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File: 161-34-1127

Citation: 2000 PSSRB 66



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

JOHN NICHOLAS LIPSCOMB

Complainant

and

**PUBLIC SERVICE ALLIANCE OF CANADA,
ANNE CLARK-MCMUNAGLE AND PHILIPPE TROTTIER**

Respondents

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

Before: [Yvon Tarte, Chairperson](#)

For the Complainant: [Himself](#)

For the Respondent: [Philippe Trottier](#)

Heard at Vancouver, British Columbia,
30 June 2000.

DECISION

[1] In January of this year, John Lipscomb filed a complaint pursuant to section 23 of the *Public Service Staff Relations Act (PSSRA)* alleging that the Public Service Alliance of Canada (PSAC) and one of its officers had failed to represent him in a grievance process thus violating his rights under subsection 10(2) of the *PSSRA*. At the hearing, Mr. Lipscomb expanded his complaint to include as respondent the PSAC's representative. Mr. Trottier did not object.

[2] Subsection 10(2) imposes a duty of fair representation on bargaining agents and their officers. It states that:

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.

Background

[3] By letter dated the 24th of February 1998, the complainant was rejected on probation. The employing department, Revenue Canada at the time, justified this termination on the basis of Mr. Lipscomb inappropriate conduct towards a female co-worker (Exhibit R-1, tab 4).

[4] A few days previously, on February 19th, the complainant had, at the suggestion of his union representative and an Employee Assistance Program counsellor, apologized in writing for his most recent behaviour in relation to the female co-worker. Mr. Lipscomb concluded his letter by acknowledging that he had made a "major" mistake and accepted full responsibility for it (Exhibit R-1, tab 3).

[5] The complainant grieved his rejection on probation and sought representation from the PSAC, his bargaining agent. The PSAC represented Mr. Lipscomb at the various levels of the grievance process but refused to do so when the complainant decided to refer his grievance to adjudication.

[6] Documents tendered by the respondents (Exhibit R-1, in particular tabs 9, 12, 14 and 15) show that they carefully studied this matter, analysing written material available to them as well as relevant jurisprudence and PSAC internal policy on harassment in the workplace (Exhibit R-2) before refusing to provide representation to the complainant at adjudication.

ArgumentsFor the complainant

[7] Mr. Lipscomb argues that subsection 10(2) of the *PSSRA* creates an absolute obligation on a bargaining agent to represent members of the bargaining unit in all matters other than trivial ones. To use his example: even if he was an axe murderer in the workplace he would be entitled to representation.

[8] The PSAC in all of this has accepted the lies told by the employer and has refused to see him as the victim he truly is. The PSAC has throughout this ordeal stonewalled him at every possible opportunity.

[9] The PSAC and its officers are following a punitive justice model where all men are scapegoats regardless of responsibilities, when in fact they should be promoting a restorative justice model, leaving aside guilt and attempting to restore relationships.

[10] Mr. Lipscomb argued that the PSAC's policy on harassment in the workplace (Exhibit R-2) is unconstitutional since it inevitably discriminates against men who are always the harassers.

For the respondent

[11] Having given this matter much reflection as is indicated by the documentary evidence, the PSAC properly concluded that Mr. Lipscomb had been rejected on probation. Given that such terminations cannot pursuant to subsection 92(3) of the *PSSRA* be referred to adjudication, the PSAC has no responsibility to provide representation to the complainant.

[12] The PSAC has on several occasions assessed Mr. Lipscomb's situation properly and objectively and certainly not in a manner that was arbitrary, discriminatory or in bad faith. The PSAC's policy on workplace harassment (Exhibit R-2) was used as guidance by union officers in reaching their decision on whether to represent Mr. Lipscomb or not.

[13] In support of his position Mr. Trottier referred to: *Gagnon v. Canadian Merchant Service Guild and Laurentian Pilotage Authority*, 53 N.R. 100; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *Jacques v. PSAC* (Board file 161-2-731); *Begley v. PSAC* (Board file

161-2-759); *Re Seneviratne and Amalgamated Transit Union, Local 583 et al.*, 92 D.L.R. (4th) 195; *Jacmain v. Attorney General (Canada) et al.*, [1978] 2 S.C.R. 15; *Richard v. PSAC*, 2000 PSSRB 61 (161-2-1119) and *Perreault and Treasury Board (Transport Canada)* (Board file 166-2-26094).

Reply of the complainant

[14] In cases where there might be competing interests between members of a bargaining unit in the interpretation of a collective agreement, the bargaining agent may have discretion as to how it will represent the membership at large. Since this is not the case, the PSAC should have no discretion.

[15] The employer resorted to the extreme regulatory action of discharge because it did not want to or could not deal with emotions in the workplace. The PSAC should have seen beyond this and agreed to represent him at adjudication. Instead it followed in the footsteps of the employer content in making a scapegoat out of him.

Reasons for decision

[16] Pursuant to subsection 10(2) a bargaining agent must provide representation to its membership in a manner that is not arbitrary, discriminatory or in bad faith. In dealing with a complaint of unfair representation, the Board must assess the impugned conduct to determine whether it constitutes a violation of the provisions of subsection 10(2).

[17] In this particular case the respondents, on more than one occasion, meticulously assessed the facts surrounding the complainant's termination of employment. They concluded in good faith and without discrimination that Mr. Lipscomb had in fact been rejected on probation, a matter that cannot be referred to adjudication under subsection 92.(3) of the *PSSRA*.

[18] The Board must allow fairly wide latitude to a bargaining agent in the representation of its membership pursuant to the *PSSRA*. The Board does not accept the complainant's position that the right to representation contained in subsection 10(2) of the *PSSRA* is practically absolute and cannot be denied except in the most trivial of cases. Such a view is contrary to the ruling of the Supreme Court of Canada in *Gagnon (supra)*.

[19] The onus of proof in this case rested with the complainant Mr. Lipscomb. He has failed to present to me any evidence that the PSAC or its officers might have, with regards to him, violated their obligations under subsection 10(2) of the *PSSRA*.

[20] The complaint of Mr. Lipscomb is therefore dismissed.

**Yvon Tarte
Chairperson**

OTTAWA, July 18, 2000