

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

AZIM RUDA

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

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

Before: Joseph W. Potter, Board Member

For the Complainant: Himself

For the Respondent: Barry Done, Public Service Alliance of Canada

Heard at Toronto, Ontario,
September 15 and 16, 1997.

DECISION

Mr. Azim Ruda filed a complaint pursuant to section 23 of the *Public Service Staff Relations Act (PSSRA)*. In it he alleges that the Public Service Alliance of Canada (PSAC) has failed “in their duty to fairly and properly represent me at all levels of my wrongful dismissal action ...”. This, he claims, is contrary to subsection 10(2) of the *PSSRA*.

The complainant states that he was forced to retain his own legal counsel; thus he seeks reimbursement of his legal fees and reimbursement of total union dues.

The only witness to testify was Ms. Catharine Rogers for the PSAC and the bargaining agent introduced Exhibits E-1 through to E-8. Mr. Ruda presented Exhibits C-1 through to C-4.

Summary of Evidence

On April 20, 1993, Mr. Ruda was told he was under investigation for allegations of sexual harassment and following the internal departmental inquiry it was recommended that Mr. Ruda be discharged. The recommendation for discharge is contained in Exhibit E-7, and at page 20 it states, in part: “His behaviour during this incident constituted harassment of a sexual nature ...”. The report further states: “... the Committee felt the actions which Mr. Ruda freely admitted to represented misconduct worthy of severe disciplinary action ...”. It was noted that Mr. Ruda had signed a statement (Exhibit E-8) which was a detailed account of the interview he had with the Department concerning the allegations of sexual misconduct.

The report led the Department to discharge Mr. Ruda on October 6, 1993. The discharge letter (Exhibit C-2) stated the reason related to his “inappropriate behaviour in the workplace”. A grievance was filed concerning the discharge upon the advice of the Regional PSAC Representative, Mr. Lennon. On December 31, 1993, the PSAC referred the grievance to adjudication, and ultimately it was scheduled to be heard from September 27 to 30, 1994.

Based on the section 23 complaint filed by Mr. Ruda, the problems he alleges he had with the PSAC commenced about August 1994. The discharge case was initially assigned to Mr. D. Landry and Mr. Ruda was informed of this on August 23, 1994. Three days later, Mr. Ruda was advised that another PSAC representative would

handle the case due to the fact Mr. Landry was on annual leave. That officer was Mr. Jacques Dupont, but he was not available to meet with Mr. Ruda until September 19. As Mr. Ruda felt this was too late to review what he believed were complex issues, the PSAC reassigned the case to Ms. Catharine Rogers. Ms. Rogers testified that at the time she was assigned to the case she was a member of the bar with over 10 years experience working in the PSAC as a Grievance and Adjudication Officer. Her practice was to review whatever case was assigned to her and initially decide if it was to proceed to adjudication. If it was going ahead, she would then decide what approach would be followed. This is what she did in the Ruda case. In addition to her work representing clients at adjudication, Ms. Rogers sat on a committee within the Alliance that eventually drafted Policy 23, "Personal/Sexual Harassment Policy" (Exhibit E-2). In it, it states, in part:

7. *Where a complaint is upheld and the respondent receives a disciplinary penalty, at the request of the respondent, the PSAC will review the disciplinary penalty and where it is deemed the penalty is unjust, will provide the respondent with representation on a subsequent grievance.*

Ms. Rogers noted that in Mr. Ruda's case, he had admitted to the events in question (Exhibit E-8) although he did not concur that it was sexual harassment. Since he had admitted to the events, Ms. Rogers testified that the PSAC could not argue sexual harassment did not occur, particularly in light of Policy 23 and the commitment of the PSAC to seek a harassment-free workplace. However, the quantum of the penalty could be argued and indeed Ms. Rogers indicated that she felt Mr. Ruda had a legitimate case on quantum, and stated as much to Mr. Ruda in her letter to him of September 7, 1994 (as set out in Annex "E" of the PSAC's response to the complaint). In this letter, Ms. Rogers informed Mr. Ruda that the main issue at the adjudication would be one of penalty, as Mr. Ruda had admitted to many of the acts alleged. The letter states, in part:

You should also be aware that the Alliance policy with respect to cases involving sexual harassment is that where both the alleged victims and the alleged harasser are bargaining unit members, we represent the alleged harasser only on the quantum of discipline imposed.

On September 12, 1994, Mr. Ruda replied to Ms. Rogers (Exhibit C-1, tab 6) stating that there had been no sexual harassment. Furthermore, there were five areas Mr. Ruda wanted advanced in his defense at the adjudication hearing and only one dealt with excessive punishment. The other areas concerned staff interaction, procedural flaws, motivation and character references.

Ms. Rogers replied on September 15, 1994 (Annex "F" of the PSAC's response) and addressed each of the five areas that Mr. Ruda wanted raised. The PSAC's policy on sexual harassment was stated and the letter informed Mr. Ruda that there was no way the bargaining agent could argue the acts which he had admitted performing did not constitute sexual harassment. Therefore, Ms. Rogers stated, the bargaining agent would represent Mr. Ruda at adjudication on the issue of penalty alone. If that was not satisfactory, Mr. Ruda was told he had the right to represent himself or make other arrangements at his expense.

This limited form of representation was not satisfactory to Mr. Ruda and he spoke to Ms. Rogers and informed her of such. She replied in writing on September 19, 1994 (Annex "G" of the PSAC's response) confirming her understanding that Mr. Ruda would employ legal counsel to represent him due to his dissatisfaction with the PSAC. Again he was told this was his right but there was no guarantee his legal fees would be covered.

On September 20, 1994, Mr. Ruda wrote to Ms. Rogers (Exhibit C-1, tab 7) stating that, as the PSAC would not represent him on all five issues, he would retain his own counsel and seek reimbursement from the PSAC.

The discharge adjudication was postponed at the request of Mr. Ruda's legal counsel and ultimately it was settled without the need to hear it.

On November 15, 1995, Mr. Ruda launched an action against the PSAC in small claims court seeking reimbursement of his legal fees. It was deferred, following which the instant action commenced.

Arguments

For the Respondent

There are occasions when the interests of one individual are divergent from those of the general membership. In such cases the PSAC must make some difficult decisions and conform not only to the *PSSRA* but to its own constitution and policies as well.

It is clear that upon examining the recommendation for discharge contained in Exhibit E-7, together with Mr. Ruda's own signed admission of the acts as contained in Exhibit E-8, the PSAC had to invoke the provisions of Policy 23. However, rather than not represent him at all in spite of his actions against other bargaining unit members, the PSAC took the position that it would represent him and attempt to mitigate the penalty. It was Mr. Ruda who decided that this procedure was not satisfactory to him and sought his own legal counsel. He did so in spite of being cautioned on more than one occasion that he may ultimately have to bear this cost himself.

A thorough review and serious study of the case was made by Ms. Rogers. She even advised Mr. Ruda and his legal counsel on how to obtain a postponement from the Public Service Staff Relations Board (PSSRB) if necessary.

The burden of proof rests with Mr. Ruda to prove the PSAC acted in a way that is contrary to subsection 10(2) of the *PSSRA*. It was submitted that this burden has not been met. This was not a case of the PSAC refusing to represent a member but rather it was a case of the PSAC determining how best to proceed in the defense of Mr. Ruda. The difference of opinion centered around the fact Mr. Ruda did not believe he had sexually harassed other employees. However, based on the Investigation Report and the signed statement of Mr. Ruda, the PSAC could not argue that sexual harassment did not occur. They could argue quantum and this they were prepared to do. The jurisprudence establishes it was the PSAC's right to determine this approach. In light of this, Mr. Done asked that the complaint be dismissed. Also, he stated I lacked jurisdiction to deal with the request to reimburse the complainant his union dues. I was referred to the following cases: *Jacques* (Board file 161-2-731); *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 5007* [1990] 1 S.C.R. 1298; and *Gagnon v. Canadian Merchant Service Guild* (1984) 53 N.R. 100.

For the Complainant

At the outset of his argument, Mr. Ruda stated that when he spoke to Ms. Rogers in September 1994, there was no mention of the constitution and Policy 23 guiding the PSAC's decision. Had the 1994 discussion divulged the information which Mr. Done provided, Mr. Ruda speculated that the issue may have been resolved then. However, he still felt that the decision to limit the defense of the initial grievance to quantum only was arbitrary on the part of the PSAC and therefore contravened subsection 10(2) of the *PSSRA*.

Mr. Ruda pointed out that three PSAC representatives had been assigned his file; therefore, by the time it ended up with Ms. Rogers, there was little time for a serious study of the case. As a result of the passage of time coupled with the approaching adjudication, Mr. Ruda lost faith in the PSAC's ability to properly research jurisprudence, interview witnesses and thoroughly review the documents pertaining to his case. It was important to Mr. Ruda that the PSAC understand it was not a case of sexual harassment and in order to fully comprehend this, Ms. Rogers could have requested a postponement from the PSSRB, met with Mr. Ruda and discussed his options. Instead, he was obliged to retain legal counsel, at a cost, and he is seeking reimbursement of the expenses plus reimbursement of the union dues he has paid.

Decision

Paragraph 23(1)(a) and subsection 10(2) of the *PSSRA* apply in this case, and they read as follows:

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;

10(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.

A situation very similar to this complaint arose in the *Jacques* (supra) decision, in that the respondent relied on Policy 23 which limited representation to quantum. In dismissing that complaint, Deputy Chairperson Tarte stated, at page 22:

In this case, PSAC had to look after the interests of all its members, properly study the situation, ensure application of the master collective agreement, which condemns harassment in all its forms, act in compliance with the established rules, competently, without being motivated by the desire to punish or harm a specific member.

I too find that the PSAC has met its obligations in the complaint filed by Mr. Ruda. The PSAC committed itself to represent Mr. Ruda at adjudication and assigned the case to an experienced legal counsel. The evidence indicated Ms. Rogers diligently reviewed the case documentation and determined that the issue of penalty could be argued with vigor. This was communicated to Mr. Ruda.

Perhaps, as Mr. Ruda suggested, had he been more thoroughly briefed on the constitution and the contents of Policy 23 at the outset, this whole matter would not have mushroomed into a dispute. Nevertheless, I do not find sufficient evidence to indicate that anything in the approach the PSAC took offended subsection 10(2) of the *PSSRA*.

As the Supreme Court of Canada pointed out in the *Gendron* (supra) case, at pages 1328 and 1329, a union “may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any ... improper motives ... and as long as it turns its mind to all the relevant considerations”. I am satisfied that the PSAC turned its mind to the relevant considerations, including the fact that Mr. Ruda had admitted to most of the matters alleged against him. In deciding to limit the representation to quantum, rather than debating whether or not sexual harassment had indeed taken place, the PSAC, in good faith, chose a route to follow. Unfortunately, Mr. Ruda wanted the PSAC to follow many routes and broaden the defense. In deciding not to do so, the PSAC was neither arbitrary nor discriminatory, nor were they acting in bad faith.

For all these reasons, the complaint must be dismissed.

**Joseph W. Potter,
Board Member**

OTTAWA, October 7, 1997.