Date: 20060511

File: 561-02-10

Citation: 2006 PSLRB 54

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

TONY D'ALESSANDRO

Complainant

and

LYSE RICARD, NYCOLE TURMEL, JEANNETTE MEUNIER-MCKAY
and
DEPARTMENT OF CITIZENSHIP AND IMMIGRATION CANADA, PUBLIC SERVICE ALLIANCE OF CANADA AND CANADA EMPLOYMENT AND IMMIGRATION UNION

Respondents

Indexed as
D'Alessandro v. Ricard et al.

In the matter of a complaint made under section 23 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Georges Nadeau, Vice-Chairperson

For the Complainant: himself

For the Respondents: Paul Champ for the Public Service Alliance of Canada and the Canada Employment and Immigration Union,
Stéphane Hould, for Lyse Ricard

Heard at Toronto, Ontario,
February 2 and 3, 2006.

Complaint before the Board

[1] On February 24, 2004, Tony D'Alessandro filed a complaint, naming as respondents Lyse Ricard, the Assistant Deputy Minister for the Department of Citizenship and Immigration Canada (the "Department"); Nycole Turmel, President of the Public Service Alliance of Canada; and Jeannette Meunier-McKay, President of the Canada Employment and Immigration Union. The complainant also referred to the Department, the Public Service Alliance of Canada (the "PSAC") and the Canada Employment and Immigration Union as respondent (the "CEIU") in Part 2 of the complaint form. PSAC is the bargaining agent, while the CEIU is a component of the bargaining agent. For ease of reference, both organizations will be referred to as the union in this decision.

[2] Mr. D'Alessandro's complaint under paragraphs 23 (1) (a) and (d) was that the Department, the PSAC, the CEIU as well as the persons identified above failed to observe the prohibitions contained in sections 8, 9 and 10 of the *Public Service Staff Relations Act* (*PSSRA*); that they had failed to comply with any regulations respecting grievances made by the Public Service Labour Relations Board; and that they had failed in the duty of fair representation under subsection 10(2) of the same *Act*.

[3] He asked that his grievances and written correspondence be properly addressed and that the collusion and discrimination by management and the union be investigated.

[4] At the beginning of the hearing, the complainant requested an adjournment of the proceedings to allow him to find a "good lawyer". He indicated to the Board that both the employer and the union had obtained prior adjournments and that he had encountered difficulties in finding a suitable lawyer to represent him. He had contacted a Mr. Desmond Fitzmaurice a week before the hearing. The complainant indicated that Mr. Fitzmaurice had told him that he was not available for the hearing as he was in Mexico and that he would need time to review the file before accepting the case. The complainant also indicated that he had previously contacted two other lawyers to take his case. However, he had found one "not so good" as the person was only trained in criminal law. As for the other, he had found him too expensive. The union did not object to the request while the employer left the question to my discretion.

[5] On April 1, 2005, the *Public Service Labour Relations Act* (the "new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Also on this date, the Public Service Staff Relations Board ceased to exist and the Public Service Labour Relations Board (the Board) was formed. Pursuant to section 39 of the *Public Service Modernization Act*, the Board continues to be seized with this complaint, which must be disposed of in accordance with the new *Act*.

Decision on request to adjourn

[6] After reviewing the file, I observed that there had been one adjournment granted after the case had been set for a hearing on July 13 and 14, 2005. This adjournment was granted as a result of the union's representative being unable to reach Toronto because of unforeseen flight delays at the Halifax Airport. As for an adjournment granted to the employer, no such adjournment was granted. There had only been a tentative date suggested to the parties to which the employer indicated it was not available. This refusal cannot be construed as an adjournment of a scheduled case.

[7] The dates of February 2 and 3, 2006, had been set for this hearing by the Board on November 16, 2005. They had been set after consultation with the complainant, the employer and the union. The complainant had indicated in a letter dated November 4, 2005, sent by fax to the Board, that he was available for the hearing on those dates.

[8] On January 19, 2006, the complainant requested a postponement of the February hearing dates, on the basis that he was having trouble finding a lawyer to represent him. The Board advised the complainant on January 20, 2006, that his request had been denied.

[9] Considering that the complainant had ample notice of the hearing; that the date had been set after consultation with him; that he had not actually secured the services of Mr. Fitzmaurice, who, as I understand, had only agreed to review his file; and that his request for postponement is not significantly different from the one already denied by the Board, I advised the complainant that I would not grant his request and would proceed to hear the matter.

Facts of the case

[10] The complainant presented the following evidence in support of his complaint. He started work at the Department of Employment and Immigration on September 10, 1986, as a mail clerk. From that position, he then moved to the Pay and Benefits area and after holding different clerical positions, he eventually became a Compensation Specialist, at the AS-02 group and level, in 1994. When the Department was split, he remained with the immigration side. On June 20, 2005, after the events that lead to the complaint, he was moved to a position in Mississauga, Ontario, within the Canada Border Services Agency (CBSA), at twice the commuting distance from his residence.

[11] The circumstances giving rise to his complaint started in early 2002. The complainant alleges that his supervisor, Sharon Diner, and another employee were friends. As a result of this relationship, the other employee would always get the acting appointments when it came time to replace the supervisor when she was away. The complainant was not happy with this situation.

[12] The complainant requested to attend a training session on retirement. He did so, not because he wanted to retire, but to better counsel employees who intended to retire. In the e-mail correspondence to Ms. Diner, in support of his request for training, the complainant wrote "In conclusion if…[Ms. X] was doing her job, perhaps it would not be necessary to seek further knowledge." The employee who was the target of these comments allegedly found a copy of the e-mail on the photocopier. As a result, the complainant was called into the supervisor's office and was told that the person who had found the e-mail was very upset. He was counseled and given three handouts: the Code of Conduct, chapter 7 of the Human Resource manual entitled "A Respectful Workplace" and the employer's Policy on the Prevention and Resolution of Harassment.

[13] On March 18, 2002, the complainant, upset with the situation, filed a grievance in which he stated that he considered the handouts irrelevant and accused the person who found the e-mail of having violated the rules enunciated in the handout. He also stated that he took strong exception to being told to be careful where he left his e-mails and questioned the intent of the supervisor.

[14] The supervisor who responded to the grievance indicated that she had wanted, in a non-disciplinary meeting, to ensure that the complainant recognized that the

derogatory and disrespectful comments in the photocopied e-mail were inappropriate. Not satisfied with the response, the complainant transmitted the grievance to the second level with the approval of the local CEIU union representative. Irene Baker, Director General, Ontario Region, responded to the grievance. In her response, she dealt with the concerns expressed by the complainant and denied the grievance. The complainant, with the approval of his bargaining agent, forwarded his grievance to the third and final level. Ms. Ricard, in her response denying the grievance, reiterated to the complainant that the initial meeting with the grievor was not disciplinary, but informative in nature. She also expressed her opinion that it was unfortunate that the complainant chose to dwell on the fact that a colleague had found his e-mail.

[15] On March 14, 2002, the complainant overheard a conversion between his supervisor and a colleague where the supervisor asked this colleague if there were any mistakes on pay actions performed by Mr D'Alessandro.

[16] On April 5, 2002, the complainant filed a grievance alleging that the incident of March 14, 2002, was: "…another clear example of the ongoing harassment campaign…" against him. He asked that his supervisor be removed from the unit. The grievance was sent, with the approval of the bargaining agent, directly to the second level.

[17] The Director General who responded to the grievance offered the grievor the opportunity to go through a mediation process to achieve resolution of his concerns. The complainant responded by referring his grievance to the final level, with the approval of the bargaining agent. Ms. Ricard, in her final level decision, indicated to the complainant that it appeared he had misconstrued or taken the conversation out of context. She also offered mediation.

[18] On August 19, 2002, the complainant filed another grievance, claiming that the employer had failed to provide equal opportunities in acting assignments since 1996, and he asked to be compensated with an equal amount of earnings. The response from the supervisor indicated that his grievance was, except for one instance, untimely and went on to explain the circumstances of that acting assignment.

[19] The supervisor, as noted in the grievance reply, did, however, endeavour to offer acting assignments on a rotational basis in the future. The complainant transmitted his grievance to the next level where it was denied. He transmitted his grievance to the final level where Ms. Ricard, in her final level response, explained to the complainant

the employer's prerogative in relation with acting appointments and indicated that in the future, the opportunities would be offered on a rotational basis.

[20] On June 27, 2003, the complainant grieved the content of his performance evaluation which he claimed was not a true reflection of his abilities "as required by the regulation for career enhancement" and requested, as corrective action, that the manager be removed for lack of management skills. This grievance was approved for presentation by the bargaining agent representative.

[21] The complainant also filed a second grievance related to the performance evaluation on June 30, 2003. In this grievance, the complainant alleged that the manager's refusal to discuss his performance evaluation without the presence of a staff relations advisor was an intimidation tactic and, again, requested that the manager be removed for unprofessional behavior and lack of management skills.

[22] The bargaining agent representative approved the presentation of this grievance. However, the complainant, not satisfied with the representative assigned to his case, requested a change of representative. The CEIU eventually agreed to his request to have Janina Lebon assigned to his case.

[23] Both grievances were denied at the final level by Ms. Ricard after considering the facts giving rise to his grievances and the written submissions he had presented to her.

[24] Both representatives of the respondents chose not to submit any evidence.

Request to amend the complaint

[25] As a result of the opening statements made by the respondents' representatives, and comments made by those representatives during the course of the presentation of his evidence, the complainant requested permission to amend his complaint. He requested that the names of Marg Mayne and Sharon Diner be added to the complaint as respondents and he also requested to add the event of his transfer to the CBSA to the complaint.

[26] In support of his request, he argued that, although Ms. Mayne and Ms. Diner had not been named as respondents, they had been identified in the complaint in the section detailing the statement of the alleged faulty facts or omissions. With respect to the second part of his request, he indicated that had his grievances been handled

correctly and his supervisor, Ms. Diner, removed from her job, he would not have been transferred to CBSA.

[27] Counsel for the respondent employer opposed the request. With regard to adding the names of Ms. Mayne and Ms. Diner, counsel argued that as all the facts were known to the complainant at the time that he prepared his complaint, there was no reason to allow him to amend his complaint at the time of the hearing, more than 15 months after the complaint was filed. These new respondents were not present and were never advised that a complaint had been lodged against them. Counsel relied on a decision rendered by Vice-Chairperson J.W. Potter in *Union of Canadian Correctional Officers v. Costello*, 2003 PSSRB 54. As for the second part of the complainant's request, counsel argued that the events he wanted to include had no relation with the presentation of the grievances mentioned in his complaint, nor with the representation provided by his union during the grievance procedure or any alleged collusion between the employer and the union. It would amount in a change to the nature of the complaint before this tribunal.

[28] Counsel for the union respondents (PSAC and CEIU) conceded that I had the authority to amend the complaint. However, they argued that it was inappropriate to do so as the facts with regards to Ms. Mayne and Ms. Diner were known to the complainant at the time when he filed his complaint. As for the addition of the issue of the complainant's transfer to CBSA, counsel argued that accepting such a request would fundamentally change the nature of the complaint.

[29] Counsel referred me to a decision rendered by Board member Ian Mackenzie in *Reynolds v. Professional Institute of the Public Service of Canada*, 2004 PSSRB 51. In that decision, a request to include events that occurred after the complaint was filed was denied on the basis that they occurred past the filing of the complaint and that the addition of the events would fundamentally change its nature.

[30] The complainant responded by saying that in *Costello* it did not indicate whether the names had been mentioned in the core of the complaint. He reiterated that he had included the names of the persons that he wished to add in the body of his complaint and that this constituted a big difference. As for the issue of adding the CBSA event, the complainant indicated that he had not known at the time of drafting the complaint that he would be transferred to CBSA and reiterated that had his grievances been handled correctly, he would not have been transferred.

[31] The complainant added that respondent Ricard was ultimately responsible for the actions of her employees and he argued that she was not taking responsibility. He speculated that perhaps he was the victim of discrimination because of his Italian ancestry.

Decision on request to amend

[32] The actions of Ms. Mayne and Ms. Diner were known to the complainant at the time that he filed his complaint. Although their actions were known to the complainant and form part of the reasons behind his complaint, he nonetheless failed to identify them as respondents.

[33] To allow him to do so at this time, more than two and half years after the events in issue would be prejudicial to their rights. Furthermore, even if I were to agree to include these additional respondents, nothing that the complainant has presented in evidence or argued leads the Board to conclude that his complaint against them would have even a remote chance of success.

[34] As for his request to include the event of his transfer to CBSA, I agree with both counsel for the union respondents and counsel for the employer respondent that this request should be denied as doing so would change the fundamental nature of his complaint. It would be inappropriate to include in the complaint an event which occurred 15 months after the complaint was filed. Furthermore, on the basis of the evidence presented by the complainant, there is no reasonable relationship that can be established between his transfer and the allegations of contravention of the prohibitions contained in articles 8, 9 and 10 of the former *Act* found in the complaint.

[35] In their preliminary comments, the employer and the union made claims that the complaint failed to identify events that, if proven, would constitute violations of the prohibitions contained in the *Act* giving rise to a section 23 complaint. In light of these comments, I asked both the union and the employer to proceed first in making their submissions in order to allow the complainant to respond to their position as well as to present his submissions.

Submissions on behalf of the union repondents

[36] Counsel for the union respondents indicated that none of the prohibitions outlined in articles 8 and 9 of the *PSSRA* apply to the respondents Nycole Turmel, Jeannette Meunier-McKay, the PSAC or the CEIU.

[37] As for the allegation with regards to article 10 of the *PSSRA* (duty of fair representation), counsel for the union respondents indicated that he understood that the allegation against the respondents was that the complainant had not been represented fairly. By his complaint, the complainant suggested that the union respondents had not competently presented his grievance and had not advanced all the arguments the complainant wished to make. The complainant also alleged that the union respondents were in collusion with the employer to deny his grievances.

[38] However, the evidence put forward indicates that the union provided representation to the complainant in all but two grievances and that it did advance all the grievances to the various levels of the grievance procedure. There was no evidence that the union or any of its representatives acted in bad faith, in a discriminatory or arbitrary fashion. The complainant presented no evidence to the effect that the assigned representatives had presented ineffective representation. In fact, the union bent over backwards to represent the complainant and in effect two of the grievances were upheld by the employer. With regards to the two grievances numbered 400 and 401, mentioned in the complaint, for which the union did not provide representation at all levels, it was at the complainant's own request. He declined to be represented by his union representative assigned to the case. None of the complainant's grievances were adjudicable as they did not involve a contravention of the collective agreement or discipline resulting in a financial penalty.

[39] Counsel directed me to the decisions rendered in *Reynolds* (*supra*), *Dwyer v. Canadian Union of Postal Workers and Canada Post Corporation (1991)*, 86 di 144 and *Toronto Public Library Board v. Canadian Union of Public Employees*, [1997] O.L.R.D. No. 3065.

Submissions on behalf of employer respondents

[40] Counsel for the employer representing Ms. Ricard commented on the discrimination allegation presented by the complainant. He indicated that even if the

facts as alleged were found to be true, this allegation was not an unfair labor practice. At *prima facie*, the allegation should be dismissed.

[41] Counsel submitted that an allegation of collusion between an employer and a bargaining agent to deprive someone of one's rights is a serious matter. While the employer can understand that the dismissal of the grievances may not have been a satisfactory outcome for the complainant, the complainant has presented no evidence of any collusion. Specifically with regards to the conduct of Ms. Ricard, the complainant presented no evidence that she colluded with the union to prevent him from exercising his rights under the *PSSRA*. The allegation of collusion should be dismissed as unfounded.

[42] As for the allegation of intimidation, there was no evidence of any attempt to intimidate or retaliate against the complainant. The complainant filed a number of grievances that were heard at the different levels of the grievance procedure. Some of the grievances that the complainant presented were upheld; although the ones mentioned in his complaint were denied. It appears that the complainant believes that he can file an unfair labour practice complaint when his grievances are denied. Counsel indicated that he could not understand how the denial of a grievance could give rise to an unfair labour complaint. He asked that I dismiss the complaint.

Submissions of the complainant

[43] The complainant indicated that he could not understand how the employer could deny a grievance that was so factual, it should be impossible to deny. He brought my attention to grievance number 038, mentioned in his complaint and presented in evidence, and asked how the employer could get away with the way that it had treated him.

[44] In response to the argument that he had presented no evidence in support of his complaint, the complainant argued that it was difficult to present evidence when there was no witness and the respondents did not show up. He complained of not being able to question the witnesses. The complainant at this point in his arguments again requested an adjournment or permission to amend his complaint. He then argued that the absences of Ms. Turmel, Ms. Meunier-McKay and Ms. Ricard resulted in his inability to ask questions and to present evidence. He concluded that there was no

sense in presenting anything, as he could not ask questions on what the respondents replied to him.

Reasons for decision

[45] Starting in 2002, the complainant filed a number of grievances arising from incidents related to his relationship with his supervisor, Ms. Diner. The complainant grieved what he perceived to be a disciplinary measure (grievance number 038); he grieved what he perceived to be solicitation of complaints against him (grievance 091); he grieved the employer's refusal to provide acting opportunities (grievance 531); he grieved the content of his performance appraisal (grievance 400); and finally, he grieved the presence of a staff relations officer during discussions with the supervisor on the performance evaluation (grievance 401).

[46] The union approved the presentation of all these grievances and the union represented the complainant throughout the grievance procedure when he so wished.

[47] None of the grievances were referable to adjudication either under the *PSSRA* or the *PSLRA* and all of these grievances were dealt with through all available levels of the grievance procedure and denied.

[48] The complainant filed the section 23 complaint, faced as he was with the denial of his grievances and with what he believed was a denial of his rights. He complained of lack of representation from his union and of the "clear attempt to threaten and intimidate him". He added that the abuse of authority on the part of the employer needed to be addressed and that "clearly there is collusion with the union".

[49] The burden of proof to establish that a violation of the prohibitions found in the *Act* resides with the complainant. Unfortunately for the complainant, the denials of his grievances do not establish that his rights under the *Act* have been violated. These denials, however wrong they may be, cannot be construed as a threat or as an intimidation tactic, in the context of this case.

[50] It is not up to the respondents to make the complainant's case. The complainant had the opportunity to subpoena witnesses prior to the hearing and present evidence in the course of the hearing. It is too late to request, during arguments, an adjournment for the purpose of presenting more evidence.

[51] The complainant's repeated requests to have his supervisor removed and his refusal to accept offers of mediation to address the situation of the deteriorating relationship with his supervisor, is telling about his frame of mind. There was no evidence of abuse of authority or collusion between the respondents, and suggesting so is, in my view, gratuitous if not frivolous.

[52] As for the allegation of discrimination, again, the complainant failed to provide any basis whatsoever for making such a claim.

[53] There is absolutely no evidence that was tendered that could lead the Board to conclude that the respondents violated in any fashion the prohibitions contained in articles 8, 9 and 10 of the *PSSRA*.

[54] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[55] The complaint is dismissed

May 11, 2006.

Georges Nadeau,
Vice-Chairperson