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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

A.B.

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
A.B. v. Public Service Alliance of Canada

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

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

For the Complainant: Gina Paris, representative

For the Respondent: Abudi Awaysheh, Public Service Alliance of Canada

Heard by videoconference,
March 8 to 10 and October 17 to 19 and 25 to 28, 2022.

REASONS FOR DECISION

I. Overview

[1] A.B. ("the complainant") made a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board") that the Public Service Alliance of Canada and its component, the Union of Taxation Employees ("the respondent" or "the bargaining agent"), breached its duty of fair representation (DFR), contrary to s. 187 of the *Federal Sector Public Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[2] All references to "the Board" in this decision include the present iteration of the Board and all its predecessors.

[3] Work has been recognized as one of the fundamental aspects in a person's life as it not only provides a means of financial support but also shapes a person's self-worth as a contributing member of society. I completely endorse Chief Justice Dickson's view in his dissenting opinion in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC) ("*Alberta Reference*"), which reads in part as follows:

> …
>
> *91 … A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.…*
>
> …

[4] In my view, this statement holds true for all employees, irrespective of their accommodation needs.

[5] A.B. was born deaf. Her first language is American Sign Language (ASL). It is accepted that deafness is a disability that requires workplace accommodation. It is also accepted that her disability is permanent. She has been employed by the Canada Revenue Agency (CRA or "the employer") and its previous incarnations since 1993. The events that led to this complaint demonstrate that certain unarticulated stereotypical assumptions about deaf people can skew their accommodation needs in the workplace

and compromise their dignity, self-worth, and emotional well-being. That is what happened to her. The respondent's actions and inactions contributed to the situation.

[6] A primary objective of accommodating employees with disabilities in the workplace is to create working conditions that promote their self-achievement and foster dignity and self-respect, while achieving the legitimate goals of the employer's enterprise.

[7] The search for accommodation is not a one-way street; in the unionized context, it is a tripartite endeavour involving the employer, the bargaining agent, and the employee. If the bargaining agent fails to play its proper role in the accommodation process, it could form the basis of a DFR complaint. The essence of this complaint are the respondent's actions and inactions in the accommodation process, particularly when it processed the complainant's grievance against the employer's alleged failure to provide her with a reasonable and timely accommodation.

II. Summary of the complaint, and findings

[8] The documentation from both sides was extensive. I reviewed the entire record closely, but I limited my narration of the relevant facts to the 90-day period preceding the date on which the complaint was made, which was May 18, 2017. However, I find that narrating the events and facts, most of which were uncontradicted, provides a complete historical context to understand this complaint and the Board's disposition of it.

[9] In August 2016, Gina Paris became a union steward specifically to represent and help A.B. with the accommodation issues that she was encountering in the workplace. Ms. Paris had worked with her in the past and had been able to help resolve an earlier grievance related to A.B.'s accommodation on a workflow or workload that met her disability ("workload" and "workflow" are used interchangeably in this decision).

[10] The resolution of the earlier grievance gave A.B. a relatively stable period of employment in the workplace until the employer discontinued that workflow and moved her to a different team and workflow.

[11] Accommodation issues re-emerged because the employer assigned the complainant to a workflow at a level lower than her substantive position. It considered several approaches to accommodate her disability and seemed focused on demotion,

beginning with a heightened performance management of her. That was a source of significant stress for her. That is when Ms. Paris stepped up to assist her.

[12] As soon as she came on board, Ms. Paris filed a grievance on the complainant's behalf. The employer denied it at the first level of the internal grievance process. Ms. Paris transmitted it to the second level in December 2016 and held it in abeyance until February 2017, when she asked the employer to remove it from abeyance and to schedule a second-level hearing.

[13] The local union executives disagreed with Ms. Paris and intervened. They did two things. First, they asked the employer to hold the grievance in abeyance until one of them, the president or the chief steward, asked that it be removed from abeyance. Second, they removed Ms. Paris's union steward role and replaced her with the chief steward on the complainant's file.

[14] A.B. became concerned when Ms. Paris was removed from her file. She was also concerned that her grievance remained in abeyance at the second level. She expressed both concerns to the local union executives. Eventually, she informed them that she did not believe they had her best interests at heart and that she did not trust that they would advocate for her with the employer. She asked them to withdraw her grievance because she would rather pursue her issue with the employer through a human rights complaint. She also informed the employer that Ms. Paris would remain her representative on the accommodation issue.

[15] In her complaint, she alleged that the respondent's actions, inactions and decisions relating to her workplace accommodation were arbitrary, discriminatory and wrongful. She alleged that the respondent's removal and replacement of Ms. Paris as her union steward during the period in question caused her severe stress and adversely impacted her in the workplace. The only option she had to try and stop the discriminatory treatment from the employer was to withdraw her grievance and pursue other recourses without the respondent's support. Without the respondent's support, the employer again moved her to a lower-level position on a different team, causing her further aggravation.

[16] Based on the evidence, I find that the respondent breached its DFR. The decision to remove Ms. Paris from her union steward role helping the complainant in the accommodation process was made arbitrarily and in bad faith. It failed to play its

proper role in the search for a reasonable and timely accommodation for the complainant. The respondent brought Ms. Paris in specifically for her expertise in deaf culture and for having successfully navigated the employer's processes to secure reasonable accommodation for A.B. in the past. Removing Ms. Paris from her role was also discriminatory because of the adverse impact on A.B.'s overall workplace wellbeing and security. Her removal left a gap in facilitating reasonable workplace accommodation for A.B. because her replacement did not understand deaf culture and had not been previously involved in accommodating A.B.

[17] The respondent also acted discriminatorily by insisting that the complainant's grievance remain in abeyance at the second level of the internal grievance process. It was unreasonable to apply its second-level abeyance rule to A.B.'s situation at the relevant time. It failed to turn its mind to the situation at hand and did not apply the required measure of assertiveness in dealing with the employer on A.B.'s behalf.

[18] The respondent's failure could have been avoided by having in place proper resources, such as well-trained and competent representatives to support bargaining unit members such as the complainant who are dealing with the employer in the accommodation process. What makes this failure even more egregious is the fact that they had a competent resource available, in the person of Ms. Paris but it deliberately chose not to use her.

[19] At no time is competent and meaningful support for employees in the workplace more important than when uncertainty arises that is caused by changes such as workforce adjustment (WFA) exercises. During such a period, the most vulnerable bargaining unit members need help from their bargaining agent. The respondent failed the complainant in that respect.

[20] I find that an award of general damages is necessary in the circumstances. The complainant requested punitive damages and the return of her union dues. I find that she has established grounds for awarding punitive damages. The respondent's insistence on keeping her grievance in abeyance and removing her union steward at a time when she was most vulnerable was callous and egregious. I do not find it necessary in the circumstances to order that the union dues she paid during the relevant period be returned to her. She also asked that she be reimbursed the value of

the sick leave that she took because of the stress that she suffered. I deny this request because it is not necessary or appropriate in the circumstances.

A. Preliminary rulings

[21] The respondent requested that the complainant's name be anonymized. She did not object to the request, which I grant. The Board is subject to the open court principle. Its Policy on Openness and Privacy is available on its website. I have assessed this request in the context of the three-part test in *Sherman Estate v. Donovan*, 2021 SCC 25 ("*Sherman Estate*").

[22] There is a strong presumption in favour of the open court principle. A party requesting an exception to that principle must show that 1) the principle poses a serious risk to an important public interest; 2) a confidentiality order is necessary to prevent the serious risk identified because there are no reasonable alternative measures to prevent the risk; and 3) as a matter of proportionality, the benefits of the confidentiality order outweighs its negative effects (see *Sherman Estate* at para. 32).

[23] The Supreme Court of Canada recognized that protecting individuals from threats to their dignity is an important public interest for purposes of the *Sherman Estate* test. A threat to an individual's dignity arises when information about core aspects of their private life is publicly disseminated through the open court principle (see *Sherman Estate* at para. 73).

[24] The respondent explained that naming the complainant would expose her to negative treatment in the workplace. Based on the facts in this case, this risk is not hypothetical. Further, given the nature of the complainant's disability, publishing her name on the decision poses a serious threat to her privacy and dignity. There is no reasonable alternative measure to prevent this risk. I find that anonymizing the complainant's name outweighs any negative effects of limiting the open court principle in this manner.

[25] She is referred to as "A.B." or "the complainant" in this decision.

[26] The respondent made a timeliness objection but withdrew it at the opening of the hearing.

[27] The Board ruled that documents dated before February 17, 2017, would be permitted to the extent that they provided necessary background information to the complaint.

[28] The respondent requested that a settlement agreement between the complainant and the employer related to a human rights complaint be produced. The Board denied it, for two reasons. First, settlements are made without prejudice and are confidential documents. Even with the parties' consent, the Board retains its discretion not to order their disclosure. Second, based on the parties' submissions, it is evident that the settlement is not relevant to the issues to be determined in this complaint.

III. Summary of the evidence

[29] I heard extensive oral evidence from both sides. I also reviewed the extensive documentary evidence that they presented. It is useful to narrate some of the information from outside the complaint's 90-day limitation period, for proper historical and contextual purposes.

A. Historical and contextual evidence

[30] For the purposes of my analysis, it is useful to outline evidence relating to the knowledge of the respondent and the employer of the complainant's accommodation needs. In doing so, I am mindful that the employer's conduct is not at issue in this DFR complaint; however, a proper understanding of this complaint requires an in-depth review of the workplace events relating to the complainant's accommodation and the respondent's implicit and explicit complicity with those events that led to the complaint being made.

[31] In 2010, the employer sent the complainant for a fitness-to-work evaluation, to assess whether she had a learning disability that would prevent her from performing the full scope of her duties. The results confirmed the absence of a learning disability. The report recommended that the employer consult a specialized advising service for deaf workers, to explore the use of appropriate adaptive technologies.

[32] On April 18, 2011, the complainant filed a grievance contesting that the employer failed to accommodate her disability and that she had been treated unfairly because of it. As corrective action, she asked that she be accommodated in her substantive position and that she be made whole.

[33] The Western Institute for the Deaf and Hard of Hearing (WIDHH, a non-profit organization that promotes communication accessibility and support for persons who are deaf and hard of hearing) carried out an assessment for the employer in 2011. During a meeting with the employer and the respondent on August 24, 2011, to present its report, the WIDHH's assessor informed the group that it was "… natural for deaf people to have problems with written correspondence. ASL does not incorporate words such as the, and, etc." and that it was a common problem.

[34] The assessor also informed that the reading level for most deaf people is Grade 6 or 7, as they rarely reach Grade 12. The assessor suggested that someone could proofread the complainant's correspondence and that it was also quite common for a deaf employee to have a mentor. Also, things could be made easier by having a template and code for the complainant's use.

[35] The WIDHH made other accommodation recommendations, including exploring the possibility of a video phone, training on the use of a grammar-checking tool when writing letters and emails, and sensitivity training for management and team members.

[36] At the meeting, A.B. explained that she did not understand the written instructions well because they were in English.

[37] Ms. Paris' performance management report for 2011 documented how she successfully assisted the complainant with her reintegration to the workplace after a protracted absence and with implementing her accommodation needs. The report stated as follows:

> …
>
> *A deaf employee was reintroduced to Gina's team under sensitive circumstances. Gina has worked diligently and carefully to ensure that the employee is treated with full respect within the team. The employee now feels supported in her position and is comfortable with the accommodations that have been put into place.…*

[38] The report stated further as follows:

> …
>
> *Gina demonstrated **exemplary leadership** on many occasions; one specific example was an accommodation issue that was of a very sensitive nature. Gina was advised that a hearing impaired employee would need to be integrated respectfully back into the*

> *team. The employee had previously been demoted to a lower level and had left the team for 6 months, as she was unsuccessful in meeting the expectations of her substantive position. Gina realized that she needed to give this employee her full support to determine if she could be successful using alternate training methods.*
>
> …
>
> [Emphasis in the original]

[39] The report observed that with the training plan that Ms. Paris developed and implemented for the complainant, the complainant thrived in the workplace. The overall assessment was that without Ms. Paris' involvement, the complainant would have continued to be unsuccessful in her work.

[40] By 2016, workloads had changed or had been eliminated, and new management was in place. Based on the documentation, it appears that the complainant experienced challenges with the shifting workload and new management, which had a different perspective of her accommodation needs. The employer described the situation in a summary of a meeting held on January 20, 2016, as follows:

> …
>
> *As we discussed approx. a year ago when we all met to discuss this file, I am very sensitive to the fact that this is a DTA* [duty to accommodate] *and potentially a Human Rights case. I want to be fair to the employee but diligent in our DTA and overall management.*
>
> …
>
> *We now need an updated OFAF* [Occupational Fitness Assessment Form] *and cognitive assessment as the one on file is dated 2011.*
>
> *From that we should identify any competencies she is unable to perform and link to the SP04 wd* [work description] *she sits on. Then seek wd's at the SP04 level … in the Lower Mainland (outside of STC too) that do NOT require these competencies i.e. analytical thinking; decision making … If no wd at the SP04 level exists without these competencies being required, we then do the same search at the SP03 level and so one until we find a job that suits her needs. If at the SP02 level we want to demote – voluntarily or through an involuntary demotion.*
>
> …
>
> *All of this should be done with Union briefings and involvement along the way.*
>
> *My question for you now though is where is the line between DTA given her disability vs. poor performance and a PIP* [performance improvement plan]*? It's difficult to navigate through this given*

> *how unique and sensitive this situation is. We do not want a Human Rights complaint of course, nor a grievance. We want to accommodate this employee appropriately while meeting operational needs but have significant concerns regarding capacity.*
>
> …
>
> [*Sic* throughout]

[41] Starting on February 15, 2016, the employer moved the complainant to a different workload on a former team where she had experienced challenges. In an email to Ms. Paris, A.B. confided that she was a "little bit nervous" about the shift.

[42] The employer began to monitor her performance very closely. On January 20, 2016, the complainant's manager emailed the employer's labour relations advisor; the subject line was "Performance Overview and Abilities". The manager documented the complainant's performance from September 2013 to January 2016. He continued as follows:

> …
>
> *On August 24, 2011, a workplace assessment was conducted by the Western Institute for the Deaf and Hard of Hearing. (WIDHH) From this assessment, the key findings were:*
>
> - [A.B.] *exhibits weak literacy abilities in regards to English comprehension in written documentation and analysis of customer of* [*sic*] *information. Due to literacy challenges, she has difficulty processing the detailed information resulting in errors taking place during the process.*
> - *English Upgrading – Vancouver Community College offers English upgrading courses through the Deaf/Hard of Hearing program.*
>
> *In a meeting with the representative from WIDHH, the representative mentioned that the reading level for most deaf people is Grade 6 or 7; rarely do they get to Grade 12.* [A.B.] *indicated that she doesn't understand the instructions* [Note: the employer's earlier notes of the August 24, 2011 meeting indicate that A.B. said that she did not understand the instructions because they were in English]. *The rep responded by advising that we should avoid using complex vocabulary — keep points short and simple — clearly defined. This is difficult to do in the workplace as all manuals are created in HQ and terms in the manuals refer to specific things which do require specific words that cannot be simplified. This also translates into* [A.B.] *not being able to write clearly in Notepad entries in Heron Road.*

> *Given the above limitations,* [A.B.] *will not be able to work in a position that requires communicating with external clients orally or in writing. There is no SP04 job in the Region that does not have client contact in the work description.*

[43] The WIDHH conducted a second workplace assessment for the employer, to address its concerns about the complainant's performance and functional duties for pay at the SP-04 level. Its concerns were that she was not meeting the performance targets at that pay level.

[44] The WIDHH's report documented problems and challenges that contributed to the complainant's performance and functional issues and noted that the employer's attempts at accommodation, specifically the buddy system, had had a negative effect on her productivity. It observed that the employer was not providing effective and reasonable accommodations that supported the complainant's and the employer's expectations.

[45] It made several recommendations, including accessibility tools to improve the complainant's functional communication skills, training materials to be provided in ASL to promote proper understanding, and workplace sensitivity training.

[46] The report concluded that if ASL interpreters were not provided, the complainant's failure would be ensured. It also stated this:

> …
>
> "The Public Service Commission, which is responsible for most of the employees of the federal government, reported that only 0.1 percent of the federal civil service is Deaf. Most of them are contract (temporary) workers in menial positions such as file clerks and maintenance staff. Even those employed in government "white-collar" jobs, such as accountants and tax workers, are blocked from advancement by the "bilingual imperative" that requires fluency in both English and French; it is not the imperative itself that is the blockade so much as the bureaucracy's refusal to recognize fluency in ASL and LSQ as meeting the bilingual imperative.
>
> Potential employers may be reluctant to hire Deaf workers because of assumptions that communicating with them is "too much trouble" and meeting their needs in the workplace would impose a financial strain. Ignorance and a lack of information also lead to these wrong assumptions: for example, employers are frequently unaware that the cost of interpreters is a deductible business expense, and that other means of accommodation (such

> as visual alarms) can be subsidized by both federal and provincial incentive programs." …
>
> …

B. For the complainant

1. The complainant

[47] A.B. was born deaf. Her first language is ASL. She started her employment with what is now known as the CRA in 1993 in Edmonton, Alberta. In 1997, she transferred to the Surrey Tax Centre in Surrey, British Columbia, where she continued to work as a processing agent.

[48] She required an ASL interpreter to communicate but was provided only with a buddy. For one whole year, she had no access to an ASL interpreter for training and meetings. She had three buddies who took turns to assist her with work-related instructions and directions. Some of the buddies complained that she asked too many questions, which took up a large amount of their time. This made the buddy system stressful and frustrating for both her and the buddies. Although she asked, the respondent's representatives did not attend the meetings when management changed her job duties.

[49] The employer moved her from job to job and used the performance evaluation process to demote her from her SP-04 position to an SP-02 position. The respondent never attended any of the meetings at which management attempted to demote her for underachieving her performance expectations.

[50] She requested ASL interpretation services for training and for her meetings with management, but they were never provided. Rather, the employer provided a teletypewriter (TTY) or an Ubi Duo, which is a communications device, both of which were not appropriate for her needs.

[51] Ms. Paris had helped her and had been very effective in advocating for her with management because she understood deaf culture. In the past, Ms. Paris was able to obtain an appropriate workload for her that met her restrictions.

[52] When the respondent removed Ms. Paris as her representative, she was very upset. She did not trust Heather Kenny, the new representative who was assigned to

her, because Ms. Kenny did not understand deaf culture and was not able to help her as Ms. Paris had done in the past.

[53] On April 1, 2017, the employer went through a WFA exercise, and the related uncertainty made her feel vulnerable, as she did not know whether she would continue to be employed. She reported that while her colleagues received reasonable job offers and knew the workloads that they would work on, she received nothing from the employer.

[54] Eventually, she was reassigned to a new workload, but she did not receive the ASL interpretation services that she required to take the related training. It was a very frustrating period for her because she received no support from the respondent. The employer did not provide her with the appropriate accommodation to enable her to receive the proper training to carry out her duties.

[55] In cross-examination, she acknowledged that the respondent helped her maintain her SP-04 salary when the employer assigned her SP-02 duties. She also acknowledged that her previous union steward helped resolve her earlier accommodation grievance.

[56] She was frustrated with the respondent's representation. It refused to take her grievance out of abeyance and transmit it to the next level of the grievance process. It removed Ms. Paris as her representative and assigned a different representative who, unlike Ms. Paris, was not familiar with deaf culture. The respondent also woefully failed to help her through the employer's WFA exercise. She was extremely stressed and anxious and had to take a large amount of sick leave during that period.

[57] On March 21, 2017, she made a complaint to the Canadian Human Rights Commission (CHRC) against the employer. That same day, she received an invitation from the local union president to attend a meeting. She noticed that Ms. Paris was not copied on the invitation and that Ms. Kenny was also invited. She questioned why Ms. Paris was not copied and stated that she was uncomfortable meeting with the respondent since she had just made her human rights complaint and wanted to wait and see what the CHRC would suggest.

[58] The following is her exchange of emails with the local union representatives, which led her to ask that her grievance be withdrawn.

[59] On March 22, 2017, she received this email from the local union president:

> …
>
> *Please understand that your human rights case is separate from your grievance and your accommodation. There are 3 separate issues. Your human rights case can't move forward until your grievance process is complete. We need to discuss moving your grievance forward, as you have indicated you want it heard at Level 2. Although, I believe we do not have all the information to present it at Level 2, we can move it forward if you need this done to go forward with your human rights case. If this is the reason, we need to discuss it. We also need to know if you have retained council* [*sic*] *(lawyer), and what direction you are moving with the grievance process.*
>
> *Representation has been reassigned to Heather, as Gina is no longer a steward.*
>
> *If you are not comfortable with this, I am not sure how we can move forward to represent you during the grievance process. The Chief Steward is also the responsible party for presenting grievances at Level 2.*
>
> …

[60] On March 23, 2017, she responded as follows:

> …
>
> *After I read your email I feel you are unable to help me with my case. I'm requesting to withdraw my grievance immediately. I think the Human Rights can review both my discrimination and Duty to Accommodate.*
>
> *Please let me know if I need to sign any documents.*
>
> *Meeting on Monday is not required.*
>
> …

[61] She explained that she did not trust that without Ms. Paris, who understood deaf culture and had historical knowledge about her situation, Ms. Kenny was well-enough equipped to help progress her grievance.

2. Ms. Paris

[62] Ms. Paris had helped A.B. in the past and at one time was her team leader. In that capacity, she knew that A.B. could perform at work if she was assigned a suitable workload and received the necessary training and appropriate tools to function. Based

on her history with A.B. and her experience, she became a union steward in August 2016, specifically to work with and assist with A.B.'s accommodation process.

[63] She reached out to other tax centres, to find out about the jobs or workloads that their hearing-impaired employees worked on and the accommodations that were in place for them. She found out that hearing-impaired employees were placed in SP-01, SP-02, and SP-03 positions and were largely term employees. In other words, the employer effectively marginalized them to lower-level positions. The respondent was aware of it but did nothing to challenge the employer on that point.

[64] She knew that there were workloads that the employer could assign to A.B. at her substantive SP-04 group and level, but the employer's sole goal was to demote the complainant to an SP-02 position using the performance evaluation process.

[65] The employer did not provide the complainant with ASL interpretation services for training on the workloads assigned to her, which made it extremely difficult for her to receive proper training, particularly considering her restrictions, of which the employer was aware.

[66] The employer did not understand the complainant's accommodation needs. What it described as issues with her cognitive abilities were really a consequence of her deafness. Her individual accommodation plan specified her restrictions as follows:

> …
>
> *Hearing Impairment*
>
> *Receptive vocabulary for Standard English*
>
> *Requires frequent repetitions of instructions or questions*
>
> *Challenges with vocabulary, reading and writing (for Standard English)*
>
> *Challenges with client communication*
>
> *Recall of written instructions resulting in the requirement of frequent repetitions of instructions or questions.*
>
> *Limitations in relation to both reading (fluency and comprehension) and writing in relation to Standard English*

[67] The employer knew that the complainant's disability is permanent, so it should have looked into finding her permanent accommodations rather than temporarily changing her to different workloads and placing her in different positions.

[68] On November 7, 2016, Ms. Paris filed a grievance on the complainant's behalf that stated as follows:

> …
>
> *I grieve that my employer has not provided me with an accommodation, in a timely manner. I further grieve that the employer has violated Article 19 "No Discrimination" of the collective agreement in terms of discrimination against my disability.*
>
> *Corrective action requested …*
>
> *That the employer fulfills their obligations to provide and assist me with the provisions of duty to accommodate to assist me in my job. That there is no prejudice against me for filing such grievances and that I am made whole.*
>
> …

[69] She also helped the complainant make a request for information under the *Access to Information Act* (R.S.C., 1985, c. A-1) and the *Privacy Act* (R.S.C., 1985, c. P-21), commonly referred to as an "ATIP request".

[70] She presented the grievance at the first level of the grievance process on November 29, 2016. The employer denied it on December 13, 2016, and she transmitted it to the second level on December 14, 2016, and asked that it be held in abeyance until February 2017.

[71] In January 2017, the employer insisted that the complainant undergo cognitive and aptitude assessments unrelated to her hearing impairment, so that it could obtain accurate information on her cognitive issues, to ensure that she was placed in a position best suited to her skills sets, with the required support and accommodations. Its request was based on a fundamental misunderstanding and stereotypical assumptions about deafness and its assumption that A.B. has a learning disability. It already had the 2011 assessment that concluded that A.B. does not have a learning disability.

[72] The employer was reluctant to maintain her at the SP-04 group and level. It knew that the complainant struggled with the accommodation that it provided and even acknowledged that its accommodation was not working, yet it was fixated on demoting or dismissing her. Ms. Paris referred to an email exchange between the complainant's manager and team leader dated May 20, 2014, as follows: "… the long

and short of this is that it is a band aid approach only as we cannot have [A.B.] on a temporary appointment to a lower level indefinitely. However, we should be able to for at least a year (maybe two). Ideally, SP3 …".

[73] In February 2017, the Government of Canada's Translation Bureau held an information session for deaf, deafened, and hard-of-hearing public service employees, to provide information on its services, explain its services and procedures, outline the rights and obligations of those employees, and to clarify managers' role and responsibilities in fulfilling their duty to accommodate employees. The complainant invited her team leader to attend, but the latter declined the invitation. It would have been helpful had the employer's representatives attended the session, to gain an understanding of deaf culture.

[74] By email dated February 24, 2017, she asked the employer to remove the grievance from abeyance and to schedule a hearing at the second level of the grievance process.

[75] She then met with the respondent's executives on February 27, 2017, to discuss the second-level grievance hearing. It was a tense meeting, during which she was berated and was asked not to proceed with the second-level hearing.

[76] As the executives directed her, she checked with the complainant as to whether she wanted to proceed to the second-level hearing. She informed the executives as follows:

> …
>
> *I spoke to the member regarding the grievance presentation for Level 2, as per our meeting yesterday.*
>
> [The complainant] *has advised me that she doesn't want to hold the grievance any longer. She feels this has gone on for to* [*sic*] *many years and needs to be resolved.*
>
> …

[77] By email dated February 28, 2017, the respondent's chief steward responded as follows: "Although [A.B.] would like to move forward, I am unable to support this, as we do not have all the documentation required to present the grievance at this time."

[78] On March 2, 2017, the local union president wrote to the complainant as follows:

…

> *I have been informed that you want to proceed with your grievance to Level 2. At this time, we can't support doing this because we do not have all the information we need to argue it with management. Once we get the information and review it, we can proceed with the next step.*
>
> *If you need more detailed information, I would suggest we invite an interpreter to come in and we can all have a meeting.*

…

[79] By email dated March 7, 2017, the local union president wrote to the employer and asked it to continue to hold the grievance in abeyance until either the respondent's president or the chief steward requested that it be removed from abeyance. Ms. Paris was copied on the email.

[80] On March 10, 2017, she wrote to the national union representative. She described the events that had occurred and asked for clarification as to presenting the grievance at the second level. Her email described the background to A.B.'s problems with management in obtaining an appropriate accommodation over the years and how she had helped A.B. in the past to secure workplace accommodations. She asked for direction on these three points:

1) What rights does the bargaining unit member have if she wants her grievance to proceed to the second level?
2) Does the respondent withdraw the grievance if the member contacts the CHRC or the labour relations board?
3) Can the discrimination grievance be presented first before waiting for the duty-to-accommodate file to complete?

[81] She disagreed with the local union executives about processing A.B.'s grievance. She was called into a meeting, during which the executives berated and belittled her, and she was told that she could no longer be a union steward. She was no longer to represent the complainant.

[82] She discussed a way forward with the complainant about making a human rights complaint about discrimination.

[83] In cross-examination, she testified that if management was being discriminatory, the respondent should not have sat back and allowed it to mistreat the complainant. She disagreed with the respondent's decision to maintain the grievance in

abeyance at the second level because she knew that there was sufficient information to move it forward. The expected ATIP request information was unnecessary.

[84] She continued to help the complainant with her accommodation needs with the employer. The WIDHH conducted a second workplace assessment for the complainant. On September 11, 2017, it presented its findings and recommendations to the employer in a report.

[85] The report pointed out that the buddy system was not successful for both the complainant and the buddies. Had the complainant been given access to ASL interpreters throughout her employment, in training sessions, and to help understand the templates and hands-on materials that were necessary to complete her job duties, she would have had a better opportunity to understand the material. She would have had a better chance to meet the employer's expectations and the opportunity to succeed. The report concluded that not providing the ASL interpreters to the complainant ensured her failure.

[86] The complainant felt left out and isolated; she had not been introduced to her new team members, even though she granted permission to her team leader to inform her colleagues that she is deaf. The report concluded as follows:

> …
>
> *From a diversity cultural perspective, not introducing a new member to a team particularly when a member is Deaf and uses American Sign Language reinforces "otherness". It prevents the staff member from building rapport from the onset of the transition to the new position…* [A.B.] *is already aware that she is different from her team members, she uses a different language and she cannot hear any interactions among the people that she is working with. Please see suggestions in the recommendation section for addressing this workplace cultural conflict.*
>
> …

[87] The report noted the employer's concerns about the complainant's poor grammar skills and stated that it is a common phenomenon among prelingual deafened individuals educated in provincial schools before 1992, whose first language is ASL, and who were born to hearing parents.

[88] Parenthetically, Ms. Paris noted that the WIDHH provided that same information to employer and the respondent back in 2011.

[89] The report concluded that the buddy system that the employer introduced to address the issue did not work and that there are accessible methods that ensure that deaf and hard-of-hearing employees obtain the same opportunities to display their competencies and failures. The accommodation measure that the employer implemented to address the grammar issue, namely, the buddy system, was ineffective and unreasonable. Providing the complainant with ASL interpreters would have been more effective.

C. For the respondent

[90] Ms. Kenny testified on the respondent's behalf. She became involved in the local union first as its chief shop steward and was then elected its president in 2018. At that time, it had approximately 1250 members, which made it one of the largest locals in that region. Since November 2016, she has worked exclusively on bargaining agent matters. She has represented members in several grievances, most of which involved accommodation. She is a trained negotiator and has vast experience assisting persons with disabilities. She is disabled and requires workplace accommodations.

[91] She described her experience being accommodated by the employer. According to her, it took more than three years to implement her accommodations. In her experience, it is very difficult to secure accommodation from the employer. She is aware of many employees who struggle to be accommodated by the employer. It often uses the performance management process to mask its reluctance to spend the money to implement proper accommodations.

[92] She did not personally represent the complainant as a steward but had knowledge of her case through discussions with the union local's president, Theresa Greenough, and through her review of the correspondence.

[93] According to Ms. Kenny, Ms. Paris was brought on board as a union steward in August 2016, specifically to work on the complainant's file and to help her accommodation move forward. She referred to an email dated August 11, 2016, from Ms. Greenough to the complainant that stated as follows:

> …
>
> *I would like to let you know that Gina Paris (Lodge) has joined your representation team along with myself.*

> *She will also be attending meetings and helping you with your accommodation.*
>
> *She would like you to file an ATIP request for information and is going to help you today to fill out the form.*
>
> *In the event of a rotating strike, I will not be in the office and you should contact Johann if any emergency issues come up.*
>
> *NOTE: Gina will be off for the next 5 weeks.*
>
> *…*

[94] According to Ms. Kenny, Ms. Paris did not follow protocol when she handled the complainant's file. Ms. Paris filed the November 2016 grievance without authorization. As a union steward, Ms. Paris should have sought approval for the grievance's wording from the respondent's chief steward, president, or both; she did not.

[95] Ms. Kenny also criticized the grievance's wording and stated that she would have filed two grievances instead — one on the duty to accommodate, and one on discrimination. When challenged on the difference between the 2016 and the 2011 grievances, she admitted that the 2016 grievance was better written than the 2011 grievance. The 2011 grievance stated as follows:

> *Details of Grievance …*
>
> *I grieve that management has failed to accommodate me with my disability and I have been treated unfairly due to my disability.*
>
> *Corrective action requested …*
>
> *That the employer accommodates me at my current level of job. That the employer find me meaningful position at my substantive job level and that I am made whole.*

[96] Ms. Kenny criticized Ms. Paris' grievance presentation at the first level and claimed that Ms. Paris did not present any evidence to support the grievance. Ms. Paris was wrong to remove the grievance from abeyance at the second level. She did not follow protocol. There was not enough information to present at the second level. She received an anonymous tip that information in the ATIP request documentation would help with prosecuting the grievance at the second level. So, in her view, the grievance had to remain in abeyance until the ATIP information was received.

[97] In her view, it was better to win the grievance at the second level or to secure a memorandum of agreement at that level. It was important for the union stewards and the local union executives to be on the same page; otherwise, the employer would, in

her words, “divide and conquer”. Ms. Paris was not on the same page as the local union executive.

[98] Ms. Kenny explained that the employer must accommodate employees to the point of bankruptcy. The employer has deep pockets, yet it was very difficult to secure accommodations for employees who needed them. The employer wanted the complainant to perform all the job duties, including phone calls. It expressed concerns about her performance. She was aware that the employer wanted to demote her permanently.

[99] The respondent was always willing to represent the complainant. It was unfortunate that she received bad advice from Ms. Paris to withdraw her grievance. The respondent cannot impose itself on a bargaining unit member who does not want to be represented. The respondent knew that withdrawing the grievance would be detrimental to the complainant’s case. Even its national office was aware of the situation and encouraged the complainant to work with the local union, to advance her grievance.

[100] Ms. Kenny referred to a letter dated September 5, 2017, from the respondent’s national office to the complainant, urging her to work with the union local to pursue the complainant’s grievance. The letter stated that it was unlikely that the CHRC would deal with the complainant’s complaint because she had withdrawn her grievance. The letter assured her that the respondent would help her pursue the grievance with the employer and urged her to work with the local union executives.

[101] On cross-examination, Ms. Kenny admitted that she knew that the employer’s manager at the second level was playing games and being manipulative. She also admitted that the cognitive testing that the employer asked for had nothing to do with accommodating A.B.’s deafness. Also, the respondent was aware that the situation was causing A.B. significant and severe stress.

[102] She admitted that the second level in the grievance process could be waived, and the grievance moved to the next level; however, she was unable to explain why that was not done when the respondent knew that management at that level was being manipulative and playing games.

[103] She testified that she was concerned that the local union would have to pay for any damages from the complainant's DFR and that the executives could potentially be personally responsible for them.

[104] In reply, she explained that it was a stressful time for the local union because of the ongoing WFA exercise. The complainant had a job, and management had assured the respondent that it would implement accommodations for her after the cognitive assessment was done. She believed that some testing was required but disagreed with the type of testing that the employer requested. It also admitted that the cognitive assessment that it requested was unrelated to her hearing impairment.

[105] The complainant was not the only employee who required accommodation. With management's assurances about her accommodation, the local union moved on to work on other urgent files. Management had agreed to bring in the WIDHH to carry out the assessment, so the respondent had bought some temporary reprieve. Bargaining unit members in the local union were losing their jobs. The complainant maintained her employment, so the respondent could wait for the ATIP information and then deal with the grievance. It was unfortunate that she decided to withdraw it. After that, the respondent no longer represented her on the grievance, but it continued to represent her in the ongoing WFA exercise.

IV. Summary of the arguments

[106] Both parties provided the Board with an outline of their respective arguments, which are retained on file. The complainant also presented a brief on the issue of remedy and damages that also is retained on file.

A. For the complainant

[107] The complainant referred to *Canadian Merchant Service Guild v. Gagnon*, 1984 CanLII 18 (SCC), for the general principles of the DFR's scope.

[108] The complainant started working for the employer in 1993. She was born deaf. It is a permanent disability, and it is protected under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) and the provisions of the collective agreement between the employer and the respondent. Both the employer and respondent have policies and guidelines in place on the duty to accommodate disabled employees.

[109] The respondent was aware that the employer was reluctant to provide ASL interpretation to help the complainant with training and meetings. It knew that the employer continually set up barriers to accommodating her rather than removing them, but it did nothing. The respondent's local union executives could have moved the grievance forward, but they continually stated that they had to wait for the ATIP information.

[110] Ms. Paris argued that the local union executives antagonized her in her capacity as the designated union steward for A.B. and that they interfered with her handling of A.B.'s grievance. She was told that she had to listen, or they would take A.B.'s case from her, which they eventually did. When she tried to advocate to advance the grievance, the respondent continually stated that it required information, but in reality, it had the information to move the grievance forward or to waive the second level. A.B. was very stressed and had to use a large amount of sick leave during the relevant period.

[111] When Ms. Paris contacted the respondent's national headquarters for help, she was reprimanded and was told not to reach out to the national office but to deal with the regional and local representatives. The respondent's local representatives repeated that they would represent the complainant, but it did nothing to help her.

[112] Ms. Paris argued that the respondent treated A.B. in a discriminatory manner when it decided to keep her grievance in abeyance at the second level of the internal grievance process even though A.B. insisted that it be moved along. It had no valid nor cogent reason for maintaining the grievance in abeyance. A.B. clearly told the local union executives that she needed an interpreter because she could not understand everything that was going on. She told them that she felt that over the years she had been receiving different treatment from the respondent and did not understand why it was asking her to wait longer for her grievance to be processed.

[113] On the issue of remedy and the claim for damages, the complainant referred to several cases, including *Stringer v. Treasury Board (Department of National Defence)*, 2011 PSLRB 110; *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20; *Audet v. Canadian National Railway*, 2006 CHRT 25; *Richards v. Canadian National Railway*, 2010 CHRT 24; *Legros v. Treasury Board (Canada Border Services Agency)*, 2017

FPSLREB 32; *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3; and *Turner v. Canada Border Services Agency*, 2010 CHRT 15.

[114] The complainant argued that the cases that she cited clearly set out that the respondent has routinely represented its members with disabilities but that it failed to in her case by choosing to hold her grievance in abeyance indefinitely. For instance, the *Johnstone*, *Nicol*, and *Turner* cases were highlighted on the respondent's website.

[115] Ms. Paris argued that A.B.'s disability made her vulnerable in terms of her employment stability and her dependence on others. She put her trust in the respondent yet experienced an inordinate delay receiving an accommodation that would have helped her carry out her job duties.

[116] The complainant urged the Board to set a precedent in this case by awarding damages as follows: 1) the value of the sick leave that she used (approximately 663.75 hours) between April 2014 and July 2019 in the amount of $45 000.00, 2) punitive damages in the amount of $20 000.00, and 3) the return of the union dues that she paid, in the amount of $3780.00.

[117] According to the complainant, the Board should send a strong message to the respondent, to prevent her from suffering discrimination a third time.

B. For the respondent

[118] The respondent's representative prefaced his remarks by raising three concerns. First, he noted that this is his first DFR complaint that went all the way to a full hearing. Second, he had a concern with the Board's comment that had the respondent been there, the complainant would have been before the CHRC. He wanted to point out that the respondent never represents members at the CHRC. Third, both he and the respondent's witness have disabilities.

[119] Based on his concerns, the Board inquired as to whether the respondent was asking for the Board's recusal based on the CHRC comment. He stated that he was not asking for a recusal.

[120] The respondent referred to the following authorities: *Fragomele v. Public Service Alliance of Canada*, 2021 FPSLREB 117; *Gagnon*; *Bergeron v. Public Service Alliance of Canada*, 2019 FPSLREB 48; *Boudreault v. Public Service Alliance of Canada*, 2019

FPSLREB 87; *Delice-Charlemagne v. Public Service Alliance of Canada*, 2021 FPSLREB 143; *Tyler v. Public Service Alliance of Canada*, 2021 FPSLREB 107; *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90; *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20; *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78; *Doe v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 89; *A.B. v. Canada Revenue Agency*, 2019 FPSLREB 53; and *K.D. v. Sodexo Canada Ltd.*, 2019 CanLII 68648 (BC LRB).

[121] The respondent referred to *Gagnon* as authority for setting out the general principles in determining DFR complaints.

[122] It cited *Delice-Charlemagne*, *Esam*, *Tyler* and *Castonguay* for the timeliness issue, however, as previously noted, it withdrew that objection at the outset of the hearing.

[123] It also relied on *Doe*, *A.B.* and *K.D.* for its request to anonymize the complainant's name in the decision.

[124] The respondent argued that A.B. made this complaint because she disagreed with the respondent's strategic approach to processing her grievance. Disagreement over strategy is not sufficient to support a DFR complaint (see: *Fragomele* at paras. 32 to 34; *Bergeron* at para. 100; *Boudreault* at para. 36; and *Paquette* at para. 38).

[125] The respondent did not have sufficient information to present the grievance at the second level. It was also waiting for the ATIP information because it had a tip that it contained helpful information for the grievance.

[126] The respondent has always been willing to help the complainant; it has never wavered. It regrets that she had to use sick leave during the relevant period. It argued that Ms. Paris did not provide relevant information to the respondent. She did not inform it of the ongoing workplace discrimination. As for removing Ms. Paris as a union steward for A.B., it was not discriminatory nor differential treatment. The local union executives had the sole discretion to appoint union stewards. It argued that it was, in its words in "a really weird situation" because the two union stewards who had previously supported the complainant back-to-back were declared medically unfit and medically retired, almost at the same time. This made it difficult for the respondent to

obtain the necessary files and information to present at the hearing. Ms. Paris exacerbated this situation by not providing information to the union executives.

[127] The respondent argued that it should not be held responsible for the complainant's decision to withdraw her grievance based on Ms. Paris' misguided advice. It was always prepared to move the grievance forward provided it had the proper information to achieve a successful outcome. It denied that maintaining the grievance in abeyance was discriminatory.

[128] The respondent urged the Board to consider that the local stewards were volunteers who were doing their best to help their members out. When they make mistakes, they learn from them as they move forward.

[129] The respondent argued that the applicable law was contained in the cases listed in its book of authorities.

[130] It argued that it did its best to support the complainant during a particularly difficult period when its members were at risk of losing jobs.

[131] The respondent asked the Board to dismiss the complaint.

V. Analysis and reasons

A. Legal principles that apply to the facts of this case

[132] Section 187 of the *Act* provides that no bargaining agent and none of its officers and representatives "… shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit."

[133] Under s. 190 of the *Act*, the Board must examine and inquire into any complaint made to it that an employer, employee organization, or any person has committed an unfair labour practice. A violation of s. 187 is an unfair labour practice within the meaning of the *Act*.

[134] Section 192 provides a range of remedial orders that the Board may make if it determines that a complaint is well founded (see *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 124 at paras. 25 to 31, *Ménard* 2).

[135] The complainant must present sufficient evidence to support the DFR allegations (see *Ouellet v. St.-Georges*, 2009 PSLRB 107 at para. 31).

[136] In *Gagnon*, at page 527, the Supreme Court of Canada explained a bargaining agent's DFR obligation in the following terms:

> …
>
> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *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.*
>
> …

[137] While a bargaining agent's members have a right to be represented, it is not absolute. Their representational rights do not entitle them to dictate how the bargaining agent carries out its obligations under s. 187 of the *Act*.

[138] A bargaining agent enjoys broad discretion when making representational decisions and when handling grievances. Its discretion must be exercised within the parameters set out in the *Gagnon* decision.

[139] The Board's role in a DFR complaint is not to determine whether the bargaining agent's representational decision was reasonable or correct but to assess the integrity of the decision-making process that led to the impugned decision. There is a high threshold or bar for establishing arbitrary, discriminatory, or bad-faith conduct (see *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44 at para. 59; and *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13 at para. 54).

[140] A bargaining agent breaches its DFR obligation under s. 187 if it represents one of its members in bad faith, discriminatorily, or arbitrarily. The Board's jurisprudence has clearly defined the parameters of the concepts of bad faith, arbitrariness, and discrimination in the context of a bargaining agent's DFR obligation.

[141] Bad faith cannot be presumed. Bad faith means the absence of good faith. In the context of a DFR about processing an employee's grievance, a respondent exercises good faith when it 1) seriously considers the facts of the employee's case, 2) considers the seriousness of the grievance and its consequences for the employee, and 3) considers its legitimate interests.

[142] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, the Supreme Court of Canada explained that the bad-faith prohibition under s. 47.2 of the Quebec *Labour Code* (CQLR, c. C-27) presumes an intent to harm or malicious, fraudulent, spiteful, and hostile conduct that in practice, would be difficult to prove (see *Noël*, at para. 48).

[143] A complainant must demonstrate that the bargaining agent's decision was motivated by ill will, an intent to harm, hostility, spite, and dishonesty. The Board must closely and objectively examine the facts, to conclude that the respondent's actions were motivated or tainted by bad faith.

[144] For instance, in *Benoit v. Trimble*, 2014 PSLRB 46, the Board found that the respondent's actions against the complainant were so hostile as to constitute bad faith. In that case, the local union president sent rude, aggressive, and inappropriate emails about the complainant to other union executives. The executives orchestrated a hostile campaign against the complainant, which led to him being the subject of two workplace-harassment complaints.

[145] The complaint in *Beaulne v. Public Service Alliance of Canada*, 2009 PSLRB 10, was dismissed because it was untimely. However, I find the Board's findings on bad-faith behaviour instructive. In that case, the local union president acted in bad faith against the complainant by taking sides and using his position to destroy the complainant's reputation in the workplace. The Board stated as follows:

…

> *281 Usually, a breach of the duty of fair representation deals with a refusal by the bargaining agent to represent an employee in his or her relationship with the employer, particularly in filing*

> *grievances, or with the quality of that representation… In my opinion, when there is a conflict between a member of a bargaining unit and another member of the same unit or a non-member of the unit, the bargaining agent breaches its duty of fair representation when a member of the bargaining unit executive acts in bad faith by taking the side of one of those persons or by attempting to harm the interests of one of those persons, with no valid reason. In this complaint, the evidence has established that Mr. Beauchamp, acting as president of the bargaining unit, acted in bad faith toward the complainant by taking the side of the complainant's former girlfriend and by using his position in the union to attempt to harm the complainant's reputation and interests with the employer, with no valid reason.*
>
> …

[146] Arbitrariness connotes notions of negligence, superficiality, carelessness, and capriciousness. An intent to harm is not required. In *Noël*, the Supreme Court of Canada explained the concept of arbitrariness 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]

[147] In *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79, the complainant alleged that the respondent breached its DFR when it failed to advance his suspension grievance to adjudication. His employer instructed him not to attend a conference that was being held on a cruise ship by a third-party supplier. Since he had already purchased a ticket for his spouse to attend the cruise portion of the conference, he decided to take his annual leave and attend it with his spouse. He purchased his ticket and went on the cruise during his annual leave. He did not attend the conference, as the employer had instructed.

[148] When that complainant returned to work, the employer imposed a five-day suspension on him and ordered him to reimburse it for the cost of the conference. He grieved the discipline, with the respondent's help. It represented him through the internal grievance process but refused to refer the grievance to adjudication. Its view was that the discipline was warranted and was not excessive because the complainant had disobeyed a direct order.

[149] The respondent did not thoroughly investigate the matter and made certain unfounded assumptions about the facts. It decided not to refer the grievance to adjudication because it believed that it would be unsuccessful. Its opinion was based on the rigid paramilitary culture of its representatives, who had reviewed the complainant's file. According to them, when an employee is ordered to do something, they must obey.

[150] After thoroughly reviewing the existing DFR case law, the Board summarized the applicable test as follows:

> …
>
> *[125] I believe the current state of the law in Canada according to the existing jurisprudence can be summarized as follows. The power conferred upon a union, as such is found in subsection 10(2) of the PSSRA and other similar legislation, to act as spokesperson for the employees of a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit. For matters involving a complaint of unfair representation, as in section 23 of the PSSRA, the examination of the union's actions includes the union's decision to represent or not represent the member at all levels, including during the grievance process, as well as the union's decision to represent or not represent the member at arbitration.*
>
> *[126]* ***When representation is undertaken by the union, such representation must be fair, genuine and not merely apparent. It must be undertaken with integrity and competence, without major negligence, and without hostility towards the employee****. When a consideration is made in regard to arbitration, it is recognized that the employee does not have an absolute right to arbitration for the union enjoys considerable discretion in the making of this decision, but that discretion has limits based on the severity and impact of the disciplinary action upon the employee. The union's discretion must be exercised:*
>
> *a) in good faith, objectively and honestly;*
>
> *b) after a thorough study of the grievance and the case, and not merely cursory or perfunctory;*

> *c) having pondered all relevant considerations of the case;*
>
> *d) taking into account the significance of the grievance for the member and its consequences for the member;*
>
> *e) taking into account the legitimate interests of the union;*
>
> *f) with regard to proper motives only.*
>
> *[127] In the final analysis, the union's decision vis-à-vis the representation of its members will not be disturbed absent the elements of bad faith, or actions which are arbitrary, capricious, discriminatory or wrongful, providing that the union has met the criteria above.*
>
> …
>
> [Emphasis added]

[151] In *Savoury*, the Board found that the respondent processed the complainant's grievance arbitrarily. The respondent had a duty to be fair, genuine, and not merely apparent. It failed; although it enjoyed wide discretion when handling grievances, it did not exercise its discretion objectively. It failed to thoroughly study and examine the grievance and consider all the relevant aspects of the case.

[152] In *Ménard v. Public Service Alliance of Canada, 2010 PSLRB 95 (Ménard 1)*, the complainant met with a representative of the respondent, to discuss her workplace problems. The representative prepared a grievance and presented it to the employer on the complainant's behalf. It was agreed that the grievance would be put on hold until the complainant returned to work from sick leave. She then found a new job and left the employer. The respondent withdrew the grievance because it reasoned that since she no longer worked for the employer, the corrective action sought in the grievance could not be granted.

[153] The Board analyzed the evidence and found that the bargaining agent's decision to not continue the complainant's grievance was arbitrary. The Board noted that the arbitrary element in that case was the respondent's reasons for refusing to follow up with the grievance, not the decision itself. The Board explained that the respondent's reasoning was not based on a "… serious study of the case, the nature of the lost wages at issue and the likelihood of being granted the requested redress" (see *Ménard 1*, at para. 27).

[154] The Board allowed the DFR complaint in *D'Alessandro v. Public Service Alliance of Canada*, 2018 FPSLREB 90, because it found that the respondent was negligent and

arbitrary in how it handled the complainant's requests for help. The Board explained as follows:

> …
>
> ***44*** *… Through his oral testimony and written communications, the complainant established that he had repeatedly sought the respondent's assistance at the local, component, and national level, only to be shunted from pillar to post and placated with platitudes and assurances that his interests would be protected. It was all to no avail.*
>
> ***45*** *The respondent's representative at the hearing chose to call no evidence or to respond in any meaningful way to the evidence that was presented to the Board, or even to assert that no* prima facie *case had been established. According to* Black's Law Dictionary, *a* prima facie *case is established when enough evidence is produced to allow the fact-trier to infer the fact at issue and to rule in the party's favour. Such a case is easily rebutted by presenting evidence that establishes facts to the contrary or facts that put the evidence before the Board in a fuller context. Such evidence in this case might have been what, if any, internal consultation process occurred before the respondent decided to refuse to represent the complainant.*
>
> ***46*** *Rather, the respondent's representative declined to cross-examine the complainant in that respect or to call any direct evidence on behalf of the respondent to establish the nature of such consultations and considerations. She demonstrated through her own conduct the disrespectful and intolerant treatment by the respondent of which the complainant complained, and that left the Board with no evidence that would support the respondent's argument that the respondent met its duty of fair representation. Even the respondent's argument, while accurate from an academic perspective, creates an unusual situation as the Board finds itself at a loss to apply the argument in the absence of any evidence to contradict that provided by the complainant.*
>
> ***47*** *The respondent's representative is correct that the duty of fair representation is a procedural right, but that does not mean that the respondent can dismiss one of its members without due care and consideration of his or her request. The complainant contacted Mr. Janz, Mr. Stapleton, Ms. Hauck, and Ms. Benson from April 21, 2016, up to and including June 23, 2016, about filing grievances, particularly a grievance against his layoff. I have no evidence of what, if any, consideration his request was given, so in the absence of it, I must rely on the evidence that I do have, which is the series of email exchanges that shunted the complainant from one representative to another and that promised to contact him promptly with further information.*
>
> ***48*** *When that promise was broken, the complainant followed up, only to be shunted elsewhere and to receive further promises. Ultimately, he was told that he would not be represented as he was*

> *no longer an employee, despite the contents of the layoff letter, which clearly indicated that he had the right to grieve the layoff and that without notification, he could have grieved his layoff without the respondent's support, as it was a termination of employment. There is no evidence of any consideration of his request for representation.*
>
> …

[155] Discrimination is not defined in the *Act*. In the context of a DFR complaint, the Board has defined it to include differential treatment and making illegitimate distinctions based on irrelevant grounds. In *Gilkinson v. Professional Institute of the Public Service of Canada*, 2018 FPSLREB 62 the Board explained as follows:

> …
>
> *17 Discrimination is not defined in the Act. However, the French version of the* Act *speaks of "*distinctions illicites*", or illegitimate distinctions, to translate discrimination. Black's Law Dictionary defines discrimination as "differential treatment"; the Concise Oxford Dictionary defines the verb discriminate as "to make an unjust distinction in the treatment of different people".*
>
> …
>
> *19 Discrimination, then, involves an illegitimate distinction based on irrelevant grounds. In this case, the complainant has not shed any light on the nature of the distinction he alleges. No grounds are invoked. Rather, a conflictual situation has arisen.*
>
> …

[156] In *Shutiak v. Union of Taxation Employees — Betty Bannon, National President*, 2008 PSLRB 103, the Board explained that "discriminatory" as used in section 187 of the *Act* refers to prohibited grounds of discrimination under the *CHRA*. The Board explained further that that the use of the word "discriminatory" in section 187 has a particular legal meaning, restricting its inquiry to prohibited grounds set out in federal human rights legislation. A complainant must therefore demonstrate that the respondent's conduct violated his or her human rights. (see *Shutiak*, at paras.16 and 17).

[157] In *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103, the Board further explained the scope of discrimination in the context of labour relations as follows:

> …

> *86 In the context of administrative justice and labour relations, a broad interpretation of discrimination within the bounds of the legislation is appropriate, and the Board must consider not only the "… result of the application of disciplinary standards but also the basis for their application and the manner in which they have been applied." Further, in* Daniel Joseph McCarthy, *[1978] 2 Can LRBR 105; cited in* Beaudet-Fortin *at paragraph 84, the following was stated:*
>
> *…*
>
> ***In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by [human rights legislation]; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that there is no fair and rational relationship with the decision being made** …
>
> *87 In my view, those comments can be applied to considerations of discrimination under paragraph 188(c) of the* Act. *The goal of preventing discrimination under that provision is inclusive and is achieved by preventing bargaining agents from excluding employees from the activities of an employee organization based on attributed rather than actual abilities. The essence of the protection is to prevent illegal, arbitrary or unreasonable barriers. On the other hand, barriers or distinctions that are legally valid and genuinely based on a rule or policy that has a fair and rational relationship to the decision being made may be valid and defensible. In some cases, the treatment of an employee will be based on a valid distinction rather than prohibited discrimination, even though the distinction has a negative impact on the employee: "[n]ot every distinction is discriminatory." In addition, the employee has the burden to prove that there was discriminatory conduct by a bargaining agent.*
>
> …
>
> [Emphasis added]

[158] Although *Shutiak* and *Bremsak* dealt with s. 188(c) of the *Act*, I find the Board's approach to the meaning of discrimination or "discriminatory manner" equally useful and applicable to s. 187.

[159] In *Bingley v. Teamsters Local Union 91*, 2004 CIRB 291, the Canada Industrial Relations Board (CIRB) reviewed several decisions on a bargaining agent's DFR obligation in the context of a disabled employee and the duty of accommodation under

human rights legislation. The CIRB concluded that in processing a grievance for a disabled employee requiring workplace accommodation, the bargaining agent must put an extra effort into the case. It explained:

> …
>
> *[64] Due to the sensitive and important issues associated with the accommodation of disabled workers in the workplace, labour boards also look to see whether unions have given disabled employees' grievances greater scrutiny. The cases generally concur that the usual procedure applied to other members of the bargaining unit may be insufficient in representing a griever with a disability, mainly because the member's situation will require a different approach…*
>
> …

[160] The CIRB held that a bargaining agent must be proactive and more attentive in handling such grievances because it also has a role to play in the accommodation process (see *Bingley*, at para. 74).

[161] *Bingley* involved a delivery driver who returned to work after cancer surgery. Her doctor recommended workplace accommodations including a reduced shift to minimize her exposure to the sun. The employer refused to implement the reduced shift accommodation measure and resorted to delay tactics and performance management. The employer wanted to demote her because she could not work a full shift. A full shift was eight hours, and the recommended accommodated shift was six hours. Ms. Bingley's efforts to obtain accommodation was protracted over a lengthy period with little to no help from her union. At her insistence, the union filed a grievance but left it in abeyance and eventually decided not to refer it to arbitration. Her complaint was based partly on the union's non-referral decision.

[162] The CIRB was careful in its analysis, being mindful of the union's wide discretion in decisions to refer grievances to arbitration. It adopted four non-exclusive criteria as guidelines to evaluate whether the union satisfied its DFR obligation in matters involving the duty to accommodate, as follows (see *Bingley*, at para. 84):

> …
>
> - *whether the union's intervention was reasonable where the employer failed to implement appropriate accommodation measures;*

> - *whether quality of the process that allowed the union to come to its conclusion was reasonable;*
> - *whether the union went beyond its "usual" procedures and applied an extra measure of care in representing the employee;*
> - *whether the union applied an extra measure of assertiveness in dealing with the employer.*

[163] Applying those criteria to the facts, the CIRB concluded that the union's conduct was discriminatory and in bad faith (see *Bingley*, at para. 115).

[164] The Board considered *Bingley* in *Tyler v. Public Service Alliance of Canada*, 2021 FPSLREB 107 and *Kemp v. Public Service Alliance of Canada*, 2024 FPSLREB 87. In both cases, the Board recognized that the analytical approach in *Bingley* was appropriate for DFR complaints where the complainant suffered from a disability but cautioned that it must not be applied in a manner that holds the bargaining agent to a standard of perfection (see *Tyler*, at paras. 185 to 187; *Kemp*, at paras. 83 to 85).

[165] In *Kemp*, the Board adopted the Nova Scotia Labour Board review officer's application of *Bingley* to a DFR complaint in *Murphy v. Unifor Local 4606*, 2021 NSSC 323, where the Nova Scotia Supreme Court upheld review officer's decision dismissing the DFR complaint. The Board explained as follows (see *Kemp* at paras. 86 to 87):

> *[86] …* [the court] *reviewed and confirmed the provincial Labour Board's application of* Bingley*, in which it conducted a two-fold analysis: substantive and procedural. On the substantive side, the analysis was specifically centred on the union's decision to refuse its assistance to a disabled member or to stop such assistance at a certain point, to ascertain that it was not discriminatory in and of itself. As for the procedural aspect, it related to the process that the union in that case followed to reach that decision, to determine if it had an adverse impact on the complainant as it failed to take account of and therefore accommodate his disability. I will take that approach.*
>
> *[87] As a starting point, for the complainant to benefit from the approach taken in* Bingley*, the following elements must be present. Firstly, the complainant must demonstrate the existence of a disability. Secondly, the disability or limitation must be known, or ought to have been known, by the union, as it could not be found faulty for not considering or accommodating something that it was not aware of. Finally, the situation underlying the duty-of-fair-representation complaint must be based on allegations of a breach of the employer's duty to accommodate (see* Bingley*, at paras. 57, 62 to 64 and 74).*

[166] As I analyze the facts of this case through the lens of the applicable legal principles, I am mindful of the Supreme Court of Canada's statements in certain decisions, which I view as guiding principles that must inform my analysis.

[167] As noted earlier, in his dissenting opinion in *Alberta Reference*, Chief Justice Dickson stated as follows:

> …
>
> *91.* ***Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.*** *In exploring the personal meaning of employment, Professor David M. Beatty, in his article "Labour is Not a Commodity", in* Studies in Contract Law *(1980), has described it as follows, at p. 324:*
>
> > *As a vehicle which admits a person to the status of a contributing, productive, member of society,* ***employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others****. It is this institution through which most of us secure much of our self-respect and self-esteem.*
>
> …
>
> [Emphasis added]

[168] Although the Supreme Court of Canada overruled the *Alberta Reference* in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ("*SFL*"), Justice Abella noted that Chief Justice Dickson's dissenting opinion in that case had been influential in developing jurisprudence on the outer limits of collective bargaining, the right to strike, and s. 2(d) of the *Canadian Charter of Rights and Freedoms* (enacted as Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.)) (see *SFL*, at paras. 33 and 34).

[169] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), Justice McLachlin cautioned as follows:

…

> *64 Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.*

…

[170] Finally, I am mindful of Justice Sopinka's oft-quoted statement in *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), which is that workplace accommodation is a multi-party inquiry involving the employer, the bargaining agent, and the employee. In that case, the Court identified two ways in which a bargaining agent could be liable for discrimination. It is liable as a co-discriminator with an employer when it takes part in the discriminatory act, directly or indirectly. It is also liable when it fails to address discrimination even if it does not cause or take part in it.

B. The relevant facts

[171] The complainant has a permanent disability that requires workplace accommodation. The purpose of the accommodation is to enable her to successfully carry out the duties of her position. Being successful in the workplace contributes to her sense of identity, self-worth, and emotional well-being at work, while achieving the employer's legitimate work results.

[172] In this case, the employer struggled with accommodating the complainant. Its focus was more on her productivity and meeting certain targets, which were valid employer expectations. However, when viewed through the prism of discrimination and the duty to accommodate, it was questionable whether it appropriately tackled the search for a reasonable accommodation for her. It is not for me to decide that question in this complaint.

[173] The evidence discloses that the employer was able to implement a reasonable accommodation for the complainant after an earlier grievance and with the WIDHH's input.

[174] Ms. Paris was instrumental in resolving that earlier grievance and in successfully implementing accommodations for the complainant to the extent that she was able to function in the workplace with dignity and self-worth.

[175] In 2016, the employer made certain workplace changes, and the complainant's accommodation was put in disarray. The respondent brought in Ms. Paris as a union steward dedicated to working with the complainant and the employer to find a reasonable accommodation for her.

[176] Ms. Paris attempted to replicate the strategy that had been successful in the past by first filing a grievance on the complainant's behalf. The employer denied it at the first-level presentation, and it then was held in abeyance at the second level for approximately eight weeks.

[177] Ms. Paris and the local union executives disagreed about moving the grievance to the second level of the grievance process. Ms. Paris believed that there was sufficient information to present it at the second level. The executives disagreed and insisted that the grievance continue to be held in abeyance at the second level. Ms. Kenny testified that she received an anonymous tip that the ATIP request would yield information that would support the grievance; however, she was unable to describe the nature of that alleged smoking gun.

[178] Ms. Paris's removal from being the union steward responsible for the complainant's grievance, and the grievance's return into abeyance at the second level, led the complainant to withdraw it. She authorized Ms. Paris to continue to work with the employer for her accommodation needs. She also made the human rights complaint against the employer.

[179] It was common knowledge among all the parties that the employer's objective was to demote the complainant from her substantive SP-04 position. Its argument was that the complainant lacked the cognitive abilities and literacy required to perform all the duties of the SP-04 position, including client contact and communication.

[180] Complicating the situation for the complainant was the employer's WFA exercise, with its resultant job losses.

C. The respondent acted arbitrarily and in bad faith when it removed Ms. Paris from her union steward role

[181] I find that removing Ms. Paris from her role as the complainant's union steward at such a critical time was arbitrary and was done in bad faith. She was effectively the complainant's agent; therefore, I find that any animosity directed to Ms. Paris was effectively directed at the complainant. I note that the respondent's animosity toward Ms. Paris was palpable even at the hearing. During cross-examination, its representative accused her of giving the complainant bad advice and insinuated that she was incompetent.

[182] The complainant was comfortable with Ms. Paris' representation. The only reason that the local union executive removed Ms. Paris from her union steward role was due to personal motivation because it believed that that she did not follow protocol. There was no evidence that the respondent seriously and thoroughly considered its decision to remove her as the union steward dedicated to help with the complainant's accommodation or the impact that it would have on the complainant.

[183] The respondent specifically assigned Ms. Paris to help move the complainant's file forward, ostensibly because of her history and familiarity with the issue. Unceremoniously removing her from the complainant's file for no reason other than a disagreement over moving the grievance forward and the perception that she did not follow protocol was unconscionable. There was no evidence that the respondent thought the decision through, including its potential impact on the complainant.

[184] Technically, the respondent grudgingly acknowledged that the grievance that Ms. Paris drafted was appropriately worded. Ms. Paris requested and procured the complainant's files, researched suitable workloads that could be assigned to her, and helped her make the ATIP request.

[185] The respondent could not point to anything that Ms. Paris did that was wrong. As she reported to its national headquarters on March 10, 2017, she and the local union president were "having troubles communicating." She explained the treatment that she received as follows:

…

> *During my 6 months investigation, I would have ongoing challenges and barriers put upon me by management. This experience proved to be nothing compared to the treatment from Theresa after I filed the Level 2 grievance. Theresa Greenough advised me that I was to put the grievance case back on hold. I was told if I didn't listen to her the case would be taken away from me, this was also noted in a text to me. I asked for a meeting so I could present all my facts, the meeting took place on Feb 27th, Chef Stewart Heather Kenny also attended the meeting. The meeting was about 45 minutes long and during that time I was told, I need to do everything the President tells me to do. I don't listen. I show no respect, and I need to agree that I will put the case back on hold and tell Labour Relations that I made a mistake, my body language is bad…etc. The meeting ended with a speech on how I need to understand I can't win ever case, and then I was provided with a couple of examples of cases they lost. Anytime I tried to provide details on my case, she would shut me down stating "you are not listening" over and over again. I started to set up my cellular phone with the 2 minute video, under the Canadian Human Rights, that would clearly confirm the discrimination for this member but was screamed at to "turn it off and you're not listening". So I did listen for 45 minutes not because I like verbal abuse but for my MEMBER.*
>
> …
>
> [*Sic* throughout]

[186] The respondent did not contradict that account.

[187] The decision was arbitrary because the respondent did not even entertain the information that Ms. Paris said that she had on hand for the second-level grievance hearing, to assess whether it was sufficient to proceed.

[188] The decision was made in bad faith because it was based on personal animosity toward Ms. Paris (see *Benoit* at paras. 47 to 53 and *Beaulne* at para. 281).

D. The respondent acted arbitrarily and in bad faith when it placed the grievance into abeyance again

[189] Local second-level abeyance agreements serve a noteworthy purpose; however, the parties must vigilantly monitor grievances that have been placed in abeyance. In *Daigneault v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2023 FPSLREB 21, the Board cautioned that while second-level abeyance agreements are administratively convenient, there is a genuine and serious risk that certain time-sensitive grievances,

such as those about health and safety and accommodation, left to fester in abeyance may be "… unduly delayed to the point of falling through the proverbial cracks" and thus render any future remedy hollow (see paragraph 118).

[190] I find that in this case, the decision to return the grievance into abeyance was arbitrary and was made in bad faith.

[191] It was arbitrary for two main reasons. First, the respondent did not investigate the readiness to advance the grievance to the next level despite the steward's opinion that there was sufficient information to move it there. At the very least, the respondent's local representatives could have listened and assessed the information that Ms. Paris had to present. It simply said that it did not have sufficient information. If it did not know the information that had been accumulated to date, it begs the question as to the legitimacy of its claim that it did not have sufficient information.

[192] In *Noël*, the Supreme Court of Canada instructed that arbitrariness includes superficiality and failing to properly investigate a matter. That is exactly what happened in this case.

[193] Second, the other reason that the respondent provided for placing the grievance in abeyance again was that it was waiting for the ATIP information. Its witness testified that she received an anonymous tip that there was useful information in the ATIP information. It did not provide any evidence as to the nature of that information.

[194] The existence of the ATIP request was simply used as a proxy, to delay processing the grievance. That was careless and superficial. The respondent did not provide the Board with any plan or strategy as to how it proposed to deal with the grievance once it was placed again into abeyance. The abeyance agreement is not a parking lot. Its purpose to provide the parties with an opportunity to investigate, discuss, and take concrete steps to deal with the grievance.

[195] I find that the respondent's excuses for placing the grievance into abeyance again were pretextual, to park the grievance there and move on to other files.

[196] I also find that in this context, the decision was made in bad faith. First, it was to spite Ms. Paris and to effectively put her in her place because she did not follow protocol and in its words "did not listen".

[197] The local union president flexed her muscle and basically insisted that she had the last word on whether the grievance would proceed to the second level. That approach was highly politically motivated and spiteful.

[198] The Board was particularly struck by Ms. Kenny's testimony that in the heat of the WFA exercise, the complainant at least had a job. There were other members in the local union whose jobs were in jeopardy. I interpreted that testimony as effectively saying to A.B. that she had to accept the treatment that she received from the employer because she had a job. I find this attitude particularly disturbing because of the uncontested impact that the workplace treatment had on A.B.'s mental health and self-worth (see *Alberta Reference* at para. 91).

[199] Although the local union representatives communicated that they were willing to represent the complainant, I find that they simply paid pure lip service to the idea of representation. Their attitude toward Ms. Paris, who was the union steward who understood the complainant's situation and had previously helped her, spoke volumes to me. The personal attacks on Ms. Paris and the act of removing her from the complainant's file spoke volumes. It was completely understandable why the complainant withdrew her grievance.

[200] The respondent argued that after the complainant withdrew her grievance, there was nothing that it could have done. In Ms. Kenny's words, "the union could not force itself on her". I find that the fact that the complainant withdrew her grievance and did not want the respondent to continue to represent her on it did not absolve the respondent from liability for its DFR obligation.

[201] I draw support from the Board's decision in *Taylor v. Public Service Alliance of Canada*, 2015 PSLREB 35, in which the complainant broke off communications with the bargaining agent based on her interpretation of the final email exchange and hired a lawyer to represent her on her grievances. Although the Board found that her interpretation of the email was wrong, it went on to analyze the complaint and found that the bargaining agent had acted arbitrarily in its representation of her.

E. The respondent acted discriminatorily when removed Ms. Paris from her union steward role and placed the grievance in abeyance again

[202] The complainant argued that the respondent's actions and inactions towards her were discriminatory, for instance, she cited its acquiescence to the employer's

demand for cognitive testing and its removal of Ms. Paris as her union steward as examples of differential treatment. She attributed the respondent's alleged differential treatment of her to her disability.

[203] For its part, the respondent denied that it treated the complainant differently and insisted that the two sides simply disagreed about its strategy in processing her grievance.

[204] The Board finds that the facts in this case are like those in *Bingley* and meet the criteria for its application. In *Kemp*, the Board stipulated that the starting point for a complainant in a DFR complaint to benefit from the *Bingley* approach , three elements must be present, namely, 1) existence of a disability or limitation; 2) the respondent knew or ought to have known of the existence of the disability or limitation; and 3) the DFR complaint must be based on allegations of a breach of the employer's duty to accommodate the complainant.

[205] All three elements are present in this case, thus justifying the *Bingley* approach. The complainant has a disability known to the respondent, and the basis of this DFR complaint is an alleged breach of the employer's duty to accommodate her disability.

[206] I will apply the CIRB's non-exclusive criteria in *Bingley* as guidelines for my analysis. The respondent's duty to represent A.B. required it to reasonably cooperate with the employer in the accommodation process. In this context, I must assess the following *Bingley* criteria: 1) did the respondent reasonably intervene where the employer failed to implement appropriate accommodation measures; 2) was the quality of the process the respondent adopted in dealing with the complainant's accommodation reasonable; 3) did the respondent go beyond its usual procedures and apply an extra measure of care in representing the complainant; and 4) did the respondent apply an extra measure of assertiveness in dealing with the employer on behalf of the complainant.

[207] Having examined all the evidence, the parties' respective submissions and the caselaw, the Board finds that the respondent ultimately and resoundingly failed on all four criteria. The Board must acknowledge that to its credit, the respondent initially adopted the appropriate approach in bringing Ms. Paris on board to specifically deal with A.B.'s accommodation. Unfortunately, the process was derailed through no fault of the complainant or Ms. Paris.

[208] The respondent did not to intervene when the employer began to treat A.B.'s accommodation needs as performance-related issues and insisted on cognitive testing and assessment unrelated to the complainant's disability during the relevant period. With the respondent's knowledge of the employer's tactics in implementing accommodation generally, its acceptance of the employer's so-called assurances that it would accommodate A.B. after the cognitive testing amounted to silent complicity or condonation of the employer's behaviour.

[209] The respondent's involvement was required to make A.B.'s accommodation possible. *Bingley* dictates that when representing an employee with disability who is alleging an employer's failure in its duty to accommodate, the bargaining agent must take an extra measure of care and assertiveness. Initially, the respondent recognized this obligation when it appointed Ms. Paris as a union steward to specifically help with the accommodation process. A.B. was vulnerable and needed specialized support. Removing this specialized support was discriminatory in the context of this case because it was based on irrelevant grounds. It was an "illegitimate distinction" amounting to discrimination (see *Gilkinson,* at para. 19).

[210] I find that the respondent failed in its obligation to engage meaningfully in the accommodation process. It also actively blocked the person who was willing to engage in the process to help the complainant.

[211] I also find that its treatment of the complainant's grievance was discriminatory.

[212] Based on the respondent's knowledge of the overall accommodation challenges that the complainant faced and the employer's attitude toward her, treating her discrimination and duty-to-accommodate grievance as any other second level grievance had adverse discriminatory impacts on her.

[213] The respondent identified that the complainant's accommodation required specialized representation, which led to it bringing Ms. Paris on board. Once on board, Ms. Paris filed a grievance to get the employer engaged in the accommodation process. Consistent with how grievances are processed, it was placed in abeyance at the second level for two months, to allow Ms. Paris to gather more information to present at that level. When she was ready to present at the second level, she asked for the grievance to be removed from abeyance. The respondent's local representatives disagreed with Ms.

Paris' decision. Not only did it dismiss her as a union steward, but it also placed the grievance back into abeyance, indefinitely.

[214] The respondent provided no justification for its decision to place the grievance in abeyance again, nor did it explain why it removed Ms. Paris from her role.

[215] I find that placing the grievance in abeyance indefinitely at the second level of the internal grievance process effectively stalled the accommodation process. With the grievance in abeyance indefinitely, the respondent did not intervene to ensure that the accommodation process continued. As the *Bingley* guidelines dictate, the respondent failed to go beyond its usual procedures to apply an extra care in representing A.B. in her grievance. The process leading to its decision to maintain the grievance in abeyance was perfunctory and unreasonable. There was no evaluation of the quality of the information that Ms. Paris had gathered for the second level presentation. Nor did it explain why it did not bypass the second level to process the grievance to the final level. All these failures and the lack of assertiveness resulted in A.B. being left to fend for herself. As she testified, she experienced mental health impacts, she was confused as she could not fully comprehend what was going on and why the respondent was asking her to wait much longer for her grievance to be processed.

VI. Conclusion

[216] Based on the foregoing, I find that the respondent acted in bad faith and arbitrarily when it removed Ms. Paris from the union steward role and from the complainant's file. I also find that it acted in bad faith and arbitrarily when it returned the complainant's grievance to abeyance at the second level of the internal grievance process. That decision was arbitrary because the respondent failed to thoroughly review the entirety of the situation before insisting that the grievance remain in abeyance.

[217] I also find that these same actions amounted to discrimination because of the adverse impacts on the complainant and that her disability was a factor in the respondent's actions.

[218] Based on the respondent's knowledge of the complainant's accommodation needs and the employer's objective of demoting her, I find that Ms. Paris's removal directly harmed the complainant and made her extremely vulnerable during a period

of heightened stress in the workplace because of the WFA exercise. It was also discriminatory.

[219] I am fully aware of the jurisprudence to the effect that an employee is not entitled to a customized representation from a bargaining agent. This case is unique and can be distinguished from that line of jurisprudence because the respondent identified the need for a dedicated resource to help the complainant. The resource was Ms. Paris. There was no other reason for her removal than the personal animosity and disagreement with the local union executives. Ms. Paris' removal was also made in bad faith because it was a direct affront to her decision to schedule a second-level grievance presentation.

[220] Placing grievances in abeyance to allow parties to investigate and resolve grievances informally is a useful tool in the labour relations context because it can foster harmonious dispute-resolution. It is however not a useful tool for every grievance. In this case, returning the complainant's grievance to abeyance at the second level had a disproportionate discriminatory impact on her. She felt compelled to withdraw her grievance and pursue her recourse under the *CHRA*. Ironically, the respondent acknowledged in its letter dated September 5, 2017, to her that the Canadian Human Rights Commission will typically deny a complaint if the complainant withdraws his or her internal grievance and urged her to continue working with it to pursue a grievance against the employer. Not only is the respondent's position ironic, but the Board also finds it shockingly irresponsible.

[221] I find that the complainant met her burden, and that the complaint is substantiated.

[222] The complaint is allowed.

[223] The Board declares that the respondent breached its DFR obligation with respect to the complainant, contrary to s. 187 of the *Act*.

VII. Remedy

[224] Section 192 of the *Act* provides that if the Board determines that a complaint is well founded, it may make any order that it considers necessary in the circumstances against the party complained of. Section 192(1)(d) specifies as follows:

192 (1) *If the Board determines that a complaint referred to in subsection 190(1) is well founded**, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:***	***192 (1)*** *Si elle décide que la plainte présentée au titre du paragraphe 190(1) est fondée, **la Commission peut, par ordonnance, rendre à l'égard de la partie visée par la plainte toute ordonnance qu'elle estime indiquée dans les circonstances et, notamment :***
…	[…]
(d) *if an employee organization has failed to comply with section 187, an order requiring the employee organization to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on any proceeding that the Board considers that the employee organization ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on ….*	***d)*** *en cas de contravention par une organisation syndicale de l'article 187, lui enjoindre d'exercer, au nom du fonctionnaire, les droits et recours que, selon elle, il aurait dû exercer ou d'aider le fonctionnaire à les exercer lui-même dans les cas où il aurait dû le faire;*

[Emphasis added]

[225] Section 12 of the *Interpretation Act* (R.S.C., 1985, c. I-21) provides, "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." The opening words of s. 192(1) of the *Act*, which are that "… the Board may make any order that it considers necessary in the circumstances …" evoke a broad, expansive, and liberal grant of authority to fashion a remedy that it deems "necessary in the circumstances".

[226] Fashioning a remedy in a founded DFR complaint requires the Board to be mindful of the relevant principles and values that underlie the entire DFR regime in the *Act* and its objects. Simply put, a good understanding of the edifice constructed by ss. 185, 187, 190, and 192 of the *Act* lays the foundation for finding a remedy that is "necessary in the circumstances".

[227] The Supreme Court of Canada's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC), is the leading case about labour boards' remedial authority in the context of unfair labour practices. In that case, the

Court discussed the scope of the labour board's remedial authority under s. 99(2) of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"), which is a provision similar to s. 192(1) of the *Act*.

[228] It held that the breadth of the remedial section clearly indicated Parliament's intent that the labour board be given flexibility to fashion remedies that best addressed the entire spectrum of problems and factual circumstances that it faced and the authority to create innovative remedies required to counteract breaches of the *Code* and fulfil its purposes and objectives (see paragraph 65).

[229] In *Beaudet-Fortin v. Canadian Union of Postal Workers*, 2001 CIRB 132, the CIRB held that it had jurisdiction under s. 99 of the *Code* to order the payment of damages if the breach of the statute could be linked to a compensable loss suffered by the employee. It also noted that it retained considerable flexibility when dealing with questions of any limits on its remedial powers. It explained as follows:

> …
>
> *[31] The fact that there is a relation between the remedy and the unfair practice is not sufficient. In addition,* ***the Board must avoid ordering a remedy that is of a punitive nature****. The Divisional Court of Ontario commented on this matter in* Re Tandy Electronics Ltd. and United Steelworkers of America et al*. (1980), 115 D.L.R. (3d) 197, with respect to the similar power held by the Ontario Labour Relations Board:*
>
> > ***So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.***
>
> *[32]* ***Based on this reasoning, the Board may award damages or moral damages in a case involving a breach of the duty of fair representation, but there must be a relation between the damages claimed and the loss suffered as a result of the union's actions. Nevertheless, the Board must exercise caution when faced with the desirability of such a remedy****. As L'Heureux-Dubé J. stated it so well in* Gendron *v.* Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, which deals with the duty of fair representation, there are several other remedies in labour law that are much more appropriate than the awarding of damages:*
>
> > *… At common law, courts were restricted to an award of damages, whereas under the* Canada Labour Code *a broad*

> *range of remedies designed to "make whole" are available. The range of remedies recognizes that often an award of damages will only go a short distance in remedying the effects of a breach. Parliament has substituted a broad, comprehensive, remedial scheme much superior to an award of damages available at common law....*
>
> *…*
>
> [Emphasis added]
>
> [*Sic* throughout]

[230] The scope of the Board's remedial authority under s. 192(1) of the *Act* in the context of a founded DFR complaint has been discussed in several decisions.

[231] In *Ménard 2*, the Board analyzed the scope of its remedial authority under ss. 192(1)(a) to (f) of the *Act*. It identified two broad branches of remedial orders that it may make for breaches of the *Act*. It explained as follows:

> *…*
>
> *28 Paragraphs 192(1)*(a) *to (*f*) of the* Act *refer to specific orders about the different breaches of the* Act *for which a complaint may be filed under subsection 190(1). A cursory analysis of paragraphs 192(1)*(a) *to (*f*) shows that the legislator's intent was to set out specific orders for the different breaches of the* Act*. In general, each order aims to return to the complainant what was lost or not received because of the breach of the* Act*. Specifically with respect to the duty of representation, paragraph 192(1)*(d) *states that the Board may require the employee organization to take and carry on on behalf of the complainant or to assist the complainant to take and carry on any proceeding that the Board considers that the employee organization ought to have taken and carried on on the complainant's behalf or ought to have assisted the complainant to take and carry on. Clearly, the remedy directly addresses the breach committed.*
>
> *29 Under that legal framework, the word "including" in subsection 192(1) of the* Act *serves to introduce or "include" specific measures adapted to different breaches of the* Act*. However,* ***it should not be understood as limiting the power of the Board to order other measures as long as they are logically connected to the breach committed.***
>
> *30 Subsection 99(1) of the* Canada Labour Code *("the* Code*") includes provisions similar to those of subsection 192(1) of the* Act*. On the limited remedial authority of the Canada Industrial Relations Board (CIRB), the Supreme Court of Canada wrote the following in* Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369:*
>
> *…*

> *The remedy directed by the Board was not patently unreasonable; rather, it was eminently sensible and appropriate in the circumstances.* ***A remedial order will be considered patently unreasonable where: (1) the remedy is punitive in nature; (2) the remedy granted infringes the Charter; (3) there is no rational connection between the breach, its consequences, and the remedy; (4) the remedy contradicts the objects and purposes of the Code. A rational connection did indeed exist between the breach, its consequences and the remedy and the remedy affirmed the objects and purposes of the Code.***
>
> *…*
>
> *31 Given the wording of subsection 192(1) of the* Act *and the rule in* Royal Oak Mines*, the remedy corrective measures that I may order in this case are not limited to those set out in paragraph 192(1)(*d*) of the* Act*; however,* ***they must be logically connected to the breach of the* Act *and its consequences. The measures must not be punitive in nature, infringe the* Canadian Charter of Rights and Freedoms *or contradict the objectives of the* Code*.***
>
> *…*
>
> [Emphasis added]

[232] In *Ménard 2*, the Board recognized that in a well-founded DFR complaint, it must fashion a remedy that is tailored to what the complainant lost by the respondent's actions or inactions. The remedy must address the breach committed. The list of specific remedies under s. 192 does not limit the Board's power to fashion other measures or remedies to address the breach so long as they are "logically connected to the breach committed" (see *Ménard 2*, at paras. 28 and 29).

[233] Punitive damages must be restricted to malicious, oppressive, and high-handed misconduct (see *Ménard 2*, at paras. 35 and 36).

[234] In this case, in addition to a declaration of the breach, I find that an award of damages is necessary in the circumstances.

A. An award of general damages for pain and suffering is necessary

[235] The complainant testified that she was extremely stressed to an extent that she took an inordinate amount of sick leave. The respondent acknowledged that she was under extreme stress during the relevant period. I have no doubt that the respondent's failures had significant psychological impacts on her. Specifically, the respondent's removal of Ms. Paris as the union steward and advocate for the complainant was

devastating to her. Without any support from the respondent when she met with management, the complainant testified that she felt demeaned and isolated, but she complied because she needed to keep her job. She felt particularly betrayed when the respondent agreed with the employer that she needed to undergo cognitive testing.

[236] I find that an award of damages for pain and suffering is appropriate in this case and is logically connected to the respondent's actions and inactions.

[237] I reviewed the complainant's cited cases very closely and find that general damages for pain and suffering in DFR complaints appear to be exceptional, and when they were awarded, the amounts were based on two factors, namely, the nature of the respondent's conduct, and the psychological impacts on the complainant.

[238] In *Benoit*, the Board awarded damages in the amount of $2000 for the respondent's malicious, oppressive, and high-handed conduct toward the complainant (see paragraph 57). The complaint was founded on the basis of bad faith.

[239] In *Jutras Otto v. Brossard*, 2012 PSLRB 15, the Board declined to award monetary compensatory damages and ordered specific performance instead. The Board found no evidence to support the complainant's claim for general damages for pain and suffering.

[240] In *Romard v. Canadian Union of Public Employees, Local 3264*, 2000 CanLII 3423 (NS SC), a Supreme Court of Nova Scotia decision, the plaintiff was a unionized employee, and the defendant was the bargaining agent certified to represent the workers in his work unit, including him. The employer dismissed him for allegedly falsifying his time sheets. He sued the defendant in negligence for the breach of its DFR in the context of how it processed his dismissal grievance.

[241] The Court found that the defendant had breached its DFR because it did not exercise its discretion to take the grievance to arbitration in good faith, objectively and honestly and after a thorough study of the case. The Court also found that the local union executive harboured such animosity toward the plaintiff that it simply did not want to represent him and that it did not demonstrate a caring attitude toward him.

[242] Among other remedies, the plaintiff claimed general damages for pain and suffering and mental distress. The Court noted that even though he did not present any evidence from medical or psychological professionals, it was prepared to take

judicial notice of the fact that loss of employment would cause a certain degree of stress. The Court awarded the plaintiff damages for mental distress in the amount of $25 000. It found that the local executives' "not caring" attitude was inconsistent with their DFR (see *Romard*, at para. 73).

[243] The complainant in this case also referred to discrimination cases in which awards were made for human rights violations. I find those cases instructive because of the nature of the damages. They were awarded to address the claimants' pain and suffering.

[244] While cases involving similar issues may serve as a guide, each case must be assessed on its unique facts and circumstances. There is no magic formula to calculate the amount of damages to award; even when a statute imposes a maximum amount, the decision maker must still engage in the exercise. I find that there are two key considerations, 1) the severity of the harm that the claimant suffered, and 2) the duration and character of the acts that caused the harm. I am mindful of the fact that no amount of money can erase a claimant's experiential pain and suffering due to harms caused by a perpetrator. A monetary award may improve one's financial situation, but the lived experience remains with the victim.

[245] In *Legros*, the grievor was subjected to discrimination based on her age. The Board awarded $15 000.00 for pain and suffering under s. 53(2)(e) and $10 000 for wilful and reckless conduct under s. 53(3) of the *CHRA*.

[246] *Nicol* was a case of a failed accommodation that continued for a lengthy period. The Board awarded the grievor $20 000.00 for pain and suffering.

[247] In *Stringer*, the employer failed to properly accommodate a hearing- and speech-impaired employee whose first language was ASL over a lengthy period by failing to provide him with the tools he required to carry out his duties. As a result, he suffered indignity and humiliation. The Board awarded him $10 000.00 for pain and suffering and $17 500.00 as special compensation.

[248] The complainant testified that suffered extreme stress and that she had to take a significant amount of sick leave to manage her mental health. She felt isolated and humiliated. I accept her testimony that she suffered humiliation and indignity that

struck at her core and her self-worth. The respondent did not challenge A.B.'s testimony on this point.

[249] Indeed, the respondent knew that the complainant was suffering in the workplace, to the point that it brought in Ms. Paris as a dedicated resource, to work on the complainant's accommodation needs. The respondent knew of the employer's plan to demote her. It knew that the employer limited hearing-impaired employees to lower-paying and precarious jobs. It knew that the cognitive and literacy assessments that the employer wanted carried out were unrelated to the complainant's deafness. It knew that the employer was reluctant to spend money to implement proper accommodations. None of that knowledge factored into its decisions to remove the dedicated resource for the complainant and to place her grievance back into abeyance.

[250] Although in *Romard*, the court accepted the plaintiff's testimony regarding his pain and suffering as sufficient to award damages, in this case, there is documentary evidence to support the A.B.'s testimony. I refer particularly to her sick leave usage during the relevant period. The pattern demonstrates the use of a combination of vacation leave and sick leave on a consistent basis immediately following the withdrawal of her grievance in March 2017. At the beginning of the fiscal year April 1, 2017, to March 31, 2018, she had 795.88 hours of sick leave credits. During that fiscal year, she used 230.50 sick leave credits. For the next fiscal year April 1, 2018, to March 31, 2019, she had an opening balance of 640.38 hours of sick leave credits. She used 370.25 hours of sick leave during that fiscal year. For the fiscal year April 1, 2019, to March 31, 2020, she had an opening balance of 254.38 hours of sick leave. During that fiscal year, she used 63.00 hours of sick leave.

[251] I note that by July 2019, with the assistance of Ms. Paris and a second report from the WIDHH, A.B. had been accommodated with a suitable workload and according to the performance evaluation report for that fiscal year, her team leader wrote that A.B. completed a successful year with the program and she was doing well at her job duties. The team leader noted further that A.B. was effective and understood most aspects of the workload and was handling a full inventory. On the social side, the team leader noted that she had formed positive relationships with team members and contributed to a positive work atmosphere.

[252] I find that there is a rational connection between A.B.'s leave usage as noted, her uncontested evidence of her pain and suffering during the relevant period, and the respondent DFR violation.

[253] In this case, I award the complainant damages for pain and suffering in the amount of $10 000 for each founded ground of s. 187 violation, namely, bad faith, arbitrary conduct and discrimination. The total amount is $30 000. I am mindful that the plaintiff in *Romard* lost his job, whereas one could argue that A.B. did not lose her job. Based on the evidence in this case, I find that A.B. was at a high risk of being severely demoted through no fault of hers or even losing her job but for Ms. Paris' valiant efforts, advocacy and persistence.

[254] I am mindful that no amount of money can erase what she experienced in the workplace because of the respondent's failures. Hopefully, this award serves as a validation of her experience and her steadfastness to advocate for herself. Being deaf should not be a barrier to career advancement.

B. An award of punitive damages is necessary

[255] The complainant urged the Board to send a message to the respondent and to set a precedent by awarding $20 000.00 in punitive damages because the respondent knew that her accommodation was not resolved during the WFA exercise and that it failed to follow up with her.

[256] The scope of the Board's remedial power under s. 192 of the *Act* extends to an award of punitive damages, in the appropriate circumstances.

[257] Punitive or exemplary damages are meant to punish and deter a defendant and to renounce egregious conduct. In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada held that punitive damages must be "… restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own" (at paragraph 62). The Court added that courts (and decision makers) must be careful and cautious when exercising their discretion to award punitive damages.

[258] In *Ménard 2*, the Board held that it was not prepared to make an award of punitive damages and cautioned that such damages must be reserved for malicious, oppressive, and high-handed conduct (at paragraph 36) and noted that no case law was

submitted in which an administrative tribunal or court awarded punitive damage for a breach of the DFR.

[259] I find that the damages award in *D'Alessandro*, which was decided eight years after *Ménard 2*, came close to an award of punitive damages, although it was not fully articulated in the decision. The Board stated that the bargaining agent ought to be sent a message that it must discharge its DFR in good faith, without negligence, and not arbitrarily. I note that in that case, the Board rejected the complainant's claim for compensatory damages for lost wages and non-compensatory damages for pain and suffering.

[260] In this case, I find it appropriate to award punitive damages against the respondent to send a strong message that the DFR is an important aspect of the principle of the majoritarian exclusivity it enjoys as a certified bargaining agent for employees. I recognize that no monetary award will address the roots of the problem that led to the unfortunate situation that the complainant experienced. There was no evidence before me that the local union representatives had the proper training and competence to help with her accommodation. The WFA exercise added a certain layer of consternation to the local union. It required positive guidance and support, which Ms. Paris attempted to obtain from the respondent's national headquarters, only to be shut down.

[261] I award punitive damages in the amount of $10,000.00.

[262] Ms. Kenny expressed concern that the local union executives could be held responsible for any damages awarded. I was not provided with any guidelines or policies on this issue. I decline to address this issue as it is an internal matter for the respondent.

[263] This decision should send a strong message to the respondent that it must ensure that its representatives at the local levels are properly and competently trained to deal with unique situations such as the complainant's and that they should have available to them broader support systems, to provide expertise as needed.

C. Ordering union dues reimbursed is not necessary

[264] The complainant claims reimbursement of the union dues that she paid from April 2014 to July 2017 in the amount of $3780.00.

[265] The Board finds that this remedy is not appropriate in the circumstances of this case. The issue is not the absence of representation by the respondent; rather, it is the quality of that representation. Like the Board's reasoning in *Ménard 2*, the complainant continued to receive the benefits and protections of a collective agreement, and it is in her interest that it remains so. Even were she to surrender her membership in the bargaining unit, she would still be required to pay union dues as a Rand employee (see *Bernard v. Canada (Attorney General)*, 2014 SCC 13 at para. 2).

D. Ordering repaying the sick leave that the complainant used is not necessary

[266] The complainant also requested compensatory damages for the sick leave she took that amounted to 663.75 hours from April 1, 2017, to July 15, 2019. The estimated value is $45 000.00.

[267] The Board is not prepared to award the payment of the sick leave value. While I have considered the complainant's testimony and evidence regarding her usage of sick leave credits for the purpose of the pain and suffering award, granting an award for the value of sick leave credits used is not appropriate in this case. Sick leave is presumably used for the stated purpose of an employee unable to report for duty on account of ill-health. Sick leave is governed by the provisions of the collective agreement between the employer and the bargaining agent. The proper place to contest its usage or claim recovery of credits used for any alleged violation or wrongdoing is through the grievance process under the relevant collective agreement.

E. Final observations

[268] Nothing in this decision is intended to impute liability to the employer as previously stated because the Board's focus was solely on the respondent's conduct.

[269] The Board echoes the observations of the WIDHH in its second report that employers' reluctance to recognize ASL and LSQ as meeting the bilingual imperative in the federal bureaucracy acts as a career advancement "blockade" for the deaf and hard of hearing. Furthermore, reluctance to hire deaf workers is largely based on the wrong assumption that meeting their workplace needs would be unduly burdensome to the enterprise.

[270] I would be remiss if I did not acknowledge Ms. Paris' dedication to help A.B. As she stated to the respondent's national president, it is not that she enjoyed verbal

abuse but that she continued to advocate for her bargaining unit member. Such loyalty and dedication are rare and exemplary. She also presented the information in a coherent and helpful manner.

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

(The Order appears on the next page)

VIII. Order

[272] The complaint is allowed.

[273] The Board declares that the respondent violated s. 187 of the *Act*.

[274] The Board orders the respondent to pay general damages of $30 000.00 to the complainant for her pain and suffering, within 30 days from the date of this decision.

[275] The Board orders the respondent to pay punitive damages of $10 000.00 to the complainant within 30 days from the date of this decision.

[276] The Board remains seized for a period of 40 days to address any implementation issues that may arise.

October 6, 2025.

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