

Date: 20050323

File: 161-2-1273

Citation: 2005 PSSRB 24



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MICHELINE RIOUX

Complainant

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Respondent

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

Before: [Jean-Pierre Tessier, Board Member](#)

For the Complainant : [The Complainant herself and Simon Cloutier](#)

For the Respondent : [Raymond Piché, Counsel](#)

Heard at Montréal, Quebec,
from October 13 to 15, 2004.

DECISION

[1] Micheline Rioux is employed by Citizenship and Immigration Canada (CIC). In the summer of 2000, she filed a complaint under section 23 of the *Public Service Staff Relations Act (PSSRA)*. A co-worker, Simon Cloutier, filed a similar complaint. In essence, the complainants allege that they were subjected to reprisals and discrimination because of their union activities, in violation of sections 8 to 10 of the *PSSRA*.

[2] In mid-August 2001, at a hearing into their complaints filed in the summer of 2000, the complainants indicated to Board Member Léo-Paul Guindon that they wished to file additional allegations and a “request for intervention”.

[3] As we will see below, these additional allegations and this “request for intervention” pertain to incidents that took place in 2001, after their initial complaints filed in the summer of 2000.

[4] Ms. Rioux forwarded a “request for intervention” to the Public Service Staff Relations Board (PSSRB) on September 30, 2001, whereas Mr. Cloutier forwarded his additional allegations on March 3, 2003.

[5] Because of various interventions, the hearing of the complaints filed in the summer of 2000, which had started in 2001, was postponed a number of times. Finally, during a continuation of the case in August 2003, the complainants asked Board Member Guindon to entertain their “additional allegations” and their “request for intervention” as part of the initial case, a request to which the employer objected.

[6] Board Member Guindon rendered an interlocutory decision on this point (2003 PSSRB 75) and decided to make these complaints separate from those filed in 2000, as indicated at paragraphs 15 and 16 of the decision:

Accordingly, I ask the Board's employees to treat the “additional allegations” submitted on March 3, 2003, and the “request for information” submitted on September 30, 2001, as new complaints under section 23 of the Act. The Board will need to open a complaint file in the name of Ms Rioux, containing the “additional allegations” and the “request for information”. A separate complaint file will need to be opened in the name of Mr. Cloutier, containing the “additional allegations”. The Board will process these new complaints in accordance with the applicable administrative procedure and will notify the employer accordingly.

Concerning the dates on which these documents are deemed to be filed with the Board, March 3, 2003, shall be the date for the “additional allegations”, and September 30, 2001, shall be the date for Ms Rioux’s “request for information”.

[7] The “request for intervention” filed by Ms. Rioux therefore constitutes a separate file to be considered at the hearing of October 13, 2004. Mr. Cloutier’s file was also submitted during this hearing. Each one is the subject of a separate decision.

The facts

[8] On September 27, 2001, Ms Rioux received a notice to appear at a disciplinary hearing from her employer. The hearing was to take place on October 1, 2001, and its purpose was to obtain her version of the facts pertaining to a co-worker’s presence at Ms Rioux’s office on September 10, 2001.

[9] In light of this fact, Ms Rioux sent her “request for intervention” to the PSSRB, alleging that penalties were being imposed on her in an abusive manner because of her union background and the exercising of her rights. In addition to this penalty, which she anticipated for October 1, 2001, Ms Rioux referred to another disciplinary measure (a five-day suspension) related to events that had taken place in May 2001.

[10] In her complaint based on section 23 of the *PSSRA*, she claims that the employer is contravening section 8 thereof by seeking to intimidate her and by imposing pecuniary penalties that she describes as abusive.

[11] At the hearing, Ms Rioux filed a number of documents related to the events of May 9, 2001 (Exhibits F-1 to F-18, as well as F-36 and F-37). To set the context, it must be remembered that one of Ms Rioux’s co-workers had filed a harassment complaint against the employer and that this complaint was dealt with through the internal procedure. During a meeting with investigators, the co-worker signed a waiver of her complaint.

[12] The disciplinary measure report (Exhibit F-17) summarizes the events of May 9, 2001, which led to a five-day disciplinary measure:

[Translation]

...

Ms Rioux stated that, at around 12:30 p.m. on May 9, 2001, Ms Antonieta Sépulvéda came to join her, Simon Cloutier and Diane l'Heureux during the lunch break. Ms Rioux noted that Ms Sepulvada [sic] was in a state of psychological distress and that her experience had been traumatic. Ms Sépulvéda told her that she had signed and that it was over. Ms Rioux asked her what she had signed and requested that she show her the document. Ms Rioux indicated that what had struck her the most was the fact that Ms Sépulvéda had had to waive all forms of remedy available to her and that they viewed this as taking her fundamental rights away from her.

According to Ms Rioux, Ms Sépulvéda said that she was not in agreement with signing the document and was not comfortable having done so. She further stated that Ms Sépulvéda had also indicated that she would have signed whatever it took for it to stop.

The purpose of their efforts was to see the investigators before they left so that they could retrieve the document that Ms Sépulvéda had signed. Ms Rioux, Mr. Cloutier, Ms l'Heureux and Ms Sépulvéda therefore left the park and went to the investigators' office.

Because the investigators were not there, they went to Ms Leclair's office at around 12:45 p.m. to retrieve the original document during the lunch break. Mr. Bélanger met with them in Ms Leclair's place. Ms Rioux asked Mr. Bélanger five times whether they were authorized to speak with him and to be there at 1:00 p.m. Mr. Bélanger said: [translation] "No problem, I'm listening." Ms Rioux and Mr. Cloutier asked that the original of Ms Antoineta's [sic] waiver letter be torn up before a witness because it represented an abuse of authority and unlawful intimidation and was not valid.

According to Ms Rioux, Mr. Bélanger told them that he would take care of it, but not immediately because he was in a meeting. Mr. Cloutier asked Mr. Bélanger to meet with the investigators with them. Mr. Bélanger replied that this was not necessary and that he would take care of it. Mr. Bélanger told them that he would contact Ms Sepulvada [sic] later. Ms Rioux said that Mr. Bélanger told her to leave the office, that he would take care of it. Ms Rioux indicated that she had stated that she was not satisfied and asked Mr. Bélanger to refer them to Nicole Grenier.

In response to a question asked about Mr. Bélanger's instructions [sic] this meeting Ms Rioux indicated that she could not really say whether Mr. Bélanger had told them to return to their work stations, but she noted that he had told them it was not necessary to see the investigators, that he would take care of it.

Ms Rioux then indicated that she and Ms L'Heureux, Ms Sépulvéda and Mr. Cloutier went to the second floor. Ms Rjoux [sic] knocked on the door and Simon requested permission to enter. Ms Rioux indicated that she was the one who had spoken to the investigators, telling them, [translation] "You know Antonieta. She has just signed a document with which she is not comfortable and she wants to destroy it. She no longer wants to sign it."

Ms Rioux indicated that one of the investigators, Mr. Lafrenière, had asked them, [translation] "You are here in what capacity?", in what she referred to as a "Far West" tone. Ms Rioux said she had been struck by Mr. Lafrenière's tone, that it showed a lack of respect and came as a surprise, as if he wanted to provoke them.

According to Ms Rioux, the telephone then rang, and it was Mr. Bélanger asking to speak to one of the employees. Ms Rioux took the phone and she said that Mr. Bélanger asked her, [translation] "You're leaving now? Are you leaving?" Ms Rioux indicated that she had answered, [translation] "Yes, I'm leaving right away."

...

[13] Ms Rioux indicated that she had filed a grievance with respect to the disciplinary measure imposed on her in connection with this incident and adduced a number of documents relating to it (Exhibits F-19 to F-26).

[14] Two other incidents that occurred on September 10 and 27 pertain to the fact that Ms Rioux spoke with other employees in her office about subjects not related to her work. Exhibits F-27 to F-36 deal with these incidents, which were penalized by a disciplinary measure equivalent to an eight-day suspension without pay.

[15] The disciplinary measure report indicates in part as follows (Exhibit F-34):

[Translation]

On Monday, September 10, 2001, Diane L'Heureux and Simon Cloutier went to your work station without authorization while you were at work to discuss a subject

that was not related to your work as a case monitoring officer. You agreed to participate in this private discussion, which lasted some 20 minutes, without asking your supervisor for authorization. After being questioned about this discussion on two occasions, you finally admitted the facts.

From 4:30 to 4:40 p.m. on Thursday, September 27, 2001, during your work day, Simon Cloutier arrived at your work station again without authorization to discuss a subject that was not related to your work as a case monitoring officer. Once again, you agreed to participate in this private discussion without requesting authorization from your supervisor.

Although your employer generally tolerates the occasional use of its time and premises by the majority of employees to attend to personal business, I find that your behaviour constitutes a specific case that your employer can no longer tolerate. Indeed, I have noted that you systematically refuse to accept the limits and standards of behaviour your employer has the right to impose on its employees and that you believe you have the right to do what you wish with whomever you wish during your work day.

[16] Ms Rioux confirmed that the September 10, 2001 meeting lasted 20 minutes and that the topic of the discussion was related to a survey on staffing. She wrote as follows on this subject on September 13, 2001 (Exhibit F-30):

[Translation]

...

3-Q. Reasons for this meeting.

A. Diane L'Heureux responded to a survey on staffing at our department. In response to Diane's opinion on staffing, an investigator, a Treasury Board subcontractor, contacted her and made an appointment to discuss it with her. In addition, the investigator asked Diane for the names of other co-workers who would be interested in meeting with him to discuss the subject of staffing. Simon and I were discussing whether we should give our names to Diane because we were very aware that the harassment would be even more severe if we were to give our opinions on a subject as controversial as staffing at CIC Montréal.

Before closing, I would like to express my surprise that I did not have the right to consult a union representative before responding to your e-mail.

[17] With respect to the meeting with Mr. Cloutier on September 27, 2001, Ms Rioux noted that it was short, three or four minutes. They discussed their reluctance to participate in a staffing survey.

[18] Ms Rioux then filed a letter written by Diane L'Heureux and sent to the Public Service Commission (PSC) on May 21, 2003 (Exhibit F-35). This letter was written after the events of 2001; it is accepted without prejudice and establishes only the subject of the discussion that took place in Ms Rioux's office on September 20, 2001. Ms L'Heureux explained that the PSC had requested that she participate in a staffing survey. A survey officer asked her to consult some co-workers.

[19] Ms Rioux stated that, when Ms L'Heureux consulted her on September 20, 2001, she decided to contact her colleague, Mr. Cloutier, to find out what he thought about participating in the PSC survey. When Miriam Ettinger, the assistant director, asked them what they were doing and whether they were discussing a work-related matter, Ms Rioux did not specify the nature of the discussion because she was hesitant to disclose that it involved a staffing survey.

[20] With respect to the incident of September 27, 2001, she noted that she had spoken with Mr. Cloutier for less than five minutes.

[21] Counsel for the employer indicated for his part that he had no specific evidence to adduce and was referring to the whole of the documentation filed to establish that this was a matter of a disciplinary offence and that the employees left their work without authorization.

Arguments of the parties

[22] Mr. Cloutier is representing Ms Rioux for the purposes of the argument. He points out that the employer tolerates having employees get together on occasion to discuss personal matters (for example, when they return from vacation or after the Christmas holidays).

[23] However, in his opinion, the employer is more severe with Ms Rioux when she meets with some of her co-workers to discuss things that are indirectly related to the

workplace, such as an employee's problem, information on employees' rights, and inquiries.

[24] Referring to the *Code of Conduct* published by CIC (Exhibit F-39), he argues that employees are encouraged to report incidents of misconduct or malfeasance.

[25] Penalizing Ms Rioux with five-day and eight-day suspensions for leaving her work to stand up for a co-worker and for taking 20 minutes to discuss the possibility of participating in a PSC survey constitutes retaliation against the employee rather than a purely disciplinary measure.

[26] Referring to the events of May 7, he points out that in a September 29, 2000 memorandum (Exhibit F-40), the employer designates Lucien Bélanger as the regional departmental representative responsible for harassment complaints. Mr. Bélanger is in fact the person with whom Ms Rioux and her co-workers met to discuss the harassment complaint that Ms Sépulvéda had just abandoned. In his opinion, it makes no sense for Ms Rioux to be punished for acting in accordance with the department's policies. The employee's representative further notes that the employer is more severe towards Ms Rioux because of her history as a union delegate, as if the employer feels that it is being bothered by all of her actions and all of her requests.

[27] The employer recalls that this is a complaint for intimidation or retaliation and that the onus is on the complainant to establish that the employer is at fault.

[28] The employer argues that the disciplinary letters show that this is a recurring problem and that there are five previous disciplinary measures.

[29] It further argues that neither Ms Rioux nor her co-worker Mr. Cloutier held a union position at the time of the events. Even union representatives are required to indicate when they will be absent on union business; this applies also, and to an even greater extent, to employees who do not hold such positions.

Reasons for decision

[30] This is a complaint in which the employee claims that the employer is contravening the *Public Service Staff Relations Act (PSSRA)* by exercising retaliation

against her and by seeking to intimidate her because she exercised a right granted to her under the Act.

[31] Essentially, Ms Rioux alleges that she filed a complaint against the employer in 2000 and that in 2001, it took disciplinary measures against her in retaliation.

[32] The *PSSRA* protects employees who wish to exercise or who have exercised their rights by prohibiting employers from retaliating against them. Section 8 of the Act provides as follows:

8. (1) No person who occupies a managerial or confidential position...

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

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

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

(ii) to refrain from exercising any other right under this Act.

[33] In the instant case, the employee claims that there are threats, retaliation and intimidation on the part of the employer. She could establish this by demonstrating, for example:

- a) that there is intimidation, which can take various forms: allusions, changes of attitude, veiled words or acts intended to intimidate the employee because he or she exercised or wishes to exercise a right;
- b) that the employer uses the slightest pretext to discipline the employee by imposing pecuniary or other penalties;
- c) that the employer is taking advantage of a wrongful act by the employee to impose a penalty that is clearly exaggerated and excessive to the point that it cannot be considered to be directly related to or in keeping with the

wrongful act but constitutes retaliation that could be deemed to be a drastic act of intimidation.

[34] In his arguments, the employee's representative states that the employer feels bothered by all of Ms Rioux's actions and that it is more severe with her. The evidence in this case does not cover all of Ms Rioux's actions during the period from May to October 2001 but is limited to the two penalties imposed by the employer, consisting of disciplinary measures of five to eight days. The latter cannot be described as veiled words or acts or indirect allusions. The other two points that the employee could establish to prove that there was intimidation, threats or retaliation therefore remain to be considered.

[35] The documents adduced in evidence describe in detail the sequence of events that took place on May 9, 2001, as well as those that occurred in September 2001.

[36] Ms Rioux claims that she had to stand up for Ms Sépulvéda on May 9, 2001, because she considered that the investigators had made her sign a document waiving all forms of remedy when she abandoned the harassment complaint.

[37] It is true that the employer's directive provides that Mr. Bélanger is responsible for the harassment policy. It is accurate that Ms Rioux complained to Mr. Bélanger and that she asked him whether she was authorized to stay at his office to speak with him.

[38] The *Code of Conduct* (Exhibit F-38) provides as follows at page 14:

1. *Employees should report the incident to their manager **immediately** in strict confidence. If, for any reason, the Manager cannot be contacted, Regional Staff Relations Advisors are available to be consulted on a confidential basis by any employee who has a concern.*
2. *Managers should then inform the Regional Director General, Director, or Head of Processing Centre, as applicable, and the Regional Staff Relations Advisors of the incident.*
3. *Regional staff relations advisors should then contact an officer of the Staff Relations, Professional Conduct and Compensation Division (BHS).*

[39] Since the event took place at the end of the lunch break, Ms Rioux may not have been able to reach her immediate supervisor and she contacted Mr. Bélanger,

designated as the person responsible for application of the policy; up to that point, the employer must analyze the context of the act before determining it to be misconduct.

[40] However, Ms Rioux then took the initiative of going into the investigators' office and arguing that they should change the wording of the waiver that Ms S epulv eda had signed. This initiative on Ms Rioux's part goes beyond the usual rules and does not refer to any right provided for under the *PSSRA*. Ms Rioux needs to obtain permission in order to be absent from her work.

[41] The second incident took place in September. It was adduced in evidence that Ms Rioux was speaking with some co-workers about the possibility of participating in a survey. However, it must also be considered that it was Ms Rioux who took the initiative of asking Mr. Cloutier to come to her office and that the discussion continued for close to 20 minutes.

[42] With respect to the disciplinary measure associated with this incident, the employer acknowledges that it tolerates having employees occasionally meet in an office to discuss personal matters. However, it distinguishes this from repeated invitations in which employees hold discussions lasting several minutes.

[43] According to the documents filed, Ms Rioux was aware that she had been criticized for leaving her work to speak with employees.

[44] I understand that the topic of the discussion was a staffing survey, but there was no need to act quickly on September 10, 2001. After making a simple telephone call to her co-worker Mr. Cloutier and to Ms L'Heureux, Ms Rioux could have contacted the union to have it establish a framework for employee participation with the employer.

[45] Although it is desirable for employees to participate in surveys, this should take place within a specific framework and no one has the right to stop working for close to 20 minutes without prior authorization.

[46] That having been determined, it remains to be considered whether the penalties imposed by the employer are clearly exaggerated and can therefore be deemed to be retaliation or whether they can be considered to be directly related to and in keeping with Ms Rioux's actions.

[47] This is not a grievance seeking a judgment as to the validity of the disciplinary measure or the fairness of the penalty imposed. Rather, it is a complaint in which the employee intends to demonstrate that there was retaliation on the employer's part.

[48] With respect to the events of May 9, 2001, I note that no consideration is given to the fact that Mr. Bélanger authorized Ms Rioux to speak with him about Ms Sépulvéda's case. Moreover, the disciplinary measure involved cutting Ms Rioux's salary for the entire duration of her absence, including the meeting time with Mr. Bélanger. This was a lapse that an adjudicator charged with hearing the grievance on the merits could take into account. However, this anomaly does not seem sufficient for me to find that this was not a disciplinary measure but retaliation.

[49] Out of context, five- and eight-day suspensions may seem harsh. However, according to the evidence adduced, these were the sixth and seventh penalties, a fact that must be considered from the standpoint of graduated levels of penalties.

[50] My consideration of the instant case has not led me to find that the penalties are exaggerated to the extent that they cannot be considered to be related to or in keeping with the disciplinary offences of which the employee is accused.

[51] The evidence clearly establishes that Ms Rioux committed some wrongful acts and that the employer did not use a pretext or a benign incident to impose a penalty.

[52] The complainant has not established that the employer's actions can be deemed to be intimidation, threats or retaliation further to the complaint that she filed in 2000.

[53] For these reasons, I dismiss Ms Rioux's complaint.

**Jean-Pierre Tessier,
Board Member**

OTTAWA, March 23, 2005.

P.S.S.R.B. Translation