

Date: 20000627

File: 161-2-1119

Citation: 2000 PSSRB 61



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

PETE RICHARD

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

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

Before: [Joseph W. Potter, Deputy Chairperson](#)

For the Complainant: Himself

For the Respondent: Edith Bramwell, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
May 25, 2000.

DECISION

[1] Mr. Pete Richard filed a complaint pursuant to section 23 of *the Public Service Staff Relations Act* (PSSRA). In it he alleges that his bargaining agent, the Public Service Alliance of Canada (PSAC), acted in a manner that is arbitrary, discriminatory or in bad faith in that it refused to represent him in the grievance process.

[2] The complainant claims that the failure of the PSAC to represent him violates section 10 of the PSSRA. He asks that the PSAC be ordered to represent him in the grievance process.

[3] Ms. Elaine Massie testified on behalf of the PSAC; the complainant introduced documentation in support of his claim (Exhibits C-1(A) to (N) and C-2).

Background

[4] Mr. Richard chose to present his case in the form of documentary evidence. Exhibit C-1(A) is his letter of complaint to the Public Service Staff Relations Board (PSSRB) outlining the background.

[5] On November 9, 1999, Mr. Richard sent an E-mail to Ms. Massie, the PSAC representative, asking her to present a grievance to his employer before November 20. Mr. Richard wanted to have his position declared surplus (Exhibit C-1(B)).

[6] Ms. Massie suggested that they use the Early Conflict Resolution Process, but the complainant replied that he did not want to use it (Exhibit C-1(F)). He again asked that the PSAC present a grievance on his behalf (Exhibit C-1(A)). Ms. Massie spoke to him and informed him that Mr. Dave Comba, the Regional Vice-president of the PSAC's Environment Component, to which Mr. Richard belonged, would represent him at the first and second levels of the grievance process. Ms. Massie explained that, if the grievance went beyond those levels, the National Office would then determine whether or not to advance it.

[7] Ms. Massie testified that she also spoke to the complainant about a number of other items he wanted to grieve, all of which were non-collective agreement issues.

[8] Mr. Richard stated at the hearing that his complaint focuses on the PSAC's decision not to represent him with respect to his desire to have his position declared surplus.

[9] On or about November 12, 1999, Ms. Massie and Mr. Bill Pynn, the National President of the Environment Component of the PSAC, indicated to Mr. Richard that representation on the grievance would not be in the best interest of the PSAC and that the PSAC would not represent him at the third level of the grievance process (Exhibit C-1(H)).

[10] Mr. Richard informed the PSAC that he would file a complaint if the PSAC did not represent him.

[11] Ms. Massie testified that she was the PSAC officer who decided representation beyond the second level of the grievance process should not be offered to the complainant.

[12] The issue that Mr. Richard wanted pursued was to have his position declared surplus. Ms. Massie testified that, following her research, she concluded that it was the Deputy Head who had the discretion as to whether or not a position would be declared surplus. As such, there was no violation of a collective agreement provision.

[13] The decision not to represent Mr. Richard was based, in part, on jurisprudence. The only case similar to the one the complainant was advancing was one that went to the National Joint Council (NJC) and the grievance was denied. On November 12, Ms. Massie sent a copy of the NJC decision to Mr. Richard (Exhibit G-2).

[14] On November 15, Mr. Richard again asked Ms. Massie to present a grievance on his behalf (Exhibit C-1(A)).

[15] In light of the fact that there was nothing in the collective agreement which Ms. Massie could find that could have been violated, she recommended that the grievance not be advanced by the PSAC.

[16] From that point on, Mr. Comba had carriage of the complainant's file (Exhibit G-3).

[17] On November 15, the complainant sent an E-mail to Ms. Massie reiterating the request to file a grievance. He stated: "... Even though these concerns are not part of the collective agreement, an employee is entitled to representation under the PSSRA..." (see Exhibit G-4).

[18] On November 19, Mr. Comba advised Mr. Richard that an alternative consultation route was the preferable way to go, but if he still wanted to grieve, wording would be supplied (Exhibit C-1(J)).

[19] On the same date, the complainant replied that a grievance should be submitted (Exhibit C-1(J)).

[20] On December 14, following a discussion with the employer, Mr. Comba advised Mr. Richard that the employer was not willing to declare his position surplus. The complainant again asked that a grievance be filed (Exhibit C-1(K)).

[21] Mr. Comba replied on December 16, stating his concerns about filing a grievance and indicating that he was not willing to proceed further. As far as he was concerned, the file was closed (Exhibit C-1(L)).

[22] The complainant felt that whether the grievance would succeed or not at adjudication was not a sufficient reason to deny him representation and he therefore lodged the instant complaint.

Arguments

For the Complainant

[23] The PSAC suggested an alternate route to resolve the problem and would not assist in the filing of a grievance.

[24] Initially, the PSAC indicated that it would assist Mr. Richard up to the third level of the grievance process, then it said that it would assist him only up to the first level, then not at all.

[25] The issue that the complainant wanted grieved related to the Workforce Adjustment Directive and this forms part of the collective agreement.

[26] Any issue that relates to the collective agreement, which a member wants to grieve, should be supported by the bargaining agent.

[27] To not support such an issue is a demonstration of bad faith, and it should not be based on whether the bargaining agent will win or lose at adjudication.

For the Respondent

[28] The evidence suggests that a number of requests were made by the complainant to represent him and they were all rejected.

[29] There is no indication of bad faith on the part of the PSAC. There was a lot of time and resources spent on the issue. The bargaining agent has a legitimate interest in balancing the needs of the general membership versus those of an individual.

[30] The employee does not have an automatic right to representation (see, for example, the Supreme Court of Canada decision in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509).

[31] The complainant sought to have his position declared surplus. The bargaining agent was not in the business of promoting a reduction of positions and, in fact, wanted to ensure that as many positions as possible remained. It had a legitimate interest in not lending support to the grievance.

[32] The issue that the complainant wanted to grieve was researched and, in the officer's opinion, there was no violation of the collective agreement. The complainant appears to agree with this assessment in Exhibit G-4. Notwithstanding this, Mr. Richard feels that he is entitled to representation at any time.

[33] There is no evidence that the bargaining agent acted in bad faith. It offered alternative approaches to the complainant to deal with his concern, but these were rejected.

[34] The following cases are relevant: *Feldsted et al.* (Board files 148-2-252 & 253; 161-2-813 to 816; 161-2-819, 820, 822 to 824); *Downer* (Board files 161-2-846 to 848); and *Tucci* (Board file 161-2-840).

Reasons for Decision

[35] 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.

[36] In *Jacques* (Board file 161-2-731), at page 19, the Board states:

In Merchant Marine Guild of Canada v. Guy Gagnon et al. [1984] 1 SCR 509, the Supreme Court of Canada discusses the union's responsibility to represent its members. It becomes clear that although there is a duty of representation toward members, employees do not have an absolute right to arbitration and the union enjoys considerable discretion. The Supreme Court of Canada does, however, establish that the discretion enjoyed by the union must be exercised in good faith, objectively and honestly, after serious study of the case, while considering the significance of the grievance and the consequences for the employee, as well as the legitimate interests of the union. In all circumstances, the union's decision must not be arbitrary, capricious, discriminatory or abusive.

[37] There is, as outlined above, no absolute right for employees to be represented by their bargaining agent. There is, however, an obligation on the bargaining agent not to act in an arbitrary or discriminatory manner or to act in bad faith in deciding whether to represent them or not. However, absent evidence of those elements, the bargaining agent has a wide degree of latitude as to how best to represent its membership at large.

[38] In the instant case, I was not presented with any evidence whatsoever that demonstrated whether elements of bad faith were present. The PSAC reviewed the merits of the case and determined that there was no violation of the collective agreement. Furthermore, it could not support a request that a position be declared surplus, as it felt that it was not in the best interests of the membership at large. It did suggest alternative dispute resolution routes, but these were not acceptable to the complainant. There was no suggestion by the complainant that the PSAC had acted in either an arbitrary or discriminatory fashion.

[39] In light of the above, Mr. Richard's complaint must be dismissed

**Joseph W. Potter,
Deputy Chairperson**

OTTAWA, June 27, 2000.