-level replies to her grievances, considering that she could have decided to proceed to judicial review on her own after evaluating the risks of engaging her own funds, the respondent should have clearly informed the complainant of her options in order for her to do so in a timely manner and so as not to jeopardize her rights. The respondent's decision not to so inform the complainant, despite her requests, is arbitrary. It is not a "… discretion reasonably exercised …". The respondent followed its general practice or policy, as explained by the respondent's witness, of not considering or informing members of the possibility of recourse to the Federal Court in the case of classification grievances. Having done this despite the clear requests for such information by this particular member is a blind application of a general practice and is therefore arbitrary, demonstrating "… a failure* ***to put one's mind to the issue and engage in a process*** *of rational decision-making* [*sic*] *…." (*Winnipeg (supra)*, emphasis added).*
>
> *[143] Furthermore, the decision was made without consideration for the consequences of the case at hand. The complainant had clearly voiced her intention to pursue her case. Consequences of the blind application of the general practice were foreseeable: it would affect her right to judicial review. As such, the action can also be qualified as arbitrary in failing "… to take a* ***reasonable view of the problem*** *and arrive at a* ***thoughtful judgment*** *about what to do* ***after considering the various relevant conflicting considerations****…." … The respondent's considerations for its mandate, membership, reputation and resources do not outweigh the considerations for the circumstances of this individual case, considering the right of the complainant to proceed without the support of the respondent in any case.*
>
> *[144] I must therefore conclude that, in the specific circumstances of this case, the respondent acted in an arbitrary manner in failing to advise in a timely fashion the complainant of her right to seek judicial review of the classification grievance reply at the final level of the grievance process without the PSAC's support, despite repeated requests for such information.*
>
> …

[Emphasis in the original]

[123] In *Daigneault v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2023 FPSLREB 21, the Board provided a catalogue of questions that it must ask itself when it evaluates whether a union's conduct in any particular case was arbitrary. It stated as follows:

> …
>
> *[59] … in assessing arbitrariness for the purpose of section 187 of the* Act*, each specific circumstance must be examined by the Board in its proper and appropriate context based on the evidence adduced. A catalogue of questions to aid in the exercise is as follows:*
>
> > *1) was the union's treatment of the employee's grievance or complaint superficial or perfunctory?*
> > *2) Was the union careless in its consideration of the grievance or complaint?*
> > *3) Did the union investigate the grievance or complaint independently?*
> > *4) Did the union ascertain, review and assess the relevant facts?*
> > *5) Did the union seek out relevant advice and/or guidance?*
> > *6) Were the union's actions reasonable based on the circumstances.*
>
> …
>
> [*Sic* throughout]

D. Holding the grievances in abeyance was neither arbitrary nor in bad faith

[124] One aspect of the complaint is the respondent's decision to apply its internal policy or guideline of holding grievances in abeyance when an employee was on sick leave. Its witness explained that grievances are held in abeyance, to allow the employees to recover before they become engaged in a grievance proceeding. That explanation makes sense because the grievance process can be highly stressful, and there is a risk of further exacerbating an employee's condition with the added stress.

[125] In this case, the complainant went on sick leave the day after she filed the first grievance. She was fully aware that the grievance was placed in abeyance, in accordance with the respondent's policy, which she acknowledged in her June 12, 2019, letter to the CEIU cataloguing her dissatisfaction with its representation. She stated that her "… two grievances [were] kept in abeyance contrary to [her] wish to

proceed since March 2015 and [her] doctor's later recommendations that they move forward."

[126] The respondent removed the grievances from abeyance and transmitted them to the second level on January 31, 2020. Due to intervening circumstances, the second level was not held until October 2020. The employer issued its replies on February 11, 2021. The respondent transmitted the grievances to the third level on February 16, 2021. They were heard at the third level on May 26, 2021.

[127] The Board finds that once the grievances were removed from abeyance, the respondent expeditiously transmitted them through the internal grievance process. I do not find any arbitrariness in this respect.

[128] In *Daigneault*, the Board cautioned that agreements to hold grievances in abeyance may be administratively convenient for both employers and bargaining agents but that there is a real risk of certain grievances that require speedy resolution falling through the cracks. I express a similar sentiment in this case.

[129] In this case, the complainant's health-care professional advised twice that she could not return to work until her workplace conditions changed and her outstanding grievances were resolved. The letter dated August 7, 2018, stated that she was "… permitted to engage in the grievance process while on her medical leave of absence." The complainant provided that letter to the respondent's national office on August 15, 2018. The respondent transmitted the documents to the local CEIU, which it informed her would reach out to her about her representation.

[130] I heard no evidence on what, if anything the respondent did to advance the grievance after receiving that letter. From the email exchanges between October 2018 and February 2019, it appears that the employer and the CEIU discussed the status of the grievances and whether the complainant wished to proceed with or withdraw them.

[131] The emails also suggested that there was a change in representatives at the local level and that Mr. Dubois had just taken over the files. He reached out to the complainant by email, dated October 18, 2018. He introduced himself as the new representative and asked her to provide information about her grievances. He also informed her that sadly, her previous representative had passed away.

[132] On December 3, 2018, the complainant emailed detailed information about her two grievances to Mr. Dubois. She impressed on the respondent her health-care professional's recommendation that workplace issues had to be resolved before she could return to work. She set out the assistance that she required from the CEIU to address her grievances, including securing a financial recovery for her and addressing the toxic work environment, to allow her to return to work. She strongly emphasized that she would not be able to return to work unless her grievances and the underlying issues were addressed.

[133] By email dated January 24, 2019, Mr. Dubois informed her that Mr. Boileau was taking over her file, to ensure that her case moved forward and in the right direction

[134] Mr. Boileau emailed the complainant on February 21, 2019, as follows:

> …
>
> *… since my last follow-up with the employer, I've been told that you have in fact been approved for disability. So now I'm trying to understand if they are mistaken or if you plan on returning to work?*
>
> *If you are returning, I can totally change directions on this file and push for it to be presented and answered.*
>
> *Please help me fill in these gaps in my understanding of what is going on.*
>
> …

[135] The complainant responded through her private lawyer. The lawyer's report to her in an email dated April 8, 2019, suggested that Mr. Boileau was concerned about the situation and that he wanted specific examples of the harassment allegations.

[136] The second time the complainant's health-care professional stated that her grievances had to be resolved before she could return to work was in a letter dated April 25, 2019, in which the professional recommended that she should proceed "… with her two grievances (harassment and discrimination) and in the foreseeable future work under different supervision in a different department." That letter was addressed to PSAC's national president. It was redirected to the local level, which was where the grievances were being dealt with.

[137] The employer sent the complainant an options letter, setting out how she could resolve her leave-without-pay situation. I gathered from the email exchanges that Mr.

Boileau engaged in with her to respond to the options letter that discussions took place about the options open to her and the CEIU's strategy to achieve her objective of returning to work.

[138] Based on my review of the documentary and testimonial evidence, I conclude that the respondent engaged with the complainant and the employer when it addressed the grievances in a meaningful way once they were taken out of abeyance. I have closely examined the written interactions between the respondent's representatives and the complainant. I did not find any correspondence that would suggest bad-faith dealing. I found that all communications with her were professional and courteous.

[139] I find no arbitrariness or bad faith in how the respondent handled the grievances.

E. The first grievance's non-referral decision was neither arbitrary nor in bad faith

[140] The complainant argued that the respondent failed to properly frame the grievance and that as framed, it did not adequately address her concerns.

[141] I disagree.

[142] The complainant neatly captured the concerns for which she wanted to file a grievance in her email dated February 26, 2015, as follows:

…

> *I am attaching the draft of the grievance that I would like to discuss (grounds), the HRSDC Staffing Policy effective March 30, 2012, the staffing announcement, and my last year PMA (PLA), and my successful competition results for PE-02 dated 2009.*
>
> *I would like to propose different grounds for my grievance, which are as follows:*
>
> *Collective Agreement - 18 02 (a) which provides me with a right to grieve because the "the direction or other instrument made or issued by the Employer was not respected/followed" (Employment and Social Development Canada Staffing Policy Suite, 2012) was not respected;*
>
> *Collective Agreement - 18.02 (b) "any occurrence or matter affecting his or her terms of conditions of employment" - my exclusion from acting opportunity*
>
> *Collective Agreement – 1.02 "promote the well-being and increased efficiency of [the] employees"*

> *Collective Agreement – 13.02 "Where the parties are unable to agree in consultation, any dispute shall be resolved by the grievance/adjudication procedure".*
>
> *The staffing announcement was communicated to everybody EXCEPT me and did not follow the guidelines outlined in the above mentioned policy. My concerns were communicated to my manager, acting director and HR Consultant responsible for ISSD staffing. No results/remedy since January 19, 2015.*
>
> *I will be happy to discuss my options how to handle this problem.*
>
> *…*

[143] It is evident that the essential character of the grievance involved the employer's staffing decisions made during her assignment. In discussions before the grievance was formalized, the parties talked about this proposed resolution:

> *…*
>
> ***Proposed resolution:***
>
> *Management of OAS Policy provide an acting PM-04 position for a period of 4 months less 1 day as soon as possible to Alina in an effort to give her the opportunity to perform the duties at the PM-04 in advance of the posting of an indeterminate PM-04 position within the Team. This will provide her with the experience and enhance her skills and competencies at this higher level, thus "leveling the field" with those other potential candidates who have been acting in the current PM-04 positions since the fall of 2014.*
>
> *Alina has demonstrated the capacity to be considered for higher level opportunities as she was successful in a PE-02 selection process in 2009 where she qualified and was part of a pool of candidates (was not selected), she has been successful on acting assignments outside of her directorate (most recent PM-03 with CIC). In addition, Alina has indicated in past Personal Learning Agreements (PLA) and her recent Performance Agreement (PA), an interest in being able to access developmental or promotional opportunities for which she can use to climb the corporate ladder*
>
> *The acting position (PM-04 or PM-05) will provide Alina with additional skills and competencies that may enhance her continued positive career progression and increase professional development. She is committed to promoting the well-being and increased efficiency of herself as an employee and in enhancing her management capacities.*
>
> ***Follow-up***
>
> *I would like to follow up of the management decision how to remedy this situation on Monday, March 2nd as agreed at our last meeting on February 26, 2015.*

[Emphasis in the original]
[*Sic* throughout]

[144] The respondent gave two main reasons for its non referral decision, namely, untimeliness and adjudicability.

[145] The complainant argued that the respondent acted in bad faith by giving her the advice that the grievance was untimely and could not be referred for that reason.

[146] I find that the grievance's timeliness was not the essence of the non-referral decision because the respondent's witness acknowledged in their testimony that had the grievance's substance had merit, the respondent could always have applied for an extension of time.

[147] The respondent analyzed the grievance closely and concluded that it was not adjudicable, for two other reasons. First, the harassment allegations fell outside the collective agreement provisions, and second, its essential character was staffing.

[148] While the respondent attempted to link the harassment allegation to the complainant's medical condition, which would have brought it under the collective agreement's provisions, she clearly and unequivocally insisted that she alleged that she had experienced personal harassment that had nothing to do with her medical condition. As the respondent correctly pointed out in its non-referral decision, personal-harassment cases are not adjudicable, as they are not related to the application of the collective agreement provisions. Furthermore, it concluded that the personal harassment made out in her grievance remained a staffing issue, which ought to have been dealt with through a staffing complaint and not the grievance process.

[149] I do not find that the respondent acted in bad faith or treated the first grievance superficially or perfunctorily; nor was it careless in how it deliberated and considered the grievance.

F. The second grievance's non-referral decision was neither arbitrary nor in bad faith

[150] Unlike the first grievance, the second grievance was clearly adjudicable because it alleged a violation of the collective agreement's sick leave provisions.

[151] Based on the documentary and testimonial evidence, the Board finds that the respondent properly dealt with the second grievance and that it arrived at its non-referral decision in a manner that was not arbitrary nor in bad faith.

[152] At the one-year mark of the complainant's sick leave without pay, she asked the employer for an advance of sick leave under the relevant collective agreement articles. The employer denied her request. She then filed a grievance against the denial, alleging discrimination and the failure to accommodate her to the point of undue hardship.

[153] Although the respondent supported and moved the grievance through the internal grievance process, it clearly explained that the employer has wide discretion when it comes to advancing sick leave. Since any advanced sick leave must be recovered from future-earned credits, if there was no likelihood of earning future credits, it would have been difficult to grant an advance.

[154] The respondent carefully considered the grievance's merits before it made its non-referral decision, which It explained as follows:

> …
>
> *The Union concurs with the Collective Agreement interpretation for which, as per article 35.04, an employee who has insufficient or no credits to cover for sick leave with pay, may request up to 187.5 hours of sick leave to be advanced, and that such advanced remains at the discretion of the Employer. In regard to the discretionary powers of the Employer, the Union recognizes them to be quite considerable. Indeed, to interfere with an Employer's decision, an arbitrator would need to find evidence of bad faith on the Employer's part, or an absence of rationality so blatant and obvious that it can only be attributed to bad faith. Provided that you had been on SLWOP for almost a year at the time of request, with no prospect to return to work, which eventually led to SunLjfe accepting your claim of medical retirement, the Union does not have leverage to force the Employer to provide the 187.5 hours, nor does the Union has evidence of bad faith in the Employer's decision. Please keep in mind that, as Article 35.04 clearly stipulates, such sick leave advance is subject to be later deduced from any subsequently earned sick leaves credits, should you go back to work. In other words, the 187.5 shall have been pay back to the Employer at your return to work. On the simple fact that this return to work was not foreseeable, the Employer seems to be justified to reject your request.*
>
> …
>
> [*Sic* throughout]

[155] I do not find anything arbitrary, negligent, or perfunctory in the respondent's reasoning that led to its non-referral decision.

[156] It was well within the respondent's discretion to not refer the second grievance to adjudication.

VIII. Conclusion

[157] I find that at all relevant times, the respondent supported the complainant through what can best be described as a difficult relationship. I agree with it that she had a clear misunderstanding of its role in her employment relationship. I also agree with it that she took no concrete steps to advance her interests, for instance, making a staffing complaint or reaching out to her work unit while she was on assignment, to stay abreast of events in her unit.

[158] The respondent supported the complainant, to achieve her stated objective of returning to work, by providing strategic advice on how to accomplish it, but she did not cooperate with it. She misinterpreted its actions and was accusatory, and she imputed baseless allegations of bad faith on its part.

[159] By singularly insisting that her grievances proceed through the grievance process and by choosing not to have direct discussions with the employer about her potential return to the workplace, she ended up creating roadblocks for herself, which worked against her interests.

[160] The complaint is unfounded.

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

(The Order appears on the next page)

IX. Order

[162] The complaint is dismissed.

June 06, 2025.

Caroline Engmann,
a panel of the Federal Public Sector
Labour Relations and Employment Board