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File: 161-2-1152

Citation: 2001 PSSRB 28

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

GERALD MACHNEE

Complainant

and

CAROL KLAPONSKI, MIKE SHEWEL, LOU LEGAL, BEV YAREMA and JIM VOLLMERSHAUSEN

Respondents

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

Before: Yvon Tarte, Chairperson

For the Complainant: Gerald Machnee

For the Respondents: Ilan Rumstein, Treasury Board Secretariat

(Decided without an oral hearing)

[1] This decision deals with the issue whether the Board should exercise its powers to dismiss, for undue delay, a complaint filed by Mr. Gerald Machnee pursuant to paragraph 23(1)(*a*) of the *Public Service Staff Relations Act* (Act), alleging that representatives of his employer failed to observe the prohibitions contained in provisions 8(1), 8(2)(*a*), 8(2)(*b*), 8(2)(*c*)(ii) and 9(1) of the Act.

[2] Provisions 8(1), 8(2)(*a*), 8(2)(*b*), 8(2)(*c*)(ii) and 9(1) of the Act read as follows:

> ***8.*** *(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*
>
> *(2) Subject to subsection (3), no person shall*
>
> *(*a*) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> *(*b*) impose any condition on an appointment or in a contract of employment, or propose the imposition of any condition on an appointment or in a contract of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or*
>
> *(*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*
>
> . . .
>
> *(ii) to refrain from exercising any other right under this Act.*
>
> . . .
>
> ***9.*** *(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.*
>
> . . .

Facts

[3] The following are the facts, as represented in Mr. Machnee's complaint; the respondents made no representation in their regard.

[4] Mr. Machnee was a meteorologist employed at Environment Canada. He was also a steward with what was then known as the Meteorology Group bargaining unit, for which the Professional Institute of the Public Service (Institute) was certified as the bargaining agent. Mr. Machnee retired in December of 1996.

[5] In September of 1991, Mr. Machnee became involved in the representation of Mr. Mike McDonald, a fellow meteorologist who had filed a grievance (grievor). At the third level of the grievance process, the employer sent the grievance back to the second level for settlement. The manager who had decided the grievance at the second level was Mr. Jim Vollmershausen, Regional Director General, Prairie and Northern Region, Environment Canada.

[6] Upon learning from management that Ms. Carol Klaponski, who had decided the grievance at the first level of the grievance process, had "settled" the grievance directly with the grievor, Mr. Machnee contacted the latter. The grievor informed Mr. Machnee that the "settlement" was to the effect that nothing could be done by management and that the matter should be "bargained". Mr. Machnee advised the grievor that he was entitled to representation. At Mr. Machnee's suggestion, the grievor agreed to a formal meeting with Mr. Vollmershausen.

[7] Mr. Machnee had already requested, on three occasions at the regional level, that a meeting be scheduled with Mr. Vollmershausen to discuss the grievance. However, none was scheduled. After having received the grievor's consent to meet with Mr. Vollmershausen, Mr. Machnee asked one of the Institute's representative at its national headquarters to request a meeting with Mr. Vollmershausen. Such a meeting was then arranged for the following week.

[8] Mr. Machnee was advised by a Mr. Lou Legal, who seems to have been in a position of authority at the time, not to request a meeting with Mr. Vollmershausen. Mr. Legal suggested that Mr. Machnee not pursue the grievance, as it had been "settled" by Ms. Klaponski. Mr. Machnee replied that the grievance was not settled and that there should be a proper meeting to settle the grievance, as directed by the decision

maker at the third level of the grievance process. Mr. Legal then responded that Mr. Machnee should forget about the grievance or it would not be good for his career.

[9] Mr. Vollmershausen did not attend the meeting held to discuss the grievance; Mr. Legal attended it. At the meeting, management agreed to settle the grievance. That happened at some time in 1992.

[10] In May of 1996, Mr. Machnee applied on a competition to staff a Program Manager position on an acting basis. At the "post-board" meeting, a member of the selection board, Mr. Mike Shewel, commented that, in 1991, Mr. Machnee had advised the grievor to file a grievance. Mr. Machnee was not offered the acting appointment.

[11] Mr. Machnee appealed the result of the competition. At the hearing before the Public Service Commission, the employer made reference to Mr. Machnee's conduct while he was representing the grievor in 1991 and 1992.

[12] Before a decision was rendered on that appeal, Mr. Machnee filed a harassment complaint with the Public Service Commission on December 13, 1996.

Position of the Parties

[13] Mr. Machnee filed the complaint at hand with the Board on November 28, 2000. At that time, he made the following submissions regarding the delay in filing his complaint:

> . . .
>
> *4. The following steps have been taken by or on behalf of the complainant for the adjustment of the matters giving rise to the complaint:*
>
> . . .
>
> *(b) Before the Appeal results were released, I signed a Harassment Complaint on December 13, 1996 which the PIPSC sent to the Public Service Commission as there were other statements made by the Rating Board that were* ***false and Harassing****. The Section 23 Complaint that should have been sent separately to PSSRB was included in this complaint which was sent to the PSC by my PIPSC representative. The PSC did not take any action on any of the complaints.*
>
> . . .

> *I was not properly informed to send the Section 23 Complaint to the PSSRB.*
>
> . . .
>
> *6. State other matters considered relevant:*
>
> *(a) If the PSSRB believes that this complaint is late, then one must consider that the grievance was already settled four years before the competition, and there is no record or mention of the allegations made by management. In addition my complaint was actually made* ***December 13, 1996*** *and this is the continuation or follow-up. The courts are now hearing allegations made with respect to events that happened decades ago.*
>
> . . .
>
> [Emphasis in the original]

[14] On December 13, 2000, the respondents raised a number of objections to Mr. Machnee's complaint, one of which related to the filing delay. In that regard, the respondents made the following argument:

> . . .
>
> *The Employer submits that the complainant's allegations are clearly untimely. A review of the complaint at this time constitutes an abuse of the Board's process given the passage of time*[.] *It is the position of the Treasury Board that it would be inequitable and prejudicial to the respondents to have this matter proceed now given that the events referred to by the complainant took place in September 1991 and May 1996.*
>
> *. . . The Employer reiterates its position that it would be inappropriate for the PSSRB to consider these allegations at this late date.*
>
> . . .

[15] Mr. Machnee responded to the respondents' objections on December 27, 2000. With respect to the issue of delay, he submitted what follows:

> . . .
>
> *3. With respect to the claim that the complaint is untimely the following can be noted:*
>
> *There is no time limit for Complaints. The process was started in 1996 which was timely.*

> *With respect to being untimely, the Rating Board decided to refer to a settled grievance 4 years later along with making false allegations about it. The actions of the Rating Board were prejudicial to the career of the complainant.*
>
> . . .

[16] On January 17, 2001, the Board informed the parties that it intended to deal with the issue of delay on the basis of their written submissions and without an oral hearing. At that time, the parties were provided with a copy of the Board decisions in *Harrison v. Public Service Alliance of Canada* (Board file 161-2-725), *Horstead v. Public Service Alliance of Canada* (Board file 161-2-739) and *Giroux v. Séguin* (Board files 161-825 and 826) and were given the opportunity to file additional submissions.

[17] The respondents filed additional submissions on January 23, 2001, which read as follows:

> . . .
>
> *In* [*sic*] *behalf of the respondents, the Employer's* [*sic*] *submits that the three decisions support the Employer's position that the complaint is untimely. In each of the decisions, it was concluded that allowing years to elapse before laying the complaints constitutes an unreasonable delay. The Board members, in all three instances, maintained the position that the onus rests with the complainant to establish that the delay was not unreasonable. The Employer submits that the* [*sic*] *Mr. Machnee has failed to meet this obligation.*
>
> . . .

[18] Mr. Machnee also filed additional submissions, on January 31, 2001. They read as follows:

> . . .
>
> *The following comments are made with respect to timeliness of the Complaint.*
>
> *1. I have reviewed the three decisions on the matter of timeliness sent to me. The following comments indicate why those decisions are not applicable in this case.*
>
> *2. In Giroux and Horstead, the decisions state that there was no contact for several years, then a complaint was made. In Harrison, the complainant states that he was*

incapable of making a complaint during a period of several years. In the first two, the Board indicates there was no reasonable explanation for the delay. In Harrison the Board did not accept the reason given to the delay.

3. The Regional Director General, Mr. Jim Vollmershausen, was informed in 1995 of Harassment against myself, but no specific action was requested at that time.

4. I signed a Harassment Complaint on December 13, 1996 which was sent to the Public Service Commission shortly after. The PSC did not do their duty in hearing the complaint.

I spent considerable time following up on the Complaint. The PSC must assume some responsibility for delay in (not) hearing the Complaint.

5. I sent a letter . . . to the Regional Director General, Mr. Jim Vollmershausen, on December 30, 1996 stating that I will be taking further action as a result of comments made during the Competition process. I also had a conversation with him in early December with respect to the Competition, but indicated that I would not comment until after the Appeal.

6. Clearly, management cannot say that they did not know a Complaint was forthcoming, as a letter stating this was sent and was followed by a Complaint.

7. The Human Resources section did not advise me on any matters with respect to Harassment or Section 23. HR seems to act primarily as counsel for managers.

8. In hindsight[,] *a Section 23 Complaint could have been made at the same time, however the PIPSC submitted one Complaint to cover all aspects.*

. . .

10. With respect to delay more comments can be made. There is the matter of my acting as a Steward for a member with respect to a grievance which was settled in 1992. This grievance was brought up in a Competition in 1996 along with false allegations. ***Management did not seem to have a problem bringing up dead matters after 4 years.***

. . .

12. I had not had a performance appraisal between 1991 and 1996. Therefore the remarks (and related ones) made with respect to Section 23 came out of the blue. . . .

> ***Management has demonstrated that 5 to 9 years is not a long time.***
>
> *13. A hearing will demonstrate that the process[ ] (problems) has not changed since my departure.*
>
> *14. As opposed to the cases sent to me, I am not seeking reinstatement to my position as it is impossible to return to a "Poisoned Environment".*
>
> ***There has not been undue delay in forwarding the Complaint, but a problem with bureaucracy in having it heard. The issue of undue delay is a technicality being brought up to avoid due process and justice which should have been done in 1997.***
>
> . . .
>
> [Emphasis in the original]

Reasons for Decision

[19] In the case at hand, the issue before the Board is whether it should exercise its powers to dismiss, for undue delay, the complaint filed by Mr. Machnee.

[20] In the past, the Board had the opportunity to deal with the issue of delay in filing complaints. As stated previously, the parties in the instant case were provided with a copy of three such decisions.

[21] One of these decisions was in the *Harrison* case, *supra*. In that case, the Board had to decide whether a three-year delay in filing a complaint was undue. The complainant argued that his alcoholism had prevented him from acting any sooner. The Board did not accept that explanation for the reasons given at pages 15 and 16, which read as follows:

> . . .
>
> *This complaint is rejected because of the complainant's undue delay in submitting it.*
>
> *The complainant should have complained within a reasonable time following his resignation in 1991. Even if I accept his argument that he was prevented by his alcoholism from filing a complaint to this Board in 1991, then he could have taken action as early as July, 1992. I say this because I agree with counsel for the bargaining agent that if the complainant was mentally competent enough to file a complaint before the Canadian Human Rights Commission*

> *on July 8, 1992 (Exhibit U-3), then, one can assume that he was also mentally competent enough to institute a proceeding before this Board. Yet, this is not what he did. Instead, he waited for the outcome of his case before the Canadian Human Rights Commission (on March 3, 1994, he was advised of a recommendation (Exhibit U-3) to the Commission to reject his complaint) and only then, did he decide to file a complaint before this Board (the complaint is signed March 28, 1994 and was received at the Board on April 6, 1994). In short, the complainant filed his complaint to this Board almost three years after the facts giving rise to the complaint which, according to him, occurred in May 1991. This is an unreasonable delay.*
>
> *I note that the complainant stated at the hearing that he was not in a proper physical or mental state to deal with his affairs until July, 1993 (see page 8, para. 4). If that is the case, and using July 1993 (instead of July 8, 1992) as a starting point for evaluating the reasonableness of the delay in submitting his complaint, then, I am still of the view that there was undue delay as it would mean that he waited another ten months after having regained a proper mental state to file the present complaint. Short of any convincing explanation for his inaction, this too is an unreasonable delay.*
>
> *Although the Act or the regulations do not specify a time limit, I am of the opinion that once the employer establishes an unexplained and lengthy delay, there remains an onus on a complainant to establish that he has submitted his complaint within a reasonable period of time. Of necessity, the assessment of undue delay is done on a case by case basis. In the instant case, the complainant has failed to satisfy me that there existed at the relevant time circumstances over which he had no control and which prevented him from submitting his complaint within a reasonable period of time. As I have already said, I am not persuaded that the complainant was prevented by his alcoholism from filing a complaint before 1994 since he was of a sufficiently competent mind, some two years earlier, to file a complaint (Exhibit U-3) in 1992 before the Canadian Human Rights Commission.*
>
> *. . .*
>
> *For these reasons, the complaint is dismissed.*
>
> [Emphasis in the original]

[22] Another of the decisions provided to the parties was in the *Horstead* case, *supra*. In that case, the Board was faced with a complaint which had been filed a few years after the facts on which it was based. Although the Board decided the matter on

other grounds, it stated that the lack of reasonable explanation for what it considered was an unreasonable and excessive delay would have been fatal to that complaint. The Board provided the following reasons at pages 13 to 16:

. . .

Ms. Horstead's delay in bringing these matters before the Board for consideration merits some attention as well. By her own admission, Ms. Horstead said that the Windsor problem now before me as complaint particulars, goes back to 1984/85 and clearly to December 7, 1990, the date of adjudicator Young's decision in Laird (supra). Mr. Newman's reference to Canadian Labour Law regarding delay bears closer scrutiny; Chapter 5.6, Delay, reads in part at page 244:

. . .

> The labour relations tribunal is intended to provide a speedy, inexpensive and efficacious forum for the resolution of labour relations disputes. Therefore, to serve this purpose the tribunal must administer its procedure in a fashion that discourages delay as much as possible. In the words of Estey C.J.O. (as he then was) the "overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied". On the other hand, the need for expeditious proceedings must be balanced against the need to ensure that meritorious claims are heard and the requirements of natural justice are met. These countervailing forces have shaped legislative and labour board policy with respect to the treatment of delay in the context of timely filing of unfair labour practice complaints and the granting of adjournments.
>
> In the interests of promoting expeditious proceedings, several jurisdictions have imposed statutory time limits upon the filing of unfair labour practice complaints.

It goes on to say at page 245:

> In jurisdictions where time limits are not specified by statute, a flexible approach has been taken to the issue of delay in the filing of unfair labour practice complaints. Manitoba has recently authorized its Board to consider delay and the Ontario jurisprudence is particularly well-developed in this regard. The Ontario Labour Relations Board is sensitive to the need for speed that prompted the

above-mentioned statutory time limits, but also to the need to have meritorious complaints resolved with finality. The Board's approach to unreasonable delay therefore is two-fold. In most cases, the Board will simply take the delay into account as a factor in assessing any compensation which might be awarded. However, where the delay is extreme and not justified or excused by mitigating factors, the Board will exercise its discretion not to hear the complaint.

The Board assesses its treatment of delay on a consideration of various relevant factors. These were summarized by Board Vice-Chairman R.O. MacDowell in City of Mississauga:

> A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

If Ms. Horstead had filed a grievance during her working period in Windsor, it is quite likely that this ongoing, long, drawn out saga would be over.

I therefore agree that even though the Public Service Staff Relations Act contains no statutory time limit regarding the filing of a complaint, as Estey C.J.O. wrote "labour relations delayed are labour relations defeated and denied".

In Canadian Labour Law, Mr. Adams states at page 247:

> There can be no exhaustive listing of all pertinent factors that relate to the reasonableness of delay in filing a complaint. Some delay may well be reasonable in a particularly difficult case. What is significant, though, is that in the absence of specific statutory time limits, a labour relations tribunal can apply practical labour relations considerations in dealing with unfair labour practice complaints not filed as promptly as they should have been.
>
> *. . . In addition, I am satisfied that there was an unreasonable and excessive time delay in filing the complaint against the employer and against respondents D. Allen, D. Griffore and R. Williams as the complainant left Windsor in 1991. Because Ms. Horstead provided no reasonable explanation for this delay, I would have dismissed this complaint for that reason alone.*

[23] The last decision with which the parties were provided was the one in the *Giroux* case, *supra*. In that case, the complainant waited five years before filing two complaints. The Board dismissed those complaints on the basis of the lack of explanation for a delay which it considered undue. The Board's reasons are reported at pages 5 and 6 of that decision:

> . . .
>
> *These complaints should have been laid within a reasonable time period of the acts complained of. Allowing years to elapse before laying the complaints constitutes an unreasonable delay which places the respondents at a disadvantage in responding to them.*
>
> *The* PSSRA *and the* P.S.S.R.B. Regulations and Rules of Procedure *do not specify a time limit in bringing such complaints. However, the complainant must establish that the delay is not unreasonable. The complainant, Mr. Giroux, put forward no explanation as to why these complaints were not brought sooner. There is no reason why through the exercise of due diligence he should not have been able to obtain information about the complaint process years ago.*
>
> *Unlike the* Harrison *case (Board file 161-2-725), another complaint under section 23 of the* PSSRA *where the complainant argued that he was prevented by his alcoholism from filing a complaint earlier, Mr. Giroux offered no real explanation for the delay. In any case, Mr. Harrison's complaint was dismissed for undue delay even though less time had elapsed between the occurrence of the events alleged and the filing of the complaint than in Mr. Giroux's case.*

> *Although some latitude must be allowed for the late filing of complaints in proper circumstances, this is not such a case.*
>
> *Mr. Giroux's complaints are dismissed because of his undue delay in submitting them.*

[24] I must agree with Mr. Machnee that the circumstances in the three decisions above are not on all fours with those of his complaint. However, it does not mean that the principles enunciated in those decisions are not sound and cannot apply to this case. In fact, I share the views expressed by the Board in those decisions, which are to the effect that complaints should be filed within a reasonable time frame following the events on which they are based. When such is not the case, the complainants bear the burden of establishing that circumstances which are exceptional or outside of their control prevented them from acting any sooner; they must establish that the delay in filing their complaints is not unreasonable.

[25] In the case at hand, Mr. Machnee alleged that the harassment complaint which he filed with the Public Service Commission on December 13, 1996 also included a complaint pursuant to section 23 of the Act. He added that he had not been properly informed to file a complaint with the Board and seemed to suggest that his employer, his bargaining agent and the Public Service Commission were to blame in this regard. I would be remiss in not taking into consideration that the complainant was a steward within his bargaining unit and, as such, was representing and advising co-workers in relation to their rights and obligations. In his capacity as steward, the complainant had to work within the ambit of both his collective agreement and the Act. In the event that the complainant did not know of the complaint process provided for in the Act, he surely ought to have known of it. As the Board wrote in *Giroux*, *supra*, ". . . [t]here is no reason why through the exercise of due diligence he should not have been able to obtain information about the complaint process years ago."

[26] Mr. Machnee also alleged that he had informed Mr. Vollmershausen, on December 30, 1996, that he would be taking further action. Given that he had already filed a complaint with the Public Service Commission on December 13, 1996, one could speculate that he was referring to filing a new complaint directly with the Board pursuant to section 23 of the Act. In any event, while he might have intended to file a new complaint, there is a difference between an intention to do something and the performance of the intended action. In other words, it is possible, for whatever

reason, that an honest intention to perform an action never materializes. Therefore, giving notice of an intention to file a complaint could not be considered tantamount to filing such complaint. In fact, Mr. Machnee made no representation to the effect that he filed a complaint after having informed Mr. Vollmershausen of his intention to do so. Mr. Machnee appears to have been fully aware of his statutory rights. Nevertheless, he failed to act in a diligent manner.

[27] For all these reasons, I find that Mr. Machnee did not file the complaint at hand with the Board in a reasonable time frame and that he did not provide a reasonable explanation for his delay in doing so. The respondents' objection is therefore allowed and Mr. Machnee's complaint is dismissed.

Yvon Tarte,
Chairperson

OTTAWA, March 19, 2001.