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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

STÉPHANIE LEFEBVRE

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Lefebvre 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: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Kim Patenaude, counsel

Heard at Montréal, Quebec,
February 14 and 15, 2024.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaints before the Board

[1] On January 24, 2022, Stéphanie Lefebvre ("the complainant") made a complaint with the Federal Public Sector Labour Relations and Employment Board (for simplicity, in this decision, "Board" refers to both the Federal Public Sector Labour Relations and Employment Board and the boards that preceded it) against the Professional Institute of the Public Service of Canada ("the respondent"), alleging that it committed an unfair labour practice under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The complainant alleges that the respondent failed its duty of fair representation, thus infringing s. 187 of the *Act*.

[2] On January 12, 2023, she made a second complaint under the same provisions of the *Act*.

[3] The complaints were scheduled for a hearing October 4 to 6, 2023, but it was adjourned at the complainant's request. They were rescheduled, and a hearing was held February 14 and 15, 2024. Before the hearing, the Board asked the complainant to specify the allegations for each complaint. On December 22, 2023, she provided them to it.

[4] According to them, her first complaint is based on the allegation that the respondent did not seriously investigate her grievance about a conflict of interest. Her second complaint is based on the allegation that in November 2022, the respondent stopped representing her in that grievance and refused to represent her in another grievance about a constructive dismissal.

[5] For the reasons set out in this decision, the complaints are dismissed.

II. Summary of the relevant evidence

[6] Before the hearing, both parties said that most of their exchanges were in writing, by either email or letter. The evidence that follows summarizes the relevant points in those documents, as well as the oral evidence that supplemented the documentary evidence at the hearing.

[7] The complainant testified on her own behalf. The respondent called two witnesses, Robert Melone, Labour Relations Officer for the respondent, and Nancy Lamarche, Director, Regional Labour Relations Services.

[8] Both Mr. Melone and Ms. Lamarche have a law degree and several years' experience in labour relations.

A. Complaint dated January 24, 2022

[9] The complainant works as a veterinarian at the Canadian Food Inspection Agency (CFIA), at the Lacolle district office in Quebec. Since 2017, she has also been a municipal councillor in the city of Carignan. In August 2021, when she wanted to run in the municipal election for a second term, the CFIA's Conflict of Interest Secretariat ("the Secretariat") informed her that a mitigating measure had been imposed, removing her from the drinking-water-supply file because she had an apparent conflict of interest.

[10] On September 28, 2021, she emailed Mr. Melone to say that she wanted to file a grievance. He replied the next day, saying that because the issue at hand did not fall under the collective agreement, she did not need the respondent's agreement or action to grieve. However, he offered to draft a grievance and analyze her case.

[11] In the few minutes before that email, she sent him a draft grievance. She asked him to comment and added that she wanted to send it to the employer before the week ended.

[12] Thursday, September 30, 2021, was a statutory holiday.

[13] She sent her grievance to the employer on Monday, October 4, 2021, without waiting for Mr. Melone to comment. As corrective actions, she asked the following:

- that there be no retaliation on account of the situation;
- that the managers from Patrique Fréchette's team be removed from the file because they could not provide a reliable analysis;
- that employees of the conflict of interest office and management be trained on municipal officials' duties;
- that she get four days of leave to compensate for the time that she had to spend during her holidays and outside work hours answering the Secretariat's requests and to compensate for the inconvenience;
- that the Secretariat's August 26, 2021, authorization letter be corrected and that the drinking-water measure be removed;

- that all supervisors … be informed of these changes right away.

[14] Between October 4 and 27, 2021, she and Mr. Melone discussed the case a number of times, several times a day. He answered her questions and advised her on options to move her case forward more quickly. He also said that the respondent could request a judicial review of the employer's decision, but that before that happened, it needed the employer's final-level grievance decision. He informed her that a decision on that point would not be made before then. In cross-examination, he said that he had "[translation] broadly" and repeatedly discussed with her the application of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and had advised her that first, she needed to show that she had been prejudiced.

[15] On October 27, 2021, he sent her the analysis that is now the subject of the first unfair-practice complaint. In it, he referred to *Duske v. Canadian Food Inspection Agency*, 2007 PSLRB 94, which was also about an apparent conflict of interest at the CFIA. He specified that "[translation] [a]lthough the current facts are not similar to those in that case, the adjudicator's reasoning is no less relevant." He referred to the broad interpretation of the CFIA's conflict-of-interest code in *Duske* and to the employer's explanation of the mitigating measures. He expressed that in his opinion, the employer's interpretation complied with the principles stated in *Duske*.

[16] For that reason, he said that in his opinion, the employer had a legal basis for saying that the complainant had an apparent conflict of interest. However, he added that he thought that the mitigating measures were excessive and suggested trying to find more targeted solutions to address its concerns. He gave suggestions and asked if she had others. He offered to contact the employer's labour relations officer to find out if it would be open to considering suggestions before deciding on the grievance. He added that if that did not work, he would make sure that she was represented at the grievance hearing. He also offered to change her grievance statement and the corrective actions if the employer turned down the suggestions.

[17] Lastly, the October 27, 2021, analysis referred to *Gauthier v. Canada (Attorney General)*, 2008 FCA 75, in which the Federal Court of Appeal set aside a decision on a conflict of interest involving a public servant who was also a municipal councillor. The decision was set aside because the employer made serious errors of fact in making its decision. Mr. Melone's analysis showed that he did not think that *Gauthier* applied because he did not believe that the employer had made such serious errors of fact. In

closing, he said that "[translation] [i]n my opinion, those decisions give you a bit of insight into how the courts handle such issues."

[18] When asked if he had researched as thoroughly as he should have, he replied that there was a lot of caselaw and that his role was to find relevant decisions, which he did. He said that the facts in *Duske* were not the same as those in the complainant's case, but that it was rare to find a decision in which the facts were the same. He said that when analyzing, he considered all the information that she had given him.

[19] On November 1, 2021, she used the respondent's decision review process.

[20] Ms. Lamarche testified that as a director, she handles member complaints about representation services. She said that the complaints could be about service quality or speed. Sometimes, there may be disagreement about the recommended strategy or a decision not to grieve. The review process is internal. If a member disagrees with a labour relations officer, he or she can appeal the decision. She reviews the file and decides if the recommendation is consistent with the duty of fair representation. Sometimes, she agrees with the member and returns the file to the officer with instructions. Other times, she supports the officer and informs the member that there is another chance for review by the president's office, which the respondent's general counsel carries out.

[21] The complainant emailed her to request "[translation] … reconsider Mr. Melone's decision not to grieve the employer's requested mitigating measure …". She based her request on her belief that Mr. Melone's analysis contained errors of fact and that he refused to reconsider his decision despite being informed of them. She attached to her request a document detailing her situation.

[22] Ms. Lamarche testified that after she received the request, she looked at the attachments, Mr. Melone's recommendation, and the entire file on the issue. She said that there were multiple exchanges between the complainant, her employer, and Mr. Melone.

[23] She testified that she drew the same conclusion as Mr. Melone on the merits of the case. She found that the recommendation was reasonable and that there had been no failure. She believed that he had considered the relevant caselaw and applied the facts, and that there had been no bad faith or discrimination. Therefore, she decided to

confirm his recommendation and reminded the complainant that she could grieve on her own. She informed her that she had the right to appeal to the general counsel, Ms. Roy.

[24] Ms. Lamarche's decision was shared with the complainant on November 8, 2021, and reflects her testimony. The letter added the following: "[translation] Please contact your representative Mr. Melone to inform him of how you wish to proceed with your grievance."

[25] The complainant testified that Ms. Lamarche, in making her decision, denied her the representation that she needed. She said that she would have liked to see a more thorough analysis. She said that she requested a review on November 14, 2021, to Ms. Roy, and asked for a thorough analysis.

[26] She said that Ms. Roy replied on November 25, 2021, but that the reply also lacked the analysis that she asked for. She said that the decision reiterated that because her grievance was not about a collective-agreement violation, she could proceed on her own.

[27] She said that she did not take any action with the respondent after November 25, 2021, because it said that it would not represent her.

[28] In cross-examination, she said that she was re-elected as a municipal councillor in November 2021.

[29] On December 7, 2021, she made a harassment complaint against her employer about the allegation that she had a conflict of interest. She did not involve the respondent.

[30] She said that in January 2022, she took sick leave because of her situation at work. She testified that the respondent had not informed her that she had to grieve the sick leave separately. She said that she thought that she could simply modify her initial conflict-of-interest grievance.

[31] Mr. Melone said that on January 19, 2022, he received seven emails from the complainant on different topics. In one, she asked him to represent her at a mediation session with the employer on January 24, 2022. She informed him that the session was being held to discuss her harassment complaint. She informed him that as redress, she

was asking "[translation] … to get her sick leave back or to be given 699 leave". Her email also contained an independent legal opinion that in her opinion, explained that her situation posed no conflict of interest.

[32] On January 20, 2022, Mr. Melone emailed her, agreeing to join the mediation. The email specified that he would simply help facilitate exchanges with the employer, but that the respondent's position would remain unchanged.

[33] On January 21, 2022, he wrote to her to inform her that he had read the independent legal opinion. He explained that it did not apply because it addressed only whether there was a conflict of interest with the City of Carignan given her job at the CFIA, not the other way around. However, he added that there was no reason not to discuss its content with the employer. About the harassment complaint, he added that he would be available to help her during the investigation and resolution process to make sure that she was treated fairly.

[34] The complainant complained against the respondent on January 23, 2022.

B. Complaint dated January 12, 2023

[35] Between January and November 2022, several events occurred, involving the complainant, her employer, and the respondent. It is relevant to review certain events to understand the aspects of the second complaint.

[36] Mr. Melone testified that the mediation meeting was held with the employer on January 24, 2022. He said that he actively participated and supported several points that the complainant raised. He said that the employer agreed to change the authorization letter with the mitigating measures and to share that information with the managers, as she wanted. She said that on February 4, 2022, she received a letter from her employer saying that she did not have a conflict of interest.

[37] On April 28, 2022, she modified her harassment complaint. She alleged that in connection with the conflict-of-interest allegation, she was psychologically harassed at work, was subject to violence at work, abuse of authority, and retaliation by her employer.

[38] An investigation report was produced on August 30, 2022. It found that none of the allegations were founded. On September 29, 2022, the respondent applied to the Federal Court of Canada for a judicial review of that decision.

[39] She said that on November 9, 2022, Mr. Melone informed her that he recommended that the respondent stop representing her in her conflict-of-interest grievance because there was no evidence. She said that before deciding, he had never asked her for that information.

[40] His November 9, 2022, email said that there had been several advances in her case. In particular, the employer's revised conflict-of-interest letter had removed all barriers to engaging in her political activities and had been shared with the relevant management chain. He said that he thought that the retaliation issue that she raised would be better handled in the harassment-complaint process subject to judicial review. About the four days of leave that she asked for in her grievance, he informed her that her file contained no information attesting to the time that she reportedly spent answering the Secretariat and the inconvenience that it caused.

[41] In closing, he said that considering the advances in her case, he recommended that the respondent stop representing her in the conflict-of-interest grievance. He repeated that because the grievance was not about interpreting or applying the collective agreement, she did not need the respondent to approve or to represent her to pursue her grievance the way that she wanted.

[42] She disagreed with his position, so she exercised her right of review under the respondent's internal review process and asked Ms. Lamarche to review on November 14, 2022.

[43] Ms. Lamarche gave her decision on December 6, 2022. She wrote in her letter that the complainant's arguments supporting her request for review were in the emails that she wrote on November 10 and 14, 2022, as well as two emails dated December 1, 2022. I was not given a copy of those documents, but Ms. Lamarche said that she summarized them in her letter.

[44] According to the summary, the complainant submitted that since the facts showed that the employer had abused its authority, the respondent had to continue to represent her so that she could obtain redress. She informed it that one remedy was to

get her sick leave back. Ms. Lamarche replied, saying that there was no sick leave remedy requested in her conflict-of-interest grievance.

[45] Ms. Lamarche's letter refers to *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509, and to the broad discretion that the respondent has in assessing a grievance's merits and whether or not to pursue such action.

[46] About the corrective action that the claimant requested, to get back the four days of leave referred to in her grievance, Ms. Lamarche said the following:

> [Translation]
>
> …
>
> *… after reading your arguments and looking at the emails that you attached, the email exchanges of August 12, 19, and 20, 2021, show that you emailed a few lines on August 12 at 9:38 a.m. and you received the employer's email asking you to complete the authorization form, on August 19 at 12:19 p.m. You replied the next day, August 20, at 8:59 a.m., and there were some exchanges throughout the day. You ultimately sent the completed form on August 20 at 4:56 p.m.*
>
> *Therefore, we have documentary evidence to warrant paying back one vacation day at most, but like your LRO, I do not think that we have evidence to warrant paying you back four days.*
>
> *In addition, contrary to what you seem to suggest in the email that you sent on December 1 at 8:25 a.m., grievance #22-ICA-QC-STH-39100 is not about a request to cancel leave that is supposedly linked to the collective agreement. That grievance is about contesting the employer's claim that you have a conflict of interest and its imposing a mitigating measure. You could have grieved to cancel your vacation and substitute those hours with work time under the collective agreement, but you did not.*
>
> *In these circumstances, your LRO's assessment of the chance that your grievance will succeed does not appear arbitrary, discriminatory, negligent, or hostile, and I see no reason to change it.*
>
> ***Furthermore, I find that your LRO could set up an informal discussion with your employer, outside the grievance process, to try to change your day off August 20, 2021, to a day worked, and credit you a day of leave based on the emails provided. Please inform your LRO if you would like that discussion to take place.***
>
> …
>
> [Emphasis in the original]

[47] The complainant said that according to Ms. Lamarche, there was no link between her grievance and the sick leave, but she said that she had not received any notice to that effect. She said that at the time, Ms. Lamarche should have suggested that it be added to her grievance because it was still active. She said that the respondent's decision to withdraw had prejudiced her because she lost the chance to get the advice that she needed to support her.

[48] She said that Ms. Lamarche had found that there was no evidence to get her four days of leave back, but that there was evidence to get one day back. She found it hard to understand how she had drawn that conclusion, as none of the respondent's representatives had asked her to provide that information.

[49] She exercised her right under the respondent's review process and asked its new general counsel, Mr. Ranger, to review. According to the letter dated December 19, 2022, the review request was emailed on December 7, 11, and 12, 2022. Only the December 7 email was shared with me. According to what she submitted in that email, all the events that occurred after she grieved were retaliation. Since the corrective actions in her grievance included that she not face retaliation, it covered all those events.

[50] According to the December 19, 2022, letter, Mr. Ranger denied her review request. He said that Ms. Lamarche had fully analyzed the facts in detail and explained at length the reasons for her recommendation. He addressed several points that the complainant raised in her review request. He reiterated the caselaw on the duty of fair representation and that the respondent is not required to move forward on all its members' grievances.

[51] The letter also stated the following:

> [Translation]
>
> …
>
> *Contrary to what you claim, we note that the Institute has represented you in the two grievances for which you requested a review and in your harassment complaint. Furthermore, the Institute applied to the Federal Court for a judicial review to contest certain aspects of the harassment complaint.*
>
> *The conflict-of-interest grievance was previously subject to two final recommendations after a thorough review of its merits. One dated November 25, 2021, from the office of the Institute's*

> *president, and the other dated January 21, 2021, after analyzing the legal opinion that you shared with us. In addition, at your request, the Institute represented you in mediation with the employer on the same grievance. We note that after mediation, the situation that led to the grievance was resolved, and several requested corrective actions were put in place. We agree with the analysis that the Director and your LRO, Robert Melone, completed on the merit and worth of the remaining corrective actions, and we find that there was no bad faith, or arbitrary or discriminatory considerations, and that the decision to stop supporting that part of your grievance is justified in the circumstances.*
>
> *For your harassment complaint, we also find that the Institute has continued to represent you from the beginning and that you are still receiving our representation services today. The retaliation that you say that you are facing is part of the harassment complaint, for which a judicial review application has been made, supported by the Institute.*
>
> …

[52] The complainant said that Mr. Ranger had claimed that Ms. Lamarche had completed an analysis, but she saw no opinion or analysis about the four days of leave that she had taken.

[53] On January 9, 2023, she wrote to him again, laying out why she considered that his justifications did not appear sound.

[54] He replied on January 11, 2023. He referred to her emails of December 19 and 29, 2022, and January 10, 2023. I did not receive copies of those emails, but the one from him said that in them, she asked the respondent to consider certain additional factors, including constructive dismissal.

[55] On that subject, his January 11, 2023, email stated the following:

> [Translation]
>
> …
>
> *About the constructive dismissal, after reviewing your file, we note that in the grievance about the conflict-of-interest letter filed on October 4, 2021, there is at no time any question of* "[translation] constructive dismissal". *Nor does it appear anywhere in the five pages of your grievance. Actually, you first mentioned constructive dismissal in June 2022. At the time, you had suggested to your LROs Robert Melone and Renée Léger that you modify your grievance to include constructive dismissal, and also wanted to claim damages to your reputation. They replied to your suggestion that constructive dismissal was a non-issue because you were still*

> *employed by the Agency and had never been dismissed. You did not dispute their response. In addition, according to the information on file, your LRO Mr. Melone clearly informed you that in his opinion, you were not disciplined and therefore, you could not grieve a harm that did not exist. He also believed that although you considered that the communications with your manager were threats to dismiss you, your harassment complaint needed to address that aspect. Your employer also said that the modified letter about the conflict-of-interest grievance had precedence over any other communication on the matter. We share your LRO's opinion that you were not and are not being constructively dismissed or disciplined.*
>
> …

[56] Mr. Ranger's email reiterated the reason for the respondent's position about the four days of leave that the complainant was trying to get back, and that the evidence that she had provided did not support that request. He addressed a draft modified grievance that she had sent to him and explained why he believed that the suggested change was instead a separate grievance. He said again that in his opinion, Ms. Lamarche's analysis was full and quite detailed, and that the complainant's disagreement with her analysis was not a reason for the respondent to change its decision. Lastly, he reiterated that because her grievance was not about interpreting or applying a clause in the collective agreement, she could proceed on her own for the remaining corrective actions in her grievance.

[57] No further evidence was produced on the exchanges referred to in Mr. Ranger's June 2022 email about a request to grieve a constructive dismissal. The complainant also presented no evidence showing that she allegedly contested the answer that she had been given at that time.

[58] In response to Mr. Ranger's email of January 11, 2023, the complainant wrote to him again that day, and the next day, laying out why she disagreed. To her January 11, 2023, email she attached medical notes from the medical leave that she took in January 2022. She testified that Mr. Ranger relied on there being no medical evidence and therefore, she sent him the medical notes that she had. In cross-examination, she admitted that she gave the respondent the medical notes for the first time on January 11, 2023.

[59] On January 12, 2023, she made the second complaint at issue in this decision.

III. Summary of the arguments

A. For the complainant

[60] According to the caselaw, the Board's role is to monitor the decision-making process. In this case, there were several gaps in the process.

[61] With respect to the first complaint, the respondent refused to seriously consider the conflict-of-interest issue, despite her repeated requests. It presented only a brief overview of the caselaw and did not explain its choice of caselaw. It did not analyze the *Charter* or the *Values and Ethics Code for the Public Sector* as it should have.

[62] Its positions were arbitrary and in bad faith.

[63] The *Duske* decision on which it relied had no similarities to her situation. Mr. Melone testified that he agreed. He refused without explanation to apply *Gauthier*, in which it was concluded that the employer had made serious errors of fact. Instead, the respondent took the position that the employer was right to say that she had a conflict of interest. Its position was that the employer had not made any serious errors of fact, but it failed to explain how it had come to that conclusion. This shows that a comprehensive analysis was not carried out.

[64] Mr. Melone admitted that the mitigating measures that the employer imposed were excessive, but he provided no representation to protect the complainant's rights. He took the position that the grievance did not fall under the collective agreement, although he knew that she faced discipline. On that point, *McRaeJackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290, is clear: the duty of fair representation commences as soon as there is a possibility that discipline may be imposed.

[65] Even when presented with an independent legal opinion confirming that there was no conflict of interest, the respondent refused to change its position. It was thanks to that opinion that the conflict-of-interest issue with the employer was concluded. However, after the mediation was over, the respondent was not prepared to go beyond what it had already decided.

[66] It refused to represent the complainant in getting back her sick leave and four vacation days, and refused to advise her on suing for damages despite its undertaking to represent her.

[67] The facts show that Mr. Melone never intended to represent her in the conflict-of-interest grievance. His analysis did not consider her desire to be reimbursed for her sick leave, although it should have.

[68] Pursuant to *Canadian Merchant Service Guild*, it is clear that the respondent has not fulfilled its duty of fair representation. Had it seriously considered her file, it would have agreed on the serious errors of fact that the employer made and would have applied *Gauthier* and the *Charter* to her case. Instead, it used caselaw that did not apply to her, without even explaining why.

[69] The representation must be real. Instead, the respondent left her to her own devices. Although it made itself available for mediation with her employer, it said before the meeting that it would not comment on its main point.

[70] In this case, bad faith was also evident in the resistance to and refusal of representation when she asked for a review of Mr. Melone's decision. The respondent chose to support him, although there was no serious investigation. Despite that inadequate reasoning and the fact that both Ms. Lamarche and the general counsel were aware of the *Gauthier* decision, they decided to deliberately disregard it to not represent her.

[71] That choice of caselaw rather reinforced the respondent's decision to not actually represent her. It took that approach to reach its pre-established conclusion, rather than relying on the actual information that it should have used to come to its decision.

[72] Later, in November 2022, it decided to stop representing her in her conflict-of-interest grievance, specifically in getting back her four vacation days and her sick leave. That decision amounts to retaliation for appealing Mr. Melone's decision. It also demonstrates bad faith, since the respondent knew that for all intents and purposes, she would lose her remedies without its representation.

[73] Bad faith was also shown when it refused to consider her medical evidence, although it had suggested that she would be represented if she gave it that information. She cannot understand its reasoning for not representing her, other than bad faith on its part.

[74] Bad faith was also expressed in the refusal to specify to her what evidence was required to help her get back the four vacation days that she asked for. Ms. Lamarche said that getting one day back would be acceptable, but did not ask for more information to justify the four days.

[75] The respondent wanted to leave the complainant to her own devices, hoping that she would abandon all remedies. The decision-making process for reviewing its decisions was flawed. There were major gaps in the analyses, which provided no reasoning. Its representatives did not explain why they relied on *Duske*, although they admitted that there was no similarity with her case.

[76] Its refusal to represent her without explanation is a blind abdication of its duty of fair representation, as was the case in *Jutras Otto v. Brossard*, 2011 PSLRB 107. That breach was illustrated as follows:

- it systematically rejected any argument being favourable to her;
- it refused to analyze her file fully and in detail before agreeing with her employer and instructing her to pursue her grievance on her own;
- in November 2022, it stopped representing her in her conflict-of-interest grievance;
- it carried out an arbitrary analysis of the constructive dismissal that she felt applied in her case.

[77] It chose to act that way, neglecting its duty of fair representation and how its actions affected her. For that reason, she requests, as a corrective action, to be represented by a lawyer of her choice at the respondent's expense and to receive $5000 in damages given what she has suffered.

B. For the respondent

[78] The complainant's dispute concerns her employer's application of its conflict-of-interest policy with respect to her duties as a municipal councillor. Section 209 of the *Act* provides that the complainant has the right to complain about her job conditions. Therefore, she does not need the respondent to approve. This has been confirmed on several occasions.

[79] She did not submit any evidence of bad faith or arbitrary conduct. On the contrary, the evidence shows that the respondent provided representation, gave advice, and supported her in mediation with her employer. Mr. Melone's testimony shows that he was committed and well informed about the case, the issues, and the

complainant's interests. He took the time to advise and counsel her about the conflict of interest. From the beginning, he offered to draft a grievance and analyze her file. Before he could proceed, she grieved on her own on October 5, 2021.

[80] In the period between October 5, 2021, and the day that he submitted his analysis on October 27, 2021, he suggested ways that she could speed up the grievance process, knowing that she was worried about the election coming up in November.

[81] As for his analysis of October 27, 2021, he testified that he reviewed her file and the many exchanges between her and her employer. He researched caselaw. In her arguments, she referred many times to a "[translation] bit of insight", but that does not mean that his research was inadequate. He found the *Duske* decision, which was relevant to the issue of policy interpretation. He tried to explain why that decision was relevant. He referred to the explanations that the employer gave to take a position, and expressed that the employer could consider her to be in an apparent conflict-of-interest situation. However, he said that its measure seemed excessive, and he made suggestions to find a more targeted way to alleviate its concerns. He said that if that did not work, he would represent her and propose a way to reword the grievance. He did not get the chance, given the complainant's decision.

[82] His analysis is far from arbitrary or blatantly negligent. He thoroughly examined the case. Contrary to what she alleged, he mentioned the serious errors of fact when comparing them to *Gauthier*. He said that in *Gauthier*, the Federal Court of Appeal found that there were serious errors of fact, but that he did not think that it would find the same in her case.

[83] Clearly, she disagreed with his analysis. However, even if the Board were to conclude that he erred in his recommendation, it would not constitute a representation error.

[84] Ms. Lamarche testified about her role in the review process. She reviewed the complainant's file in detail. She addressed the elements that the complainant raised in her review request, as well as the allegations of serious errors and bad faith. She concluded her analysis by advising the complainant that she could still proceed on her own, and inviting her to contact Mr. Melone to follow up. It was by no means a blind abdication, as the claimant maintains.

[85] With respect to the second complaint, Mr. Melone was called in November 2022 to review the complainant's file in light of the activities that had since taken place. He analyzed, and expressed that there was no evidence to support getting back the four days of leave that the claimant asked for in her grievance. His analysis is not superficial. He thoroughly examined the file. There was no negligence.

[86] Ms. Lamarche reviewed the analysis. She examined it thoroughly. It is certainly not a blind abdication, as she overturned part of Mr. Melone's decision, saying that it would be possible to request one of the four vacation days. She wrote that there was documentary evidence to support getting one day back. She suggested that the respondent discuss it informally with the employer. She took her review role seriously. She changed Mr. Melone's opinion and suggested a different approach.

[87] About the sick leave, Mr. Melone testified that he had repeatedly asked for evidence to support the link between sick leave and the conflict of interest. The medical certificates were provided only after the complainant made this complaint, and they still gave no evidence that the leave was related to the conflict of interest.

[88] The complainant alleged that the respondent's decision was to punish her, but there is no evidence of that. There is no evidence of malice, aggression, or dishonesty. On the contrary, it is clear that she has been supported in several challenges in her workplace.

[89] In conclusion, there was no breach of the duty of fair representation, as Mr. Melone testified. He gave several pieces of advice and supported the complainant in a mediation session with her employer, which resulted in a significant change to the letter that allowed her to fulfill her role as a municipal councillor without concern. That letter was distributed to supervisors. For the other corrective actions, he did not have the necessary tools to support her request. The sick leave was not clearly requested until January 9, 2023, and she did not provide her medical certificates to the respondent until January 11.

[90] The grievance is still in abeyance. Nothing is stopping her from pursuing her grievance to obtain the corrective actions that she is seeking.

[91] The respondent requests that the complaint be dismissed.

IV. Analysis and reasons

[92] It is alleged in complaints under s. 190(1)(g) of the *Act* that the respondent has committed an unfair labour practice and failed its duty of fair representation. As stated in *Ouellet v. St-Georges*, 2009 PSLRB 107, the complainant bears the onus of presenting evidence sufficient to establish that the respondent failed to meet that duty.

[93] The Supreme Court of Canada explains the principles governing the duty of fair representation in *Canadian Merchant Service Guild*, as follows:

> …
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee on 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.*
>
> …

[94] The Board has repeatedly applied those principles in the context of s. 190(1)(g) of the *Act*. It follows that that duty is not limited only to exercising discretion to file a grievance and refer it to arbitration, but also to the overall representation of a member. However, the Board's role is not that of a Court of Appeal to review and determine the merits of a bargaining agent's decisions. The Board's role is limited to reviewing the decision-making process and determining whether that process was conducted in an arbitrary or discriminatory manner, or in bad faith (see *Ouellet*).

[95] To make that determination, I must consider the facts.

A. Complaint dated January 24, 2022

[96] At the Board's request, the complainant clarified her complaint on December 22, 2023. According to her, the complaint is based on the allegation that the respondent breached its duty of fair representation by failing to fully analyze the caselaw on conflict of interest and by failing to examine the relevant facts.

[97] She believes that the respondent's October 27, 2021, analysis of the merits of her conflict-of-interest grievance, as well as its refusal to change its opinion on January 21, 2022, after reviewing the independent legal advice that she received, are arbitrary.

[98] She is clearly dissatisfied with its analysis and with its recommended strategy moving forward with her case. In her view, if a serious analysis had been done, it would have relied on the facts that she had presented and would have concluded that the employer had made serious errors of fact. Then, it would have applied *Gauthier* and concluded that she did not have a real or apparent conflict of interest.

[99] The Board's role is not to determine the merits of the respondent's analysis. Rather, the complainant must provide enough facts to show that its decision-making process was arbitrary, discriminatory, or in bad faith.

[100] After reviewing the facts, I see no evidence to support that. Instead, I find that it has at all times represented her diligently and without hostility toward her.

[101] According to the contextual evidence, Mr. Melone did as required, informing her from the start that she did not need his approval to grieve because the issue did not fall within the scope of the collective agreement. However, he still took action to represent her, starting with an offer to draft the grievance. It was her choice not to take him up on his offer, opting instead to grieve without giving the respondent reasonable time to respond. After she filed her grievance, Mr. Melone was in constant communication with her, answering questions and offering advice on how to move her case forward. He testified that he repeatedly discussed with her why the *Charter* did not apply, and she did not testify otherwise.

[102] On October 27, 2021, he gave her his analysis of the grievance's merits and suggested how she could move her case forward. Since that analysis is the subject of the unfair-labour-practice complaint, I must take a closer look at it and the review

process that followed. It goes without saying that I am interested in the steps that the respondent took, not in the merits of its conclusions.

[103] Mr. Melone testified that first, he thoroughly reviewed the file and researched the applicable caselaw. In his October 27, 2021, analysis, he referred to *Duske* and explained why he thought that decision was relevant. Then, he referred to the facts that the employer raised, and he expressed that its position was consistent with the Board's interpretation in *Duske*. He referred to *Gauthier* and explained why he did not think that decision applied. Then, he expressed that the employer's mitigating measures were excessive and suggested alternatives. He offered to contact his counterpart at the employer to see if it would consider a more targeted measure. He offered to modify the grievance and corrective actions in line with his suggestions. He testified that he had not included the *Charter* issue in his analysis because he had previously discussed that point with her.

[104] His opinion was reviewed twice in accordance with the respondent's internal review process. Ms. Lamarche testified that she thoroughly analyzed the file. She looked at the caselaw and documents, and came to the same conclusion as Mr. Melone. I note that her letter to the complainant is detailed and consistent with her testimony. The letter from the general counsel also explained the reasons for denying the second-level review.

[105] The complainant chose not to follow up with the respondent until January 19, 2022. That day, she sent seven emails to Mr. Melone on different subjects, including one to request representation at a mediation session with her employer on January 24, 2022. She attached to it an independent legal opinion that she had obtained. He replied promptly the next day that he was available to attend the session as a support person, to facilitate discussion with the employer.

[106] The day after, he wrote back to her to explain why he thought that the independent legal opinion did not apply. He referred to the applicable facts, namely that the opinion addressed only the conflict-of-interest situation with the City of Carignan given her job at the CFIA, not the other way around. However, he added that there was no reason that she could not bring it up at the meeting with her employer. I note that in that same email, he also offered to help her during the harassment complaint investigation and resolution process that she had begun in December 2021.

[107] Those facts in no way demonstrate arbitrary behaviour or bad faith. On the contrary, they show the respondent's ongoing commitment to represent her with integrity and competence. Mr. Melone seriously analyzed her file. He identified the relevant caselaw and applied it to the facts. He analyzed the situation and gave his opinion on the grievance's merits, applying his labour-relations knowledge. He offered suggestions for moving the case forward, taking into account the complainant's interest in being involved in the drinking-water-supply file.

[108] The mere fact that the respondent decided to rely on one decision rather than another, or that it gave more weight to some facts than others, does not mean that its representation was arbitrary or in bad faith.

[109] As noted in the Board's caselaw, a complainant's dissatisfaction is not a criterion that the Board uses to determine whether a bargaining agent breached the duty of fair representation (*Boudreault v. Public Service Alliance of Canada*, 2019 FPSLREB 87). As long as it seriously and diligently analyzes the situation, a bargaining agent is not obligated to represent its members in all cases and in the way that they want.

[110] The complainant's criticism stems from a deep-seated dissatisfaction at not being supported in the way that she wanted. However, the respondent does not have to follow all her instructions. It has a duty to seriously and diligently analyze the situation, and explain the chances of success. That includes highlighting a file's weaknesses as it sees them. That is exactly what it did.

[111] Although she clearly disagreed with its analysis of her case, its representation was in no way arbitrary, capricious, wrongful, or hostile toward her.

[112] In the end, the parties disagreed on the grievance's merits and the strategy to be adopted. As mentioned earlier, it is not the Board's role to determine who is right. Since the facts do not support a finding that the decision-making process was arbitrary or in bad faith, I must dismiss this first complaint.

B. Complaint dated January 12, 2023

[113] At the Board's request, the complainant clarified her second complaint on December 22, 2023. According to her, the complaint is based on 1) the respondent's refusal to continue to represent her with respect to the remedies sought in connection

with her conflict-of-interest grievance; and 2) the refusal to represent her with respect to a constructive-dismissal grievance.

[114] Since the facts of each case are distinct, I will address them separately.

1. Decision to stop representation in connection with the conflict-of-interest grievance

[115] The complainant is clearly dissatisfied with the respondent's decision to stop representing her, and with its analysis in deciding that. However, aside from her disagreement, is there any evidence of arbitrary or bad-faith representation?

[116] After reviewing the facts, I conclude that there is not.

[117] According to the evidence, the mediation session with her employer on January 24, 2022, was successful. It agreed to modify the authorization letter so that she could serve as a municipal councillor, and a new letter was issued and shared with her managers.

[118] On November 9, 2022, Mr. Melone informed her that he recommended that the respondent stop representing her in her conflict-of-interest grievance. That decision was reviewed twice in accordance with the respondent's internal review process. Since those analyses are what the unfair-labour-practice complaint is about, I must take a closer look at them. It goes without saying that again, I am interested in the steps that the respondent took, not in the merits of its conclusions.

[119] In the email that he sent on November 9, Mr. Melone informed the complainant that he had reviewed her grievance in light of the developments during the year. He reported on each corrective action identified in her grievance and what had been achieved. With respect to retaliation, he said that he believed that it would be better addressed in the harassment complaint that is the subject of a separate proceeding. As for the four days of leave that she wanted to get back, he said that there was nothing in the file to support her request. Given the information, he recommended that the respondent stop representing her in that case. He reiterated that she was free to proceed with the grievance on her own, as it was not about interpreting or applying the collective agreement.

[120] Ms. Lamarche testified that she fully analyzed the complainant's file after receiving her request for review. Ms. Lamarche's letter is detailed and consistent with

her testimony. In it, she took the time to address every point that the complainant raised. With respect to the complainant's request to get back the sick leave in January 2021, Ms. Lamarche advised her that there was no sick leave remedy in her conflict-of-interest grievance. With respect to the four days of leave that she requested in her grievance, Ms. Lamarche informed her that she thought that one day would be possible, and explained in detail how she had come to that conclusion. She said that the respondent could speak with the employer informally about getting that day back, if the complainant wanted.

[121] Mr. Ranger's review letter dated December 19, 2022, and his email of January 11, 2023, are, like Ms. Lamarche's review, very detailed and address the many points that the complainant raised. In both, he took the time to explain why the respondent decided what it did.

[122] At the risk of repeating myself, my role is not to determine the merits of the respondent's decision. Instead, I must look at the decision-making process. According to the evidence, it was neither arbitrary nor in bad faith.

[123] There is no evidence of an indifferent or cavalier attitude toward the complainant's interests. I note that all exchanges with the complainant were respectful and that the respondent's representatives made a concerted effort to explain to her why they decided what they did.

[124] It was also not established that the respondent's motives were inadequate or that it had acted out of personal hostility.

[125] On that point, she alleged that its decision to stop representing her in the grievance was retaliation to punish her for requesting a review. That subjective belief must be backed up by facts. The evidence does not support that finding. On the contrary, the evidence shows goodwill.

[126] First, Mr. Melone's letter of November 9, 2022, and Ms. Lamarche's and Mr. Ranger's subsequent reviews show that the respondent continued to represent her in other matters with the employer.

[127] In addition, I note that Ms. Lamarche analyzed the complainant's file in detail and reviewed Mr. Melone's recommendation. She offered to speak with the employer informally to get back a day of leave.

[128] Those two actions show how seriously the respondent exercised its duty of representation, and not collusion to punish her.

[129] According to her, it had an obligation to represent her and could not remove itself from her grievance.

[130] As stated in the Board's established caselaw, it is up to the bargaining agent to decide which grievances to proceed with and which ones not to proceed with. It has no absolute obligation to represent a member of the bargaining unit, as long as it seriously and diligently analyzes the situation. *Boudreault* summarizes that point well in paragraph 36:

> *[36] The bargaining agent must represent its members fairly, genuinely, with integrity and competence, and without hostility towards them (*Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509 at 527). As the Board has often held, this does not mean that the bargaining agent must follow instructions from its members on filing a grievance every time a member wants to. Bargaining agents have limited resources, and the Board certainly cannot dictate to them how to use those resources.…*

[131] In *McFarlane v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 27 at paras. 40 and 41, the Board made the following observations, which I also consider relevant to the present case.

> *40 … A bargaining agent's duty of representation is not defined by a blind acceptance of representing all the employees in the bargaining unit, irrespective of the circumstances. When a bargaining agent decides, based on legitimate considerations, not to proceed with a grievance such as those referred to in this decision, it meets an essential part of its duty of fair representation. It is entirely free to decide the best course of action for all the employees it represents, as a whole.*
>
> *41 I would go even further and suggest that a bargaining agent has the right to make the wrong decision, provided it has made the necessary enquiries giving rise to its decision and so long as its decision-making process is not tainted by actions or conduct that is tantamount to arbitrariness, discrimination or bad faith.*

[132] With respect to the evidence in this case, I am satisfied that the respondent's decision about the complainant's conflict-of-interest grievance was motivated by legitimate considerations about the chances of success and that its analysis was detailed and complete, taking into account the relevant facts. It raised rational

concerns about the lack of documentary evidence and gave her a chance to provide that evidence through the review process.

[133] She alleged that it had not asked her to provide that evidence, but it seems fairly obvious that she should have when Mr. Melone found that there was nothing in the file to support her request. She accuses the respondent of failing to describe the evidence that it needed, but it was up to her to explain how she determined that she was owed four days off, not for it to guess.

[134] With respect to getting back the sick leave, the evidence shows that the respondent was informed of that leave on January 19, 2022. That day, she asked it to represent her at the mediation of a harassment complaint against her employer. Her message clearly indicated that she was seeking to get back her sick leave in connection with that complaint. Therefore, it is not surprising that the respondent's position in January 2023 merely reflected that.

[135] One year after the fact, she cannot complain that it engaged in unfair labour practice because it did not advise her or did not file a grievance to get that leave back when she had not requested it.

[136] Paragraph 32 of *Ouellet* states the following:

> *… duty of fair representation assumes that the grievor takes the necessary measures to protect his or her own interests. He or she must inform the bargaining agent of his or her willingness to file a grievance and act within the time limits set out in the collective agreement.…*

[137] The complainant admitted that she simply thought that she could amend her grievance to include getting back her sick leave. She did not confirm her thinking with the respondent at the time. Therefore, she cannot later accuse it of acting arbitrarily or in bad faith when it simply did not know.

[138] Since the facts do not support a finding that the decision-making process was arbitrary or in bad faith, I must dismiss the first part of the second complaint.

2. The respondent's decision about a constructive-dismissal grievance

[139] The complainant alleges that the respondent failed its duty of fair representation, infringing on s. 187 of the *Act* when it refused to represent her in a constructive-dismissal grievance.

[140] After reviewing the facts, I conclude that that part of the complaint is untimely.

[141] Section 190(2) of the *Act* provides the time limit for making a complaint when alleging a contravention of s. 187 as follows:

190 (2) *Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board* ***not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.***	***190 (2)*** *Sous réserve des paragraphes (3) et (4), les plaintes prévues au paragraphe (1) doivent être présentées* ***dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.***

[Emphasis added]

[142] The complainant complained to the Board on January 12, 2023. Therefore, my jurisdiction is limited to the respondent's actions in the 90 days before this complaint, so between October 14, 2022, and January 12, 2023.

[143] Although the parties submitted evidence outside the time limit, s. 190(2) of the *Act* must be respected, and I cannot determine whether events that took place outside the time limit contravene the duty of fair representation.

[144] The complainant alleged that the respondent had breached its duty of fair representation "[translation] by not grieving after what amounts to a constructive dismissal". According to the evidence, it was in June 2022 that she mentioned constructive dismissal, and the respondent advised her at that time that it was a non-issue, as she was still employed by the CFIA and had not been dismissed. Mr. Ranger's letter indicates that she did not contest that response.

[145] The complainant cannot set the record straight on s. 190(2) simply by raising that issue again six months later with Mr. Ranger, through a review process that did not even include it in the first place.

[146] I must dismiss the second part of the second complaint because it is untimely.

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

(The Order appears on the next page)

V. Order

[148] The complaints are dismissed.

June 10, 2025.

FPSLREB Translation

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board