

Date: 20000929

File: 161-2-1126

Citation: 2000 PSSRB 89



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

Joseph Gilles Sylvain Martel

Complainant

and

Ken Veley, Dan McGrath, John Edmunds and Rod Nellis

Respondents

RE: Complaint under section 23 of the
Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Complainant: Himself

For the Respondents: Anne Clark-McMunagle and Cécile La Bissonnière, Public
Service Alliance of Canada



(Decided without an oral hearing)

DECISION

[1] This decision deals with the issue whether the Board has jurisdiction to entertain a complaint filed pursuant to paragraph 23(1)(a) of the *Public Service Staff Relations Act* (Act), alleging that officers of the Union of Solicitor General Employees (Union), a component of the Public Service Alliance of Canada (Alliance), failed to observe the prohibitions contained in subparagraph 8(2)(c)(i) of the Act. In other words, do those prohibitions apply to a person acting on behalf of an employee organization? Those prohibitions read as follows:

8. (2) Subject to subsection (3), no person shall

...

(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or

...

...

Facts

[2] The following facts are not in dispute.

[3] Mr. Joseph Gilles Sylvain Martel is a correctional officer with Correctional Service Canada. He belongs to the Correctional Officers Group (CX) bargaining unit, for which the Alliance is the bargaining agent.

[4] The Union set up the Ontario Regional Discipline Committee (Committee) to investigate the conduct of some of the Union's members in relation to "... the 1998-1999 CX Raid ..." to determine whether they violated the Alliance's Constitution and Union's by-laws. These persons "... were alleged to have participated in activities designed to undermine the PSAC and to sign up PSAC members with a new organization entitled Union of Canadian Correctional Officers, under the umbrella of the CSN." The Committee was chaired by Mr. Ken Velej, the Union's Ontario Regional Vice-President and was also comprised of Mr. Rod Nellis, President of the Union, Millhaven Local, and Mr. Dan MacGrath, President of the Union, Bath Local.

[5] Mr. Martel was one of the persons investigated by the Committee.

[6] In September 1999, the Committee issued its report. It found that Mr. Martel had violated the Alliance's Constitution and recommended that his membership with the Alliance be "... suspended for the maximum period of time allowable."

[7] By letter dated January 7, 2000, the Committee provided Mr. Martel with a copy of its report. That letter was signed by Messrs. Velez and McGrath and by a Mr. John Edmunds on behalf of Mr. Nellis. At the time, the Committee informed Mr. Martel that its report would be reviewed by a Union's National Discipline Committee, which would submit its own report to the Union's National Executive.

[8] On February 24, 2000, Mr. Martel filed a complaint alleging that officers of the Union failed to observe the prohibitions contained in subparagraph 8(2)(c)(i) of the Act. More particularly, Mr. Martel alleged that he "... was being disciplined for alleged dealings with a rival employee organization." Mr. Martel is seeking "[a]n Order requiring the PSAC to cease and desist actions contrary to Section 8 of the Act."

[9] On March 16, 2000, the Alliance objected to the Board's jurisdiction to entertain Mr. Martel's complaint and requested that the complaint be dismissed pursuant to section 8 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* (Regulations). That provision reads as follows:

8. (1) Subject to subsection (2), but notwithstanding any other provision of these Regulations, the Board may dismiss an application on the ground that the Board lacks jurisdiction.

(2) The Board, in considering whether an application or complaint should be dismissed pursuant to subsection (1), shall

(a) request that the parties submit written arguments within the time and in the manner specified by the Board;
or

(b) hold a preliminary hearing.

...

[10] Pursuant to paragraph 8(2)(a) of the Regulations, the Board requested that the parties file written submissions on the issue "... whether the Board has the authority

to decide if the Public Service Alliance of Canada has violated subparagraph 8(2)(c)(i) of the Act.” That process was concluded on August 9, 2000.

Submissions of the parties

[11] The Alliance presented the following submissions:

...

The present document represents the respondents written representation as to the jurisdiction of an adjudicator to hear the above-noted complaint alleging violation of subparagraph 8(2)(c)(i) of the PSSRA which reads as follows:

8(2) Subject to subsection (3), no person shall

(c) seek by intimidation, threat of dismissal or any kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization...”

In his March 30, 2000 letter to the Board, the complainant claims that the Alliance has violated the right to freedom of association contained in the Charter of Rights. However, he also states that the Board does not have jurisdiction to address such an argument and we fully agree with him.

In his complaint, the complainant also claims that the Alliance violated subparagraph 8(2)(c)(i) of the PSSRA when the Alliance notified him that he was being disciplined for alleged dealings with a rival employee organization and that attempting such discipline was contrary to the provisions of Section 8 of the PSSRA.

In accordance with the PSAC Constitution and Regulations and the Union of Solicitor General Employees (USGE) By-laws, the National Executive of the USGE, a PSAC Component, has established procedures for Regional Discipline Committees and a National Discipline Committee to investigate matters of discipline arising from the 1998-1999 CX Raid.

The Ontario Regional Disciplinary Committee, established by USGE, investigated the actions of Sylvain Martel and found that he was in violation of Section 25. Subsection 5(d,e,f,m) of the PSAC Constitution. The Committee also recommended

that his membership in the PSAC be suspended. However, no decision has yet been taken by the Alliance.

We are submitting that, the subject matter of the complaint involves the internal affairs of the union which, as such, are beyond the purview of this Board and labour relations boards generally, as has been determined in many labour relations boards' decisions. All the evidence filed by the complainant concern and is directed at the union's internal process of discipline and not the employment relationship of Mr. Martel with his employer.

The decision recommending that the complainant be suspended from membership in the union was done within the by-laws of the bargaining agent. This action does not fall under any of the subjects included under section 23 of the PSSRA. The PSAC is a democratic organization that is only accountable to its members. The PSSRA only allows the PSSRB to interfere in a situation that affects a complainant's employment relationship.

Subparagraph 8(2)(c)(i) has already been interpreted in Hibbard (161-2-136). In this case the Board concluded as follows:

"15. The language of Section 8(2)(c)(i) is confined to the rights of an employee and does not involve the rights of a member vis-à-vis an employee organization. In the circumstances of this complaint, the Board has no authority to intervene in the internal affairs of an employee organization. Its authority and powers are limited to attain the objects of the Act and compliance with its provisions such as Section 8(2)(c)(i). The complainant, however, contends that this Board does have the power and the duty to make an order that the alleged failure of certain officers of the PSAC to exercise their responsibilities denied to him the right to participate in the lawful activities of Local 70041, as if the prohibitions contained in Section 8(2)(c)(i) included words to the effect that no employee organization shall cause or permit any of its locals to become inactive, thereby depriving a member of his right to participate in the lawful activities of the employee organization.

16. This Board has no such authority under Section 8(2)(c)(i). Its concern is restricted to the rights of employees. The rights of members are matters between a member and the employee organization and are governed

by the constitution and by-laws of that organization. The complaints of Mr. Hibbard against the officers of the organization are an internal matter of PSAC, for which there may be a remedy in another forum."

In Forsen (148-2-209), the essential issue was whether the Board had the authority to involve itself in the applicant's suspension from membership in the PSAC. In dismissing the application, the adjudicator held the following:

"As a statutory tribunal, the Board's authority to act is derived exclusively from federal legislation, in particular the Public Service Staff Relations Act. That is, the Board has no authority to act except pursuant to the mandate specifically given to it by Parliament. In assessing whether Parliament, through that statute, intended to confer on the Board the authority and responsibility to regulate the internal proceedings of an employee organization that is certified as a bargaining agent under the Act, it is interesting to contrast the provisions of the PSSRA with the Canadian Labour Code, another federal labour relations statute. As the respondents' representative has noted, the Labour Code has more broadly worded provisions in respect of an employee's rights vis-à-vis his bargaining agent, see for example section 95 of the Code. However, even these provisions have been found not to confer general jurisdiction in the Canada Labour Relations Board to intervene in the internal affairs of an employee organization. It must be concluded therefore a fortiori that it was not the intention of Parliament to confer on the Public Service Staff Relations Board the sweeping authority over a bargaining agent which the applicant is in effect arguing for."

In St-James (100-1), the Board stated specifically that it had no authority to regulate the internal affairs of a bargaining agent. At page 7 it stated the following:

"It is quite clear that the Public Service Staff Relations Act does not confer the authority on this Board to regulate the internal affairs of a bargaining agent. The granting of certification pursuant to section 28 of the Act undoubtedly imposes certain obligations on the bargaining agent. However, as noted by the representative of the respondents, unless and

until the actions of the bargaining agent affect the employment relationship, the Board clearly has no role to play."

In Feldsted, Czmola and Llewellyn (161-2-945, 946, 955), the Board interpreted subsections 23(10 and 8(1) of the PSSRA as meaning the following:

"...only an employee organization or a person on its behalf has the statutory authority to bring a complaint alleging employer interference in the affairs of the employee organization."

Section 10 of the PSSRA has already been interpreted by the Board as meaning that duty of fair representation of a bargaining agent only applies to the representation of their members with the employer. We would like to refer you to the decision in Shore (161-2-732) on this issue. In this case the adjudicator interpreted that same section of the Act and held the following:

"Representation is concerned with the actions of a bargaining agent as they relate to the dealings that an employee in the bargaining unit may have with the employer. The addition of subsection 10(2) to the Public Service Staff Relations Act does not in my opinion provide any new authority to regulate the internal workings of a bargaining agent."

In conclusion, we are submitting that there is nothing in the PSSRA concerning the discipline of union members; this is an internal union matter and the Board has no jurisdiction to hear a complaint from a member who has been or is going to be disciplined by its union. If the legislature intended the Board to have the power to review internal union procedures it would have specifically spelled that out in the Act. In addition, the complainant did not bring any evidence to prove that the Alliance or its representatives have failed to represent him in his dealings with the employer.

We are therefore submitting that the above-noted complaint should be dismissed for want of jurisdiction.

...

[Sic throughout]

[12] Mr. Martel's response reads as follows:

...

In response to the PSAC submission . . . we would comment:

1. *The Hibbard decision dates back to May 1976 and relies on the PSSRA as it was framed at that time.*
2. *The St. James decision dates back to March 1992 and states in part:*

"It should be noted, however, that unlike other labour relations statutes in Canada, the Act contains no specific provision imposing a duty of fair representation upon an employee organization in relation to employees in a bargaining unit for which it is the certified bargaining agent."

This was rectified by Parliament, who amended Sections 8, 9 & 10 of the PSSRA in 1992, adding Section 10 (2):

"Fair representation

(2) No employee organization, or officer or representative of an employee organization, that is the bargaining agent for a bargaining unit shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit."

It is clear that the St. James decision is in conflict with the amended PSSRA.

3. *The Forsen decision dates back to September 1993 and is in respect of a different situation altogether. Forsen was suspended for activities during a strike and relied on PSSRA Section 6 rather than on Sections 8, 9 & 10. It is not relevant to the case at hand.*
4. *The Shore decision dated back to November 1994 and Shore relies on an excerpt from a reference book on law (Canadian Labour Law — Second Edition) that had become obsolete due to changes in the PSSRA rather than on precedent. The adjudicator in Shore states that:*

"The addition of subsection 10 (2) to the Public Service Staff Relations Act does not in my opinion provide any new authority to regulate the internal workings of a bargaining agent".

We submit that the adjudicator's interpretation of PSSRA Section 10 (2) is questionable at best. We further submit that if Parliament had not intended to expand the

powers of the PSSRB, legislators would not have added a new subsection to the PSSRA.

5. *The Feldsted, Czmola & Llewellyn decision is a repetition of the questionable opinion cited in Shore. We again submit that if legislators did not intend to expand the powers of the PSSRB, the legislation would not have been promulgated.*
6. *Finally, we submit that there is enough controversy over the interpretation of PSSRA section 10 (2) to warrant a hearing and to hear our legal representations. We further submit that we will not settle for interpretations as set out in the respondent's reply and are prepared to take this matter to courts if that proves necessary.*

...

[Sic throughout]

[13] The Alliance presented the following rebuttal:

...

We are of the opinion that that [sic] there is no controversy over the interpretation of subsection 10(2) of the PSSRA. This subsection has always been interpreted in the same way by the Board ever since its introduction.

We are reiterating the fact that the complaint deals with internal union matters and that there is nothing in the PSSRA that gives jurisdiction to an adjudicator [sic] to hear such a complaint.

We are therefore submitting that the present complaint should be dismissed for want of jurisdiction.

...

Reasons

[14] Mr. Martel complained that officers of the Union failed to observe the prohibitions contained in subparagraph 8(2)(c)(i) of the Act. The first question to address is whether those prohibitions apply to a person acting of behalf of an employee organization.

[15] The Board recently considered the application of subparagraph 8(2)(c)(i) of the Act to an employee organization in *Lai v. Professional Institute of the Public Service of*

Canada, 2000 PSSRB 79 (166-34-1128). In that case, the Board examined the various paragraphs of subsection 8(2) and concluded that the prohibitions they contain apply to an employer, not to an employee organization. The Board followed the same approach in *Tucci v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 80 (166-34-1129).

[16] In *Lai (supra)* and *Tucci (supra)*, as in the case at hand, the complaint arose from the relationship between an employee organization and one of its members, not from the relationship between an employer and one of its employees. In all cases, the complaint challenged the exercise of an employee organization's authority to suspend the membership of one of its members. I see no reason why the interpretation provided by the Board in *Lai* should not equally apply to Mr. Martel's complaint; the mere fact that Mr. Lai's complaint was filed against his bargaining agent, while Mr. Martel's is filed against officers of the Union is not determinative in this regard. The interpretation provided in *Lai* appears at 2000 PSSRB 79 § 15-19:

...

[15] In the complaint at hand, Mr. Lai alleges that the Institute has failed to observe the prohibitions contained in subparagraphs 8(2)(c)(i) and (ii) of the Act. The first question to address is whether those prohibitions apply to an employee organization. My reading of section 8 of the Act suggests that they do not. Subparagraphs 8(2)(c)(i) and (ii) have to be read in their context; they cannot be read in isolation from the remainder of section 8. ...

...

[16] The prohibition contained in subsection 8(1) of the Act is specifically directed at persons occupying managerial or confidential positions. Its purpose is to prevent management interference in the affairs of a bargaining agent. By its very wording, subsection 8(1) could not be construed as being directed at an employee organization.

[17] Paragraph 8(2)(a) prohibits discrimination on the basis of membership in an employee organization or on the basis of a right being exercised as provided for in the Act. The examples provided in that paragraph all refer to the authority of an employer, i.e. the refusal to employ or to continue to employ or the imposition of a term or condition of employment. An employee organization has no such authority and I do not believe it is subject to paragraph 8(2)(a).

[18] Paragraph 8(2)(b) prohibits the imposition of a condition of employment seeking to restrain membership in a employee organization or to restrain the exercise of a right provided for in the Act. The examples provided in that paragraph refer to appointments and contracts. No employee organization is involved in the appointment or contracting processes and I fail to see how it could be subject to the provisions of paragraph 8(2)(b).

[19] Paragraph 8(2)(c) prohibits seeking or compelling an employee to take a particular course of action in relation to membership in an employee organization or to refrain from exercising a right provided for by the Act. One example provided in that paragraph refers to threatening to dismiss. The authority to dismiss belongs solely to an employer. An employee organization has no power to dismiss an employee. In this light, and in light of the other provisions in section 8 of the Act, I find that paragraph 8(2)(c) of the Act could not be directed at an employee organization.

...

[17] In their submissions, the parties referred the Board to a number of cases. One of those was the Board's decision in *Forsen v. Bean* (148-2-209). I do not agree with Mr. Martel that *Forsen* is "... not relevant to the case at hand." It is true that Mr. Forsen's complaint alleged a violation of section 6 of the Act, while Mr. Martel complains about a failure to respect the provisions of subparagraph 8(2)(c)(i); in that regard the object of both complaints is different. In *Forsen*, however, the Board made comments on the complaint process that still hold true. These comments appear at pages 8 and 9 of that decision and read as follows:

...

... In *St-James et al.* [Board file 100-1] the PSSRB made the following observation:

(at p.7) It is quite clear that the *Public Service Staff Relations Act* does not confer the authority on this Board to regulate the internal affairs of a bargaining agent. The granting of certification pursuant to section 28 of the Act undoubtedly imposes certain obligations on the bargaining agent. However, as noted by the representative of the respondents, unless and until the actions of the bargaining agent affect the employment relationship, the Board clearly has no role to play. (See also the *Laporte decision*, [Board file 148-2-99].)

As a statutory tribunal, the Board's authority to act is derived exclusively from federal legislation, in particular the Public Service Staff Relations Act. That is, the Board has no authority to act except pursuant to the mandate specifically given to it by Parliament. In assessing whether Parliament, through that statute, intended to confer on the Board the authority and responsibility to regulate the internal proceedings of an employee organization that is certified as a bargaining agent under the Act, it is interesting to contrast the provisions of the PSSRA with the Canada Labour Code, another federal labour relations statute. As the respondents' representative has noted, the Labour Code has more broadly worded provisions in respect of an employee's rights vis-à-vis his bargaining agent; see for example section 95 of the Code. However, even these provisions have been found not to confer general jurisdiction in the Canada Labour Relations Board to intervene in the internal affairs of an employee organization (see e.g. the Carbin decision [59 di 109; 85 C.L.L.C. 16,013]). It must be concluded therefore a fortiori that it was not the intention of Parliament to confer on the Public Service Staff Relations Board the sweeping authority over a bargaining agent which the applicant is in effect arguing for.

...

[18] For these reasons, I find that subparagraph 8(2)(c)(i) of the Act has not been contravened by officers of the Union, as the provisions it contains do not apply to an employee organization or to persons acting on its behalf. The complaint process is not an appropriate forum for challenging a recommendation that he be suspended from his bargaining agent's membership. That is an internal union matter over which the Board has no jurisdiction.

[19] Accordingly, the complaint is dismissed.

Yvon Tarte,
Chairperson.

OTTAWA, September 29, 2000.