

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

WAYNE S. MILLER

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

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

Before: Rosemary Vondette Simpson, Board Member

For the Complainant: Himself

For the Respondent: David Landry, Public Service Alliance of Canada

Heard at Winnipeg, Manitoba,
November 24, 1995.

DECISION

Mr. Miller was formerly employed as a teacher with the Department of Indian and Northern Affairs and the Public Service Alliance of Canada (PSAC) was the certified bargaining agent for his bargaining unit. He accepted a cash buy-out in 1987. In his written complaint, Mr. Miller claims that the PSAC has failed to “*provide any form of representation in the matters of my application before the Board to extend time in a grievance and my Complaint under Section 23*”. By way of redress, he requests that the Board issue an order directing the PSAC to represent him.

The complainant relied on subsection 10(2) of the *Public Service Staff Relations Act (PSSRA)* which reads as follows:

(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.*

His position is that the PSAC discriminated against him by reason of mental disability contrary to his rights under the *Canadian Charter of Rights and Freedoms*.

The present complaint arose out of Mr. Miller's desire to pursue a grievance for lost earnings for the period from December 24, 1979 to September 2, 1980. He testified that he was out of the hospital and medically fit to work during this period but that the employer refused to allow him to return to work. However, he admitted in cross-examination that he had never provided the employer with any medical certification as to his fitness to work during this time.

Mr. Miller testified that he wishes to claim an amount of \$750,000 against his former employer for lost wages. He also wishes to add a claim in the amount of \$12,950 against the PSAC because of its failure to provide him with representation in (1) an application for extension of time to pursue a grievance in the above-mentioned matter; and (2) a complaint under section 23 of the *PSSRA* that he had made against his employer for allegedly interfering in his right to present a grievance.

The amount claimed against the PSAC is for 60.5 hours of work that he spent in preparing his own cases, based on an hourly rate of \$200. an hour plus expenses.

The following is a complete list of his costs of self-representation (Exhibit C-2):

COSTS OF SELF-REPRESENTATION

<i>Letter of July 12, 1994 to PSSRB</i>	
<i>researching personnel files at IAN - 3 hrs.</i>	\$600
<i>letter writing - 1 hr.</i>	\$200
<i>Letter of Nov. 7, 1994 to PSSRB - 1 hr.</i>	\$200
<i>Letter of Nov. 11, 1994 to PSSRB</i>	
<i>compiling chronology - 3 hrs</i>	\$600
<i>letter - 1/2 hr</i>	\$100
<i>Letter of Nov. 25, 1994 to PSSRB</i>	
<i>composing justification - 3 hrs</i>	\$600
<i>letter 1/2 hr</i>	\$100
<i>Letter of Nov. 31, 1994 to PSSRB - 1/2 hr</i>	\$100
<i>Letter of Dec 6, 1994 to Lloyd Fucile - 1 hr</i>	\$200
<i>Letter of Dec. 16, 1994 to PSSRB - 8 hrs</i>	\$1600
<i>Letter of Jan. 23, 1995 to PSSRB -5 hrs</i>	\$1000
<i>Letter of Jan 23, 1995 to PSSRB 1 hr</i>	\$200
<i>Letter of Feb. 6, 1995 to PSSRB - 2 hrs</i>	\$400
<i>Letter of Feb 20 to PSSRB - 2 hrs</i>	\$400
<i>Letter of Apr. 10 to PSSRB</i>	
<i>review of Board' s decision - 10 hrs</i>	\$2000
<i>letter writing - 4 hrs</i>	\$800
<i>Letter of May 20, 1995 to PSSRB</i>	
<i>research and writing-5 hrs</i>	\$1000
<i>Psychiatric report of May 17, 1995</i>	\$100
<i>Letter of June 6, 1995 to PSSRB - 1 hr</i>	\$200
<i>Letter of June 21, 1995 -</i>	
<i>Section 23 Complaint - 5 hrs</i>	\$1000
<i>Letter of July 11, 1995 to PSSRB - 1/2 hr</i>	\$100
<i>Letter of July 13, 1995 to PSSRB</i>	\$100
<i>Letter of July 18, 1995 to PSSRB</i>	
<i>research and writing- 3 hrs</i>	\$600
<i>Long distance charges 12 months @\$50</i>	\$600
<i>Photocopying</i>	\$100
<i>FAX charges</i>	\$50

GRAND TOTAL

\$12,950

** Costs are calculated at a rate of legal service of \$200/hr.*

Mr. Miller testified that on November 25, 1994 he made an application under section 63 of the *PSSRB Regulations and Rules of Procedure* for an enlargement of time to present a grievance relating to his lost wages. On April 4, 1995, the Board issued a decision without an oral hearing denying the application as Mr. Miller had presented no cogent reason why he could not have filed a grievance within the relevant time limit: Board file 149-2-149.

The complainant testified as to the following sequence of events.

On April 10, 1995, the complainant filed an application for review under section 27 of the *PSSRA* of the Board's decision denying his request for an enlargement of time. In a decision rendered on August 9, 1995 the Board dismissed the application: Board file 125-2-65.

On June 21, 1995, Mr. Miller filed a complaint against the employer based on events which occurred in 1986 while he was employed in a bargaining unit for which the PSAC was the certified bargaining agent.

On July 20, 1995, he filed the present complaint against the PSAC for not providing representation in the preceding matters.

Mr. Miller testified that he suffers from schizophrenia and the PSAC was aware of this. Because of this mental disability, he has experienced great problems in preparing his submissions to the Board. A letter from Dr. Neil Mowchun (Exhibit C-1"H") dated May 17, 1995 reads as follows:

TO WHOM IT MAY CONCERN:

RE: MR. WAYNE MILLER

I have been asked by Mr. Miller to provide a medical report in the context of his recent negotiations with the Public Service Staff Relations Board.

Please be advised of the following points:

- 1. I have been treating Mr. Miller for schizophrenia on a regular basis since 1983.*
- 2. He has had fluctuant periods of moderate to severe psychotic symptoms from at least 1979 to 1994 often*

precipitated and/or aggravated by his poor stress tolerance and the effect of adverse life circumstances.

3. Due to periods of paranoid thinking, in particular attached to authority figures, poor emotional and physical stamina, poor judgement and poor stress tolerance he was functionally limited by his illness from being able to fully understand, clearly formulate and consistently and properly implement his grievance before the Public Service Staff Relations Board for lost earnings prior to his recent efforts.

I hope this information will allow you to consider his case in a more empathic manner due to medical reasons.

Mr. Miller claims that the PSAC gave him no assistance in any of these matters.

Jocelyne Poirier, Regional vice-president of the National Component of the PSAC, was called by the complainant to testify.

In December, 1994, she and the complainant first met to discuss his concerns. A letter was drafted which she sent to the National Component in Ottawa for its review of Mr. Miller's concerns. His case was reviewed by a service officer in Ottawa. She had other meetings with Mr. Miller and there were brief exchanges of correspondence. They spoke approximately a dozen times.

A letter from Evelyne Henry, Section Head, Grievance and Adjudication Section, PSAC, dated February 9, 1995 to the Board was submitted (Exhibit C-1"B"). It reads as follows:

*Re: Extension of time application of Wayne S. Miller
(149-2-149)*

This will confirm that the Alliance is willing to provide Mr. Miller with representation at the hearing which may be scheduled on this application.

At present, we have nothing to add to the written materials which Mr. Miller has already submitted.

A letter from Denis J. McCarthy, Special Advisor, National Component of the PSAC, to Mr. Miller dated May 1, 1995 was also submitted with the attached opinion of

Public Service Staff Relations Board

Catharine Rogers, Assistant to the Legislative Officer, PSAC, addressed to Mr. McCarthy and dated April 27, 1995 (Exhibit C-1"D").

Mr. McCarthy's letter reads as follows:

**RE: THE DENIAL OF YOUR APPLICATION TO THE
PSSRB FOR AN EXTENSION OF TIME TO PRESENT
A GRIEVANCE**

As you are aware, the National Component wrote to the Legislative Officer of the Alliance and asked for a review to be conducted to determine if the Alliance was willing to refer your case to the Federal Court with their support.

Unfortunately, for the reasons given in the attached memo dated April 27, 1995 the Alliance is unable to take this action as you have requested.

As a result, I regret to advise you that the Alliance cannot take any further action on your behalf.

Ms. Rogers wrote the following:

**Re: Wayne Miller
Denial of Application to the PSSRB for an Extension
of Time to Present a Grievance
PSSRB File No.: 149-2-149**

This is in response to your memorandum of April 12, 1995 to J.C. Plamondon concerning the above-referenced matter, which was assigned to me for response. I have reviewed the decision of the Public Service Staff Relations Board concerning the application for an extension of time to present a grievance, and the accompanying documents. I regret that I am unable to recommend that the Alliance take any further action in this matter, for the reasons which follow.

As you are aware, Mr. Miller made an application to the PSSRB in 1994 seeking an extension of the time limits to file a grievance relating to a (sic) lost earnings in 1979 and 1980, when he sought to return to work following a period of sick leave due to a disability but was prevented from doing so by the employer. He alleges that he filed a grievance at the time but withdrew it as a result of intimidation by the employer. In the intervening years he suffered from periodic bouts of mental illness which saw him hospitalized. He took

no action on the grievance or to recover the lost earnings that he believes he is owed until he filed the instant application.

The PSSRB considered the facts as related to them by Mr. Miller and ultimately declined to exercise its discretion to relieve against the time limits on the grounds that Mr. Miller had failed to provide a cogent reason as to why he could not have filed his grievance in the requisite time, or, at least, in a more timely fashion. A fifteen year delay required, in the Board's opinion, a cogent explanation which Mr. Miller has not provided. Furthermore, the Board was also concerned about the prejudice to the employer that a fifteen year delay would engender.

The power of the Board to relieve against time limits is discretionary. Provided that the power is exercised reasonably, in good faith and without taking into account extraneous considerations, courts are extremely reluctant to interfere. Based on the decision before me, I cannot conclude that the Board exercised its power unreasonably, in bad faith, or took into account extraneous considerations. The fact that we do not necessarily agree with the decision is not a sufficient ground for review.

For these reasons, I cannot recommend that the Alliance support a judicial review application of the Board's decision. Of course, nothing prevents Mr. Miller from pursuing this matter at his own expense, should he choose to do so. If you have any questions or comments concerning this matter, please do not hesitate to call me.

Mr. Miller argued that the PSSRA being an Act of Parliament, was subsumed in the *Canadian Charter of Rights and Freedoms*. He urged a finding that he had been discriminated against by the PSAC on the ground of mental disability. He requested that the PSAC be ordered to pay restitution for contributory negligence in the failure of his claims against the employer for lost wages as well as fees for time spent and expenses of self-representation.

The PSAC argued that Mr. Miller's claims had been reviewed and there were two overriding problems with his case.

(1) There was no evidence of Mr. Miller's medical fitness to go back to work in the time period December 24, 1979 to September 2, 1980. There was no such evidence then and there isn't any now. He was on medical leave prior to December 24.

(2) In order to obtain an extension of time in a grievance some 14 years after the expiration of time limits, some cogent reasons would have to be advanced explaining the delay. However, Mr. Miller worked until 1987. Only Mr. Miller could provide a possible explanation as to why he delayed for some seven years in submitting a grievance between September, 1980 and 1987, a period during which he continued to be employed. Similarly, another seven years went by after Mr. Miller's cash buy-out in 1987 until he finally raised the matter in 1994. In addition, Mr. Miller would have to argue against his own position. If he was not fit enough to file a grievance during the period in question, it would be difficult to take the position that he was fit to work.

In any case, there was no obligation on the part of the bargaining agent to represent Mr. Miller in the application for extension of time nor in the complaint against the employer.

REASONS FOR DECISION

It is a matter of record that the PSAC offered to represent Mr. Miller at a hearing of his application for extension of time (Exhibit C-1"B"). Mrs. Evelyne Henry, Section Head, Grievance and Adjudication Section, PSAC, wrote to the Board and indicated that there were no other written materials that the PSAC could supply to add to the written materials Mr. Miller had already submitted (Exhibit C-1"B"). Clearly she was aware of the materials he had submitted. There is no reason for me to conclude that Mr. Miller's submission to the Board was lacking in any way that could have been augmented by anything the PSAC might have done. Certainly there was no refusal by the PSAC to represent him. On the contrary, they specifically undertook to do so.

I might add that at the present hearing Mr. Miller was well-prepared, organized, able to present all possible relevant material and showed himself to be quite capable of strongly representing his interests.

Mr. Miller was also concerned about union representation in a second matter, a complaint against the employer. At the present hearing, Mr. Miller stated that he had decided to withdraw that aspect of his complaint. Since it has been withdrawn, this is no longer an issue before me.

There is no question here of the bargaining agent ignoring Mr. Miller's concerns. Without delving into the question of whether or not the PSAC had a duty to represent Mr. Miller in an application for extension of time made some seven years after he ceased to be an employee in the federal Public Service, I am of the opinion that the PSAC did in fact provide him with a great deal of assistance. Jocelyne Poirier had approximately a dozen contacts with him to assist him. The record reveals various other dealings by the National Component, the Grievance and Adjudication Section and the Legislative Office of the PSAC. Aspects of the case were painstakingly reviewed. An honest assessment of the merits of a case is one of the services that a bargaining agent can provide. In doing so, it is representing an employee's interests. The complainant has failed to satisfy me that the PSAC acted in a manner that is arbitrary, discriminatory or in bad faith in its representation of him in this matter.

In relation to Mr. Miller's argument that the PSAC had discriminated against him in light of his mental disability contrary to the *Canadian Charter of Rights and Freedoms*, even if the *Charter* applies to this situation Mr. Miller has failed to establish that the PSAC was guilty of such discrimination. On the evidence, Mr. Miller has failed to establish that the PSAC breached subsection 10(2) of the *PSSRA*; accordingly, the complaint is dismissed.

**Rosemary Vondette Simpson,
Board Member**

OTTAWA, January 4, 1996.