



Public Service Alliance of Canada
Alliance de la Fonction publique du Canada

MEETING the UNION'S DUTY of FAIR REPRESENTATION - GRIEVANCE TRAINING

Presented by Douglas Hill, G&A Officer and Kalapi Roy, Analyst
Representation and Legal Services Branch

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Introduction

- Kalapi Roy, Analyst
- Douglas Hill, Grievance and adjudicator officer



History of DFR

1944 US Supreme Court decision *Steele v Louisville & Nashville Railroad Co*

- members sued their trade union for negotiating terms and conditions discriminating against Black employees
- court struck down offending provisions and held that as the exclusive bargaining agent for the employees, the union's duty was to exercise its authority fairly

1967 US Supreme Court decision *Vaca v Sipes*

1969 court decision in Canada

1984 Supreme Court of Canada decision *Canadian Merchant Service Guild v Gagnon et al*

1977 Federal statutory duty enacted

- *Federal Public Sector Labour Relations Act* (FPLSRA)
- s 187 No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit



Assessing merits of a grievance - 1

Doro 2019 FPSLRB 6 and *Reeves* 2019 FPSLRB 61

- 1.) Communication with grievor
- 2.) Grievance wording
- 3.) Relevant articles of the applicable Collective Agreement
- 4.) Employer's level 1,2,3, final responses
- 5.) Evidence (i.e., **emails**, other documents, video, witness statements etc.)
- 6.) *CHRA*, policies, jurisprudence
- 7.) Any preliminary objections to overcome (i.e., untimely grievance)



Assessing merits of a grievance - 2

Doro / Sexual Harassment

para 13 s.65 (1) CHRA

- 1.) That it did not consent to the acts of sexual harassment
- 2.) That it exercises due diligence to prevent the acts of sexual harassment
- 3.) That it exercised due diligence after the acts of sexual harassment occurred to mitigate the affects of the sexual harassment

If one or more of the requirements are met, then the employer is also liable

Reeves /discrimination based on race and ethnic origin

para 179 3-part test

- 1.) Prohibited ground
- 2.) Adverse impact
- 3.) The prohibited ground was a factor in the adverse impact

para 181 direct evidence v. circumstantial evidence

In assessing the merits of a grievance did you act in manner that was arbitrary, discriminatory or in bad faith?



Arbitrary, Discriminatory, Bad Faith - 1

Bastasic 2019 FPSLREB 12 and *Cousineau* 2013 PSLRB 68

Arbitrary: *Cousineau* para 25, 32, 38 and *Bastasic* para 43, 44

- 1.) May not process the employee's grievance in a superficial or careless manner
- 2.) Must investigate the grievance
- 3.) Review the relevant facts
- 4.) Seek whatever advice may be necessary
- 5.) Interpretation of Collective Agreement and CHRA
- 6.) Considered the impact on other union members



Arbitrary, Discriminatory, Bad Faith - 2

Bastasic 2019 FPSLRB 12 and Cousineau 2013 PSLRB 68

Discriminatory: Vuk pg. 5 re: Blakely para 32

"Discriminatory conduct occurs when a union distinguishes between employees on illegal grounds" The illegal or prohibited grounds spelled out in the CHRA and most collective agreements can be found in the No Discrimination Article. (see History)

- | | | | |
|-----|--------------------------------------|------|--------------------------------|
| 1.) | <i>Race</i> | 6.) | <i>Family/Marital status</i> |
| 2.) | <i>Language</i> | 7.) | <i>Religion</i> |
| 3.) | <i>Sexual orientation</i> | 8.) | <i>Ethnic/National origin</i> |
| 4.) | <i>Mental or physical disability</i> | 9.) | <i>Age</i> |
| 5.) | <i>Sex & gender identity</i> | 10.) | <i>Genetic characteristics</i> |



Arbitrary, Discriminatory, Bad Faith - 3

- **Bad Faith v. Good Faith:** *Ouelette* para 30 or *Bastasic* para 45 states: The Board's role is to examine "*the manner in which the union handled the grievance*" ...or "*the decision-making process*" i.e.
- Reviewing the file (*Bastasic* para 40)
- Communication with grievor (*Bastasic* para 40)
- Preparing and presenting the grievance (*Bastasic* para 41)
- Supporting grievor, providing relevant information and a rational justification for declining to refer to adjudication = "*good faith*" (*Bastasic* para 3)



Questions



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Non-Referral - 1

Bastasic 2019 FPSLREB 12 and *Cousineau* 2013 68

Q. Will a non-referral result in a valid DFR complaint?

- Both the *Bastasic* para 48 and the *Cousineau* para 38 decisions were the results on non-referral and as a result DFR complaints were filed. However, in both decisions the DFR complaints were dismissed at adjudication for no breach of duty of fair representation.
- In *Bastasic* at para 45 and *Cousineau* at para 29, both decisions reiterate that it is not the Boards role to appeal the bargaining agent's decision of whether or not the grievance has merit and therefore should or should not proceed to adjudication. It is the Boards role to evaluate the bargaining agent's decision-making process by making sure the bargaining agents did not act in an arbitrary, discriminatory or bad faith manner.

A. No! But anytime the bargaining agent makes a non-referral they open the door for a possible DFR complaint. However, if the bargaining agent exercised their due diligence and their "decision making process" was the result of investigating the grievance, communicating with the grievor, reviewing documents, not process the grievance in a superficial or careless manner, seeking the necessary advice, considering other union members, rendering a rational justification for the non-referral. Then a DFR complaint will never be valid and will therefore be dismissed at adjudication or prior to adjudication (Mary Vuk decision).



Non-Referral - 2

Victoria Alexis 2020 FPSLREB 9 para 186 to 198 the grievance only alleged termination and not racial discrimination. As a result, the issue of racial discrimination was never referred to adjudication. In the decision the adjudicator pointed out the various missed opportunities post grievance (i.e., Burchill) where PSAC could have raised the second issue. The termination grievance was allowed and the grievor was ordered to be reinstated. However, the employer appealed the reinstatement but on Nov 9th, the 2021 the Federal Court of Appeal upheld the original decision for reinstatement. This was a missed opportunity to refer to adjudication the second issue of racial discrimination which adjudicators expect from PSAC! (see summary)



Non-Referral - 3

Member on member harassment

1. Member grieves harassment on the basis of a protected ground of human rights

Policy 23 – “PSAC Policy on union representation: Workplace harassment (23A)”

- Complainant grieved she was harassed on the basis of her alcohol addiction by her supervisor, who was also a member of the grievor’s bargaining unit
- Component’s reluctance to refer the grievance to adjudication
- Grievance - three-part test establishes a prima facie case?
- *Cousineau*. Workplace considerations
- DFR on grounds of discrimination?



Non-Referral - 4

Member on member harassment

2. Grievor grieves disciplinary measure and claims that ER's investigation of a complaint of on line sexual harassment is flawed

Policy 23 – “PSAC Policy on union representation: Workplace harassment (23A)”

- Grievor says the investigation is flawed as he is hard of hearing (for which he had been accommodated at work) and his hearing impairment impeded his ability to properly answer the investigator's questions. Investigation interviews conducted by video!
- Union relies on the ER's investigation. Policy 23 (3)
- *Cousineau*. Workplace considerations
 - Grievor's entitlement to procedural fairness . Policy 23 (3)
- Reduce quantum of discipline (Policy 23 (3)). Is the corrective measure too severe?
- DFR on grounds of discrimination?



Non-Referral - 5

Working with members with perceived mental illness

- We are not medical experts
- Treating the grievor like a standard grievor
- *Cousineau*. Workplace considerations
- Time limits

Working with members with confirmed disabilities

- Accommodation



Questions



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DFR Complaint

Vuk 2016 CIRB LD 3588

If a member feels that the union breached their duty of fair representation by acting in a manner that is arbitrary, discriminatory or in bad faith, they may file a DFR complaint.

Federal government employees who fall under Treasury Board can file a DFR complaint under s. 187 of the *Federal Public Sector Labour Relations Act* (FPSLRA).

Federal government employees who come from separate employers can file a DFR complaint under art. 37, Part 1 of the *Canada Labour Code* (CLC).

Both the FPSLRB and the CLC adopted this DFR legislation from the historical decision in 1944 US Supreme Court in *Steele Louisville & Nashville Railroad Co.* 323 U.S. 192.

The time limits associated with filing a DFR complaint is 90 days from when the complainant becomes aware of the breach of duty of fair representation. If a complaint is outside the 90-day time limit, then a preliminary objection can be raised to have the matter dismissed without a hearing.

A DFR complaint must contain “particulars” (who, what, when, where, why, how) so that the Respondent can properly respond. If a complaint does not contain particulars, then a preliminary objection can be raised to have the matter dismissed without a hearing.

With a DFR complaint the burden of proof is on the complainant who must establish a “prima facie” case of breach of duty of fair representation by demonstrating that the union acted in an arbitrary discriminatory or a bad faith manner. If the complaint does not establish a “prima facie” case of breach of duty of fair representation a preliminary objection can be raised to have the matter dismissed without a hearing.

Or like the Mary Vuk DFR complaint under the CLC, at pg. 6 & 7 the 3-person Board simply dismissed the complaint without the union having to respond at all because the complainant did not establish a “prima facie” case of breach of duty of fair representation.



Defending the “Decision Making Process” v. a DFR complaint

Negi 2021 FPSLREB 98

If a DFR complaint is untimely, lacks particulars or fails to establish a “prima facia” case, a preliminary objection can be raised to have the matter dismissed without a hearing.

However, like *Negi* some adjudicators may hold a full hearing to ensure the complainant has a “full, fair and well-informed hearing” *Negi* para 8. Giving the complainant “every possible avenue of inquiry into the handling of the grievance”. *Negi* para 12. Therefore, leaving the complainant with no grounds for judicial review.

If the matter is not dismissed via preliminary objection, then the bargaining agent must prepare to defend the matter at adjudication. Therefore, all the due diligence that went into reviewing the grievance and research to the conclusion not to refer a grievance to adjudication must now be presented as evidence of the “decision making process” at an adjudication hearing.

The “decision-making process” must demonstrate that the bargaining agent did not act in an arbitrary, discriminatory, or bad faith manner:

- 1.) Email communications with grievor
- 2.) Note of phone calls with the grievor
- 3.) What advise was sought
- 4.) *CHRA*, Policies and Collective Agreement articles referred to
- 5.) Presentations at grievance hearings & employers replies
- 6.) Consideration of impact on other members
- 7.) No differential treatment because of race or any prohibited ground
- 8.) All the care and effort put into processing the grievance
- 9.) A written justifiable response for the non-referral

All the above which is part of the duties and responsibilities of a union representative must be presented via union witness and oral testimony at a formal hearing to an adjudicator to have a DFR complaint dismissed.



DFR Statistics

- ± 20 DFR complaints lodged against the PSAC every year.
- Most DFR complaints are resolved through hearing or are decided via written submissions
- Majority of DFR complaints fail



Decisions & references

- *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944)
- *Vaca v. Sipes*, 386 U.S. 171 (1967)
- *Canadian Merchant Service Guild v. Gagnon et al.*, 1984 CanLII 18 (SCC)
French <https://canlii.ca/t/1ldds>
English <https://canlii.ca/t/1lddr>
- *Doro v Canada Revenue Agency* 2019 FPSLREB 6
English <https://canlii.ca/t/hz4cg>
French <https://canlii.ca/t/hz4cf>
- *Reeves* 2019 FPSLREB 61
English <https://canlii.ca/t/j24dw>
French <https://canlii.ca/t/j24ds>
- *Bastasic* 2019 FPSLREB 12
English <https://canlii.ca/t/hzcxt>
French <https://canlii.ca/t/hzcxs>
- *Cousineau* 2013 PSLRB 68
French <https://canlii.ca/t/fzktf>
French <https://canlii.ca/t/fzktq>



Decisions & references -2

- *Vuk* 2016 CIRB LD 3588
- **Oullet**
 - English
 - French
- *Victoria Alexis* 2020 FPSLREB 9
 - English <https://decisions.fpslreb-crtespf.gc.ca/fpslreb-crtespf/d/en/465648/1/document.do>
 - French <https://decisions.fpslreb-crtespf.gc.ca/fpslreb-crtespf/d/fr/465648/1/document.do>
- *Negi* 2021 FPSLREB 98
 - English <https://canlii.ca/t/jj65d>
 - French <https://canlii.ca/t/jj65f>
- PSAC Policy on union representation: Workplace harassment (23A)
 - English <https://psacunion.ca/psac-policy-union-representation-workplace>
 - French <https://syndicatafpc.ca/declaration-principes-sur-representation-syndicale>
- *Melanie Chapman v Attorney General of Canada* 2019 FC 975
 - English <https://canlii.ca/t/j1sfb>
 - French <https://canlii.ca/t/j2cxb>



Questions



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