Date: 20040426

File: 161-34-1240

Citation: 2004 PSSRB 29

Public Service
Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

RÉAL LAMARCHE

Complainant

and

YVAN MARCEAU

Respondent

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

Before: Sylvie Matteau, Deputy Chairperson

For the complainant: Pierrette Gosselin, Counsel, Professional Institute of the Public Service of Canada

For the respondent: Stéphane Hould, Counsel

Heard at Sherbrooke, Quebec,
January 19 and 20, 2004.

[1] This decision relates to a complaint made under section 23 of the *Public Service Staff Relations Act* (*PSSRA*), in which the complainant has alleged discrimination prohibited under paragraph 8(2)(*a*) of the *PSSRA* in that the respondent manager [translation] "did not qualify me as a candidate on the sole pretext that 'I was not available because I occupied a national position with the union'" (wording of the complaint dated October 4, 2002).

[2] In fact, two complaints were made, one dated September 10, 2002, and the other dated October 4, 2002. After preliminary discussions, the parties agreed to proceed with only the latter complaint. As well, the complainant intends to proceed only against Mr. Yvan Marceau, Assistant Director of the Appeals Division at the TSO in eastern Quebec. The complainant's withdrawal of proceedings against all the other respondents in this case is therefore acknowledged.

[3] It goes without saying that the staffing process itself is not at issue before me. The complainant followed the appropriate procedures in this regard, in accordance with the legislation governing the Canada Customs and Revenue Agency (Agency). My jurisdiction is limited to determining whether, according to the evidence heard, the respondent discriminated against the complainant because of his union activities.

[4] The issue of the adjudicator's jurisdiction over corrective action was debated by the parties before the hearing in an exchange of letters; these letters are in the file. Brief representations on this issue were made at the hearing. This issue will have to be decided only if I find that the complaint is justified.

[5] The relevant legislative provisions are the following:

> *8.(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall* [...]
>
> *(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;*
>
> [...]

> *23.(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> > *(a) to observe any prohibition contained in section 8, 9 or 10;*
>
> [...]
>
> *(2) Where, under subsection (1), the Board determines that the employer, an employee organization or a person has failed in any manner described in that subsection, the Board may make an order directing the employer, employee organization or person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate.*
>
> [...]

The evidence

[6] The complainant called one witness and testified himself. The respondent alone testified to his version of the facts.

[7] Mr. Lamarche has been employed by the Canada Customs and Revenue Agency since 1975. He has always worked at the Sherbrooke office. He has occupied a position at the AU-3 level for nearly 10 years. He is also national president of the AFS group, which has included some 10,500 members of the Professional Institute of the Public Service of Canada since 1996. During the period at issue, the complainant was a technical advisor in the Appeals Division, although his substantive position was in auditing.

[8] The team leader of the Appeals Division in Sherbrooke was Mr. Jean-Claude Fontaine. In May 2002, Mr. Fontaine was assigned to other duties for a two-year period. Mr. Marceau, Assistant Director of the Appeals Division, therefore launched a staffing process to fill that position on an acting basis during that period. Mr. Marceau's office is located in Québec. The complainant has alleged that prohibited action was taken against him by Mr. Marceau, the respondent, during that process.

[9] The witnesses described the events surrounding that staffing process. Ms Lucie Bouchard testified for the complainant. She has been employed by the Agency for 11

and one-half years. In May 2002, she was an auditor at the AU-1 level and occupied an appeals officer position at the Appeals Division in Sherbrooke.

[10] Briefly, Ms Bouchard explained that she learned at a June 6, 2002 meeting that Ms Danielle Rouleau had been appointed acting team leader. She stated that she was surprised and shocked at that announcement because, according to her, more senior persons in the section had been approached about that position.

[11] Apparently, an informal consultation process began as soon as Mr. Fontaine was appointed to his new position at the end of May. Mr. Fontaine took the initiative of verifying certain persons' interest in that position, and Mr. Denis Blais and Mr. Claude Charpentier were approached. These two persons were not members of the appeals division in May 2002, but had been in the past. Ms Bouchard stated that she spoke with them about the matter.

[12] Ms Bouchard spoke to Mr. Lamarche on June 3. She stated that at that time, she asked him whether he had been consulted by Mr. Fontaine, since he was then an appeals technical advisor, and whether he was interested in the position. He then told her that he had not been consulted and was indeed interested in the position. Ms Bouchard added that Mr. Lamarche apparently also told her that [translation] "he would have some decisions to make". In her opinion, he was referring to his union activities.

[13] Ms Bouchard also spoke with Mr. Marceau after the decision to appoint Ms Rouleau was announced on June 6. After the group meeting, Mr. Marceau met with the division employees individually. At that time, Ms Bouchard asked him how that choice had been made. Mr. Marceau apparently answered that Ms Rouleau already worked in the division, that her appointment did not create a vacancy in another sector and that, before coming to the Sherbrooke office, she had had experience at the AU-3 level at the TSO in Laval, although she occupied a position at the AU-2 level in Sherbrooke.

[14] Ms Bouchard stated that she asked Mr. Marceau whether Mr. Lamarche's application had been considered along with that of Ms Rouleau. According to Ms Bouchard, Mr. Marceau said no; he explained that Mr. Lamarche was already busy with the union. Ms Bouchard then asked Mr. Marceau whether he had asked

Mr. Lamarche that question; Mr. Marceau answered that he had not, reiterating that he believed Mr. Lamarche was busy with the union.

[15] Mr. Lamarche testified next. He explained that he has worked as an appeals technical advisor since 1995. Exhibit P-3 was adduced in support of this statement, confirming Mr. Lamarche's temporary lateral transfer from April 3, 1995, to March 31, 2003. He explained that on several occasions in the past, he shared duties with Mr. Fontaine, occasionally replacing him for a day or two. During the so-called pre-Agency period when certain delegations were possible, he was sometimes authorized to sign for Mr. Fontaine. He considered himself Mr. Fontaine's right-hand man and believed that the other employees also saw him in that role.

[16] Mr. Lamarche testified that in 1995 he applied for the position of chief of appeals, at the AU-4 level (this position having been designated team leader since April 2002, following a reorganization explained by Mr. Marceau in his testimony), and obtained confirmation of his qualifications from the then selection board (Exhibit P-4).

[17] Concerning the circumstances surrounding the acting appointment process at issue, Mr. Lamarche stated that he was approached by Ms Bouchard, who asked him about his interest in the position and the selection process. He explained that he met with Mr. Fontaine later that same day, June 3, when he personally informed Mr. Fontaine of his interest in the position and inquired about the selection process. Mr. Fontaine apparently then explained to him that he had been authorized by Mr. Marceau to issue a notice of interest and to identify candidates.

[18] Mr. Lamarche described the notice of interest process as a staffing process designed to identify potential candidates who might be interested in the position. The criteria Mr. Fontaine said he gave him at that time had to do with experience in appeals and work at the AU-3 level. In response to a question by Mr. Lamarche, Mr. Fontaine stated that four candidates had been identified in this manner: Mr. Blais, Mr. Charpentier, Ms Lemieux and Ms Rouleau.

[19] Mr. Lamarche then asked Mr. Fontaine why he had not been approached for the position. Mr. Fontaine answered that he did not know the complainant was interested. Mr. Lamarche stated that he was then very clear about his interest, reminding Mr. Fontaine that he had the necessary experience and qualifications, having worked

with him on appeals for seven years, not counting a three-year period from 1989 to 1991.

[20] Mr. Fontaine then answered that he wanted someone who was available and prepared to do the job, which he did not believe Mr. Lamarche to be as he was unavailable because of his union activities. Mr. Lamarche responded to this statement by reiterating his interest in the position and telling Mr. Fontaine that he would have some major decisions to make and could make himself available.

[21] Mr. Lamarche was very frank in his testimony when he stated that he probably did not tell Mr. Fontaine clearly that he was prepared to leave the union in order to take the position. He believes he told him, [translation] "I'll have some major decisions to make."

[22] On June 6, 2002, at 7:25 a.m., an e-mail message concerning the notice of interest process was sent to Mr. Lamarche and to the four other candidates, informing them that a competition would be held in the next few months to fill the appeals team leader position and that one person would be appointed on an acting basis during that staffing period (Exhibit p-5). This message therefore terminated the notice of interest process and described a new, two-stage process: a short-term appointment without competition, and then an acting appointment by means of a competition.

[23] The complainant was not present at the team meeting that same day when Mr. Marceau announced Ms Rouleau's short-term appointment to the position. He learned of that development by means of a telephone call from Ms Bouchard.

[24] Mr. Lamarche stated that he met with Ms Rouleau, who came to his office later that day to tell him about her appointment. Apparently, she asked him whether he had been approached for the position and whether he was interested. The complainant stated that he explained to her that he had not been contacted and told her about his June 3, 2002 conversation with Mr. Fontaine. As Ms Rouleau left the office, she told Mr. Lamarche that Mr. Marceau wanted to see him.

[25] The complainant met with Mr. Marceau only the following day, June 7, 2002. Mr. Marceau explained to him the reasons for the decision to appoint Ms Rouleau: she met the criteria, including recent experience. The complainant emphasized that he heard the word "recent" for the first time in that description of the experience criteria.

Where Mr. Lamarche's availability was concerned, Mr. Marceau told him that he had not envisaged the possibility of his leaving his position with the union and that, in addition, he should not leave that position because he was doing good work there. Mr. Lamarche then confirmed to Mr. Marceau that, on the contrary, he was prepared to make himself available for the position.

[26] Mr. Lamarche's greatest criticism is that he was not consulted. Whether to leave his responsibilities with the union and devote himself to a new career plan was his decision. He saw the short-term acting appointment as a way of getting back into that type of work and reintegrating himself, in order to obtain the longer-term acting appointment. According to Mr. Lamarche, he could have made himself available in less than 10 days. He had the necessary experience and qualifications.

[27] Mr. Lamarche felt that the fact that he [translation] "did union business" must not harm his career. He stated that he clearly saw the need to leave those union activities. The short-term acting appointment would have given him a better chance of succeeding in the competition. Three years away from retirement, he saw immediate financial as well as pension advantages in that appointment, which would have had considerable impact on his career.

[28] Mr. Lamarche subsequently entered the competition for that position, but withdrew during the process.

[29] As well, Mr. Marceau explained that the process to replace Mr. Fontaine was launched on May 30, 2002. He first spoke to Mr. Fontaine, who was to speak to Mr. Donati, the manager of the Sherbrooke office. Apparently the notice of interest process was Mr. Fontaine's initiative. Mr. Marceau then consulted the human resources services.

[30] Following his consultations with the human resources services, Mr. Marceau decided on an acting appointment of a few months' duration, without competition, while preparing for a competition in the fall to fill an acting appointment for a little less than two years. A meeting with Mr. Fontaine on June 5 in Sherbrooke was arranged in order to set the directions for the process. At that meeting, Mr. Fontaine told Mr. Marceau about the approaches he had made as part of the notice of interest process. Mr. Marceau stated that he was uncomfortable with that process, but Mr. Fontaine had already made those approaches.

[31] The two managers reviewed the applications together. Since he had been responsible for the Appeals Division only since April 2002, Mr. Marceau stated that he relied a great deal on Mr. Fontaine, who knew the candidates well. In his opinion, the process was very brief. The candidates were assessed using the criteria that had been identified and would ensure an effective transition until the competition was completed. Five candidates were considered (Mr. Blais, Mr. Charpentier, Ms Lemieux, Ms Rouleau, and the complainant Mr. Lamarche). In Mr. Marceau's opinion, the decision was clear since Ms Rouleau best met all the required criteria, having 10 years' experience in appeals, having worked at the AU-3 level in Laval for six years, and having occupied a position at the Appeals Division in Sherbrooke for one year.

[32] The reaction to his decision on June 6 surprised Mr. Marceau. However, Ms Bouchard was the only person who approached him concerning Mr. Lamarche after the announcement. He testified that he told her he had considered Mr. Lamarche's application even though he had not spoken to him, as he had not spoken to any other candidate. He thus confirmed that he relied on Mr. Fontaine.

[33] When asked for more details about Mr. Lamarche's case, Mr. Marceau answered that apparently Mr. Lamarche had recorded working only 49 hours on appeals in operations during the previous year, which gave him little recent experience with the appeal programs. Under cross-examination, however, Mr. Marceau admitted that he obtained this exact figure only afterwards. He also admitted that this figure did not necessarily represent all the time Mr. Lamarche spent as an appeals technical advisor; it was time recorded working on specific cases.

[34] Mr. Marceau stated that he was told by someone that Mr. Lamarche wanted to meet with him when he came out of a meeting with an Appeals Division employee on June 6. It was then agreed by telephone that they would meet each other the following day, at another meeting already arranged in Drummondville.

[35] The purpose of the June 7 meeting was to explain the selection criteria and the overall process to Mr. Lamarche. On the issue of availability, he acknowledged that an informal exchange took place. Mr. Marceau stated that the issue of availability to do the job was not the determining factor in his decision. He stated that he based his decision on two other criteria that he considered different: recent, significant experience in performing the duties of a position at the AU-3 level; and recent experience with the programs administered by the Appeals Division. According to

Mr. Marceau, having Mr. Lamarche leave his union duties to become more available would therefore not have changed his decision.

[36] Mr. Marceau testified that the conversation then moved to the fact that in the next few weeks Mr. Lamarche would be very busy with the collective agreement negotiations that were to begin. Mr. Marceau disclosed that, during a discussion (which he described as informal) of the upcoming negotiations, he asked Mr. Lamarche whether in those circumstances he would have time for the position. Mr. Lamarche answered that he would have some decisions to make. They apparently then discussed Mr. Lamarche's participation in the competition planned for the fall.

[37] Ms Rouleau's experience was also discussed. Under cross-examination, Mr. Marceau admitted that her experience was in general auditing. Also discussed was the fact that, according to Mr. Fontaine, Mr. Lamarche had had little experience in appeals over the previous two or three years.

[38] Mr. Marceau stated that he did not deny that he had doubts about Mr. Lamarche's availability. However, he reiterated that availability was not a selection criterion. He clearly testified that he had [translation] "no objection to appointing someone in a union position as team leader".

[39] Under cross-examination, Mr. Marceau was asked to describe the process of appointing Mr. Fontaine to his new position. According to the description provided, a notice of interest process was used and Mr. Fontaine was appointed for two years, without competition.

[40] Concerning Mr. Marceau's feelings about the union, two events in his past were raised under cross-examination. Counsel for the respondent objected to this evidence in both instances. Evidence about Mr. Marceau's refusal to join the union was allowed, subject to the value to be assigned to it. That event went back a number of years and was explained by Mr. Marceau in terms of his relationship with a person who [translation] "kidded" him about joining the union at a time when he was aiming for a management position. The other event had to do with a passage in an annual evaluation of an employee, in which Mr. Marceau apparently indicated that that person's duties as an auditor were incompatible with his role as a union representative. In this instance, the objection was upheld.

[41] That event had do with the personal file of an employee who was not present; according to Mr. Marceau, it went back a number of years and had nothing to do with the circumstances of the present case. According to counsel for the complainant, it was a demonstration of the respondent's anti-union animus, from which a conclusion in the present case could be drawn by inference.

Arguments

For the complainant

[42] The complainant has alleged that the refusal to consider his application for the team leader position constitutes discrimination prohibited under the *PSSRA* since, according to the reasons for the employer's decision, Mr. Lamarche's unavailability because of his union activities was a limitation and an impediment. As a national president in the union, Mr. Lamarche has important responsibilities that demand a great deal of his time. These activities played a role in Mr. Marceau's decision.

[43] It has also been established that Mr. Lamarche was a member of the appeals team at the time the process to appoint a replacement to Mr. Fontaine's position was launched, and that he was working as a technical advisor at the AU-3 level (Exhibit P-3). Counsel for the complainant added that Mr. Lamarche had already qualified for that position in 1995 (Exhibit P-4), had the confidence of the other team members, as well as the required experience and, lastly, in practice had already replaced Mr. Fontaine during the years 1990 to 1992 and had even been authorized to sign for him until his union activities required him to be absent.

[44] According to counsel for the complainant, I should therefore find that Mr. Lamarche had the experience and the qualifications to occupy that position on a temporary, acting or indeterminate basis and met the three criteria set out: (1) he had experience in appeals; (2) he was already a member of the appeals team; and (3) he had experience at the AU-3 level.

[45] Counsel for the complainant also emphasized that the complainant clearly indicated his interest in the position to various persons during the decision-making period from May 28 and June 6. On June 3, during a meal, Mr. Lamarche would have told Mr. Fontaine clearly and in concrete terms that he was interested. Mr. Fontaine would have objected initially, citing Mr. Lamarche's unavailability because of his union

activities. Ms Bouchard testified to the same effect. When Ms Bouchard approached Mr. Fontaine and Mr. Marceau, she was told that the complainant's reduced availability because of his union activities would have been a factor in the decision.

[46] In addition to the fact that the decision to appoint Ms Rouleau appeared unpopular, her experience was in general auditing, and the fact that her experience was given priority over the experience in appeals acquired over the years by Mr. Lamarche would be evidence of discrimination. According to the complainant, then, it is not impossible that the [translation] "'recent' experience in appeals" was designed to exclude Mr. Lamarche. In any case, it had that effect.

[47] In support of her allegations, counsel for the complainant cited *Stonehouse* (Board File No. 161-2-137 (1997) (QL)), which should serve as a guide in the present case. Ms Gosselin drew a parallel between the two cases and adopted the points set out in three paragraphs of the argument by Mrs. Stonehouse's representative:

> [...]
>
> *(d) Mrs. Stonehouse should have been but was never asked whether if promoted, or assigned to supervisory duties, she would devote all the necessary time to her departmental work.*
>
> *(e) He contended that management neither had, nor has, any right to consider time spent on Union activities in assigning work or considering an employee for promotion. The mere consideration of such activity as a factor in making these decisions is evidence of discrimination and prohibited by Section 8. In the instant case he submits that if Mrs. Stonehouse had not exercised her statutory right to participate in the lawful activities of her employee organization both as President and the exercise of her duties as a Union Representative, she would have been considered more favourably for promotion, assignment of duties and avoided the discriminatory conduct by management.*
>
> *(f) The lawful absence of an employee from the duties of a position, such as for the purpose of language training, ought not and does not affect adversely the opportunities and rights of such employee. Why then should absence for Union activity adversely affect opportunity for promotion or assignment of work. In*

> *fact, the statute by Section 8 prohibits the management from so discriminating.*

[...]

[48] My attention was also drawn to paragraph 24 of that decision, and it was added that Mr. Marceau has also apparently admitted that unavailability would have been a factor in his decision.

> *24. Mr. Farmer in the course of his testimony admitted that time spent on Union activity by Mrs. Stonehouse was a factor in not placing her in the Unit Head position at the time of reorganization in December 1975. He also expressed the opinion that time spent on union activity was of no benefit to the employer and that the activities of a Union could be a disadvantage in achieving "a smooth running operation with no complaints or grievances". When one considers the whole of his testimony, it is reasonable to conclude that Mr. Farmer tolerates the existence of a union and finds it troublesome rather than a constructive instrument.*

[49] As well, the complainant cited paragraph 43 of the reasons for that decision:

> *43. The words contained in section 6 are fundamental to the object of the Act. They are the statutory Magna Carta of the rights conferred on every employee within the jurisdiction of the P.S.S.R. Act. In simple, concise language, it provides that every employee may be a member of an employee organization and may participate in the lawful activities thereof. They are rights to be exercised by any and every employee without any fear or restraint whatsoever from or by any person. In the absence of these rights, the balance of the provisions of the P.S.S.R. Act regarding certification of a bargaining agent, collective bargaining, mediation, and resolution of disputes and grievances would be a mere mockery.*

[50] Still according to that decision, at issue in the present case, as well as in that case, would be whether the refusal to consider Mr. Lamarche for appointment because of, among other things, the time spent on his union responsibilities constitutes discrimination prohibited under subsection 8(2) of the *PSSRA*. Also at issue would be whether Mr. Lamarche was given an opportunity to explain himself and to decide for himself what priorities to give to his union activities and his career plan.

[51] According to paragraph 56 of *Stonehouse* (*supra*), in order not to discriminate, management must ascertain individual employees' interest and consult them in order

to give them an opportunity to explain themselves. The evidence has shown that here that did not happen; on the contrary, it was the complainant who indicated interest.

[52] The prohibition set out in subsection 8(2) of the *PSSRA* is absolute. Paragraph 58 of *Stonehouse* specifies, "[...] the Act prohibits discrimination whether it is done knowingly or wilfully or neither". In the present case, even if Mr. Marceau is given the benefit of the doubt, which the complainant is prepared to do, I should find in favour of the complainant since the repercussions of the discrimination on him personally have been established.

[53] Lastly, the complainant wondered why the acting staffing process to fill that position and Mr. Fontaine's new position was different. Was it a way of excluding Mr. Lamarche?

For the respondent

[54] For the respondent, counsel argued that at issue was whether it had been established that Mr. Marceau discriminated against Mr. Lamarche during the appointment process because of Mr. Lamarche's union activities. In other words, did Mr. Lamarche's union activities influence Mr. Marceau's decision? Mr. Marceau denied that the complainant's union activities were a factor in his decision. According to him, had Mr. Lamarche no longer participated in those activities, it would not have changed his decision in any way. The following arguments were made:

(1) I do not have jurisdiction over Ms Rouleau's appointment.

(2) The complainant simply has not discharged the burden of proof. The testimony was largely based on hearsay; Mr. Marceau provided a credible version of the facts and a plausible explanation of the events. His version of the facts is more consistent with the evidence as a whole (*Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA). The criticism of Mr. Marceau is limited to his apparent failure to consider Mr. Lamarche's application because Mr. Lamarche was busy with union matters, which Mr. Marceau has denied, as is supported by the evidence.

(3) If indeed there was discrimination, it might be laid at Mr. Fontaine's door. It was Mr. Fontaine who initiated the notice of interest process, explained the criteria to Mr. Lamarche on June 3, and commented on the candidates to

Mr. Marceau, who did not know them. That was not the evidence the complainant chose to adduce. Mr. Marceau was looking for a competent, "operational" person for those few months. Counsel for the respondent emphasized that Mr. Lamarche admitted in his testimony that, had there been any doubts about his qualifications, the position would have allowed him to do his homework and get back to that type of work.

[55] Counsel for the respondent cited two decisions in support of his arguments that I cannot rule on the decision to appoint Ms Rouleau to that acting position and that the burden of proof is indeed on the complainant: *Gaudreau and Harvey* (Board File No. 161-2-347) (QL)); and *Prue and Bhabha* (Board File No. 161-2-540) (QL)). The onus was on the complainant to establish that his union activities influenced Mr. Marceau's decision and to establish a connection between the differential treatment and the decision.

[56] In the present case, the evidence adduced has not established that connection. Mr. Marceau did not know Mr. Lamarche; he was looking for a person who would be operational immediately, and it was entirely acceptable for him to look for recent experience for those purposes. His short-term priority was the operation of the Appeals Division. Concerning the acting appointment by competition, he invited Mr. Lamarche to enter that competition.

[57] Thus, the evidence has not established intent by Mr. Marceau to discriminate against Mr. Lamarche because of his union activities. Even if Mr. Lamarche's availability had been a factor in Mr. Marceau's decision-making process, it would not have altered his choice in any way because availability was not a criterion. As well, the other candidate had recent experience and could be "operational" immediately. Mr. Marceau testified that the decision was clearly and quickly made, given Mr. Fontaine's knowledge of the candidates and Ms Rouleau's experience, and given that the appointment was a short-term one to be followed by a full competition. The process was launched on the advice of the human resources services. The appointment process used to fill Mr. Fontaine's position is not relevant to the present case. That situation is different.

[58] In rebuttal, counsel for the complainant emphasized that no evidence had been adduced of urgency in the situation in the appeals division calling for the appointment

of a person with recent experience. Accommodations could have been made to allow the complainant to free himself from his union activities.

Reasons

[59] Did Mr. Marceau show evidence of discrimination or differential treatment against Mr. Lamarche in comparison with the other candidates because of his union activities, as is prohibited by paragraph 8(2)(*a*) of the *PSSRA*?

[60] The complaint is limited to action by Mr. Marceau and to the short-term (six-month) acting appointment without competition. It is also limited to the Board's jurisdiction under section 23 of the *PSSRA*, since the Board is not at liberty to become involved in the staffing process itself.

[61] The complaint reads as follows:

> [Translation]
>
> *Statement of circumstances:*
>
> *In filling the ITA appeals team leader position at the TSO in Sherbrooke, the managers involved in the appointment process did not qualify me as a candidate on the sole pretext that "I was not available because I occupied a national position with the union". That statement was the only explanation provided by the delegated managers until the date the appointment was announced (June 6, 2002).*

The corrective action requested is the following:

> *To be appointed ITA appeals team leader on an acting basis at the TSO in Sherbrooke.*

[62] This case is not a simple one since it must be considered in a context that involves a number of delicate balances: firstly, the balance between the individual's rights to participate in union activities and that person's obligations toward the employer; and, secondly, the balance between the manager's duty to respect the employee's union activities and the organization's operational requirements.

[63] The *PSSRA* seeks to protect employees who are involved in union matters. However, the *PSSRA* also endeavours to maintain a balance between this right of employees and the needs of the employer. On the one hand, the complainant participates by personal choice in union activities, even at a high level, without

interference from management; on the other hand, management is obliged to ensure the smooth operation of the organization, taking into account employees who have made that choice. This delicate balance has been at issue in other decisions before the Board, including *Fairall and McGregor* (Board File No. 161-2-368) (QL)).

[64] As Deputy Chairperson Muriel Korngold Wexler noted in that case, "It is obvious that there are only a limited number of hours during the day which permit [the employee] to do [that person's] work and attend to [that person's] union responsibilities. It is therefore [the employee's] responsibility to divide [that person's] time properly and ensure that [the employee] fulfils [that person's] obligations." In short, she states, the complainant could not be in two places at once. That is also the case here.

[65] The factor that appears to have disadvantaged Mr. Lamarche in the staffing process is, in his opinion, the fact that he was [translation] "not available because I occupied a national position with the union". Must we then conclude that discrimination occurred?

[66] In determining whether unlawful action within the meaning of the *PSSRA* did take place, I must examine the selection criteria used, the qualifications of the persons involved, and the circumstances surrounding the staffing process, in order to seek indications of discrimination.

[67] Quite some time ago, through its then Chairperson Mr. Finkelman, the Board adopted a test for determining whether such action did take place (*Gennings and Milani* (Board File No. 161-2-87) (QL)). According to this test, a complainant must establish that:

> *(i) discriminatory action against the employee was taken with regard to that person's employment or one of that person's conditions of employment;*
>
> *(ii) the discriminatory action was taken because the employee was a member of an employee association or was exercising a right under the Act; and*
>
> *(iii) the discriminatory action was taken by the person named in the complaint as the respondent.*

[68] We must therefore determine whether these three elements are present in the present case. Let us first examine the evidence of anti-union animus.

(i) Discriminatory action

[69] The complainant has cited two factors that would indicate discrimination against him: the selection criteria; and the staffing process used. Let us first examine these two factors and the extent to which they might constitute discrimination against the complainant.

[70] *Black's Law Dictionary* defines discrimination as follows:

> [...] *A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.*

[71] The evidence has shown that five candidates were considered: Mr. Blais, Mr. Charpentier, Ms Lemieux, Ms Rouleau, and the complainant Mr. Lamarche. The organizational chart (Exhibit P-1) and the evidence also show that Mr. Blais and Mr. Charpentier were not members of the appeals division at the time of the acting appointment process in June and that, therefore, they did not have the required recent experience, either.

[72] Thus we cannot conclude that using the recent experience criterion was designed to disqualify Mr. Lamarche or had the effect of discriminating against him, since it also had the effect of disqualifying two other candidates who, to my knowledge, were not active in the union. On the contrary, this factor corroborates Mr. Marceau's explanations that he was looking for someone who was familiar with the operations and programs and would be able to fill the acting position quickly until the competition was completed.

[73] According to the evidence adduced, then, I do not consider that the legitimacy of the criteria used is at issue. As well, the *Act* recognizes that the choice of criteria is the employer's responsibility. Section 7 of the *PSSRA* provides as follows:

> *Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*

[74] Concerning the process used, that is, an initial appointment without competition, followed by an acting appointment by means of a competition for the remainder of Mr. Fontaine's two-year absence, according to the evidence this process did not have the effect of discriminating against the complainant in favour of the other candidates, either. Everyone was subject to the same process. The decision was made on the recommendation of the human resources services, without regard to the candidates. The decision had to do with the organization of the work under section 7; it was indeed the employer's responsibility. As well, Mr. Lamarche entered the subsequent competition, before withdrawing from it.

[75] Therefore, on the issue of whether the criteria and the process used in themselves had the effect of discriminating against Mr. Lamarche, I must respond that the evidence has not been so established.

[76] Consideration of the issue does not stop there, however. Mr. Lamarche has argued that these factors, and particularly the recent experience criterion, were a pretext to exclude him intentionally from the position. According to the wording of Mr. Lamarche's complaint, the factor that worked against him was his unavailability and the resulting lack of recent experience with the Appeals Division programs. The criteria were therefore apparently deliberately chosen so as to eliminate him from the competition or not to consider him for the position because of his union activities, thus discriminating on the basis of his union membership and the exercise of his activities as a national president. At issue here, then, is the second part of the Finkelman test.

(ii) <u>Causal relationship</u>

[77] For a finding that there was discrimination under section 8 of the *PSSRA*, according to the Finkelman test there must be evidence of a causal relationship.

[78] I found Ms Bouchard's testimony, that Mr. Fontaine apparently told her that Mr. Lamarche was not considered for the position because of his union activities, very disturbing. Mr. Lamarche then described his meeting with Mr. Fontaine. He stated that he had to tell Mr. Fontaine that he was interested in the position, and that the response he was given was that he had not been considered because he was busy with the union. Mr. Fontaine did not testify, and Mr. Lamarche withdrew his complaint against him. I will therefore make no further comments on that aspect of the case.

[79] However, the written evidence has established that, following that meeting, Mr. Lamarche's name was added to the list of candidates, as can be seen from the June 6 e-mail message sent by Mr. Fontaine (Exhibit P-5). This fact leads me to believe that Mr. Lamarche's conversation with Mr. Fontaine was productive.

[80] In her testimony, Ms Bouchard also noted her conversation with Mr. Marceau after the decision was announced on June 6. Mr. Marceau apparently told her that Mr. Lamarche's application was not considered because he was busy with union activities, which Mr. Marceau denied. Mr. Marceau testified that Mr. Lamarche's application was considered but that, following Mr. Fontaine's comments, he concluded that the time Mr. Lamarche had spent in the appeals division in the previous few years would not have given him the same experience with the programs that Ms Rouleau had. According to Mr. Marceau, the decision-making process was very brief. Given Ms Rouleau's qualifications, her application was accepted because of operational requirements.

[81] Here again, determining whether Mr. Lamarche or Ms Rouleau was better qualified for the position in the circumstances does not fall under my jurisdiction. However, the candidates' qualifications may be an indication of discrimination. Mr. Marceau testified that the successful candidate met the selection criteria. She had occupied a position at the AU-3 level in Laval for six years, and a position at the AU-2 level in the Appeals Division in Sherbrooke for one year. The complainant did not contradict these facts, even though under cross-examination he led the respondent to admit that Ms Rouleau's experience at the AU-3 level was in general auditing, while his own experience was in the Appeals Division. I cannot express an opinion on the weight of these aspects of the case in the staffing process. Nonetheless, on the face of the matter, the person selected appears to have met the selection criteria. In my opinion, therefore, there is no indication of discrimination.

[82] Concerning Mr. Lamarche, even if I were convinced that he, too, had the qualifications required for the position, that reason alone does not allow me to find that discrimination occurred.

[83] Still with regard specifically to a short-term acting position, I consider that Mr. Lamarche was not selected for the position because his union activities did not allow him to acquire experience with the Appeals Division programs that, in management's opinion, would have allowed him to be "operational" within a very short

time. That fact is therefore a consequence of his union activities. However, nothing has shown that those activities were a cause of the decision in a manner that is prohibited under the *Act*. In other words, his union activities deprived him of experience, which deprived him of the position. The situation would be different in the case of a competition in a staffing process for a position in which the incumbent was to occupy the position later and for a longer period.

[84] The purpose and intent of section 8 of the *PSSRA* are to sanction any reprisals, pressure or interference by the employer or its agents against employees who are involved in union matters. That is the context in which I must analyse the situation. In my opinion, a causal relationship has not been established.

(iii) Anti-union animus

[85] The complainant has raised the issue of evidence of anti-union animus, which I must address in a case of this nature. The complainant adopted a number of arguments from *Stonehouse* (*supra*), the gist of which is that evidence of anti-union animus need not be established.

[86] That said, the authorities and the case law agree that anti-union animus can be inferred from negative repercussions for the complainant, where there appears to be no valid explanation of the reasons for differential treatment: *Social Science Employees Association and the Canadian Union of Professional and Technical Employees v. Frank Claydon and Tom Smith* (2002 PSSRB 101).

[87] I note first of all that, in *Stonehouse* (*supra*), the respondent unreservedly admitted anti-union animus against the complainant. While taking into account the principles set out in that decision, here my decision must be guided by the evidence in the present case.

[88] Mr. Marceau denied that the complainant's union activities were a factor in his decision. He stated that Mr. Lamarche's unavailability was not a factor and would not have changed his decision in any way since availability was not a selection criterion. In the present case, there is no direct evidence of anti-union animus. There is agreement, however, that it is rare for the respondent to admit that type of thing.

[89] There were repercussions for the complainant. However, it is important to see them in the relatively limited context of the present complaint, and not in the context

of alleged discrimination in the subsequent competition and longer-term appointment, as the complainant appears to do.

[90] The respondent provided a valid explanation for his actions and decisions, and I cannot infer either anti-union animus by him or feeling against Mr. Lamarche personally or because he was involved in union matters. His version of the facts is consistent with the evidence as a whole (*Faryna v. Chorny* (*supra*)).

[91] The events raised under cross-examination, concerning the respondent's past refusal to join the union and his role in the annual evaluation of an employee who was a union member, have little relevance in the present case. Those events, which were presented as being similar, have no direct relationship to the complainant and the events of May and June 2002 that are being considered (Yves Ouellette, *Les tribunaux administratifs au Canada,* Les Éditions Thémis, 1997, p. 298). After reviewing the evidence and analysing the case, I find that, even if the objection concerning the past performance evaluation had not been upheld, I would have reached the same conclusion.

[92] Mr. Lamarche himself admitted that the position required him to be available to the extent that [translation] "he would have some decisions to make" about his union involvement. It is clear that his responsibilities and obligations as a national president represented a significant investment of time. This factor was known to Mr. Marceau and acknowledged as a consequence of Mr. Lamarche's union involvement. Although the repercussions of these activities for his work were noted, he was not criticized regarding his productivity or his presence at the office.

[93] The complainant has criticized Mr. Marceau and Mr. Fontaine for not consulting him on this matter. Could these persons then have been criticized for interfering in union matters? The respondent took for granted the complainant's choice to be involved with the union. The nature of the decision to be made did not necessarily justify that consultation. However, such a practice would promote good working relationships. Concerning the long-term decision, Mr. Marceau stated that he discussed Mr. Lamarche's participation in the fall competition with him. In my opinion, the fact that Mr. Lamarche was not given the short-term acting position because of insufficient experience with the current programs resulting from his choice to look after union matters does not constitute discrimination because of his involvement in union matters within the meaning of the *Act*.

(iv) Was it the respondent who took the action?

[94] Although the analysis and the findings set out above do not require that this issue be addressed, I will take the liberty of making some comments. Ms Bouchard testified that Mr. Fontaine did not consider the possibility that Mr. Lamarche would be interested in the position. On his own initiative, Mr. Lamarche told Mr. Fontaine that he was interested in the position. According to the evidence, at that point and as Mr. Fontaine explained to him, Mr. Lamarche's name was added to the list of interested persons. The notice of interest process was apparently carried out on Mr. Fontaine's initiative. Mr. Marceau stated that he was uncomfortable with that process and relied on Mr. Fontaine's comments about the candidates. The evidence against the respondent is therefore rather weak.

[95] In conclusion, the complainant had the onus of establishing on a balance of probabilities that his union activities influenced the respondent's decision. He also had to establish a causal relationship between any differential treatment directed towards him and the decision that was made. In conclusion, having carefully examined the relevant evidence, the disturbing testimony by Ms Bouchard, the circumstances and the explanations provided by the respondent, I cannot find that it has been established that the respondent discriminated against the complainant because of his union activities.

[96] Concerning corrective action, no decision is made because no violation of a prohibition set out in the *PSSRA* has been established.

[97] The complaint is therefore dismissed.

Sylvie Matteau,
Deputy Chairperson

OTTAWA, April 26, 2004.

P.S.S.R.B. Translation