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File: 561-33-48

Citation: 2006 PSLRB 57

Public Service Labour Relations Act, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22

Before the Public Service Labour Relations Board

BETWEEN

MARTIN CYR

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Cyr v. Public Service Alliance of Canada

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

REASONS FOR DECISION

Before: Jean-Pierre Tessier, Board Member

For the Complainant: Himself

For the Respondent: Francine Cabana, Public Service Alliance of Canada

Heard at Sept-Îles, Quebec,
October 18 and 19, 2005.
(P.S.L.R.B. Translation)

Complaint before the Board

[1] Martin Cyr has been employed with Parks Canada since 1983. In the summer of 2003, he received three disciplinary sanctions.

[2] One of these sanctions dealt with the complainant's comments and actions during the summer of 2003 that were offensive to other employees to the point where, according to the employer, they constituted sexual harassment. On September 3, 2003, Mr. Cyr received a suspension without pay for a period of 16 working days, or 160 hours.

[3] In September 2003, the complainant filed a grievance against this sanction. In the months that followed, he requested the assistance of his union to defend him. After various communications with union representatives, the complainant was unsatisfied and in May 2004, he filed a complaint against his union with the Public Service Staff Relations Board (the "Board") under section 23 of the *Public Service Staff Relations Act* (the "former Act") alleging violation of subsection 10(2) of the former Act by his union. The complainant deplored the fact that the union did not conduct an independent investigation and that it offered to defend him only on the severity of the sanction.

[4] There were several exchanges between the parties and the Board finally heard the complaint in October 2005.

[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. Under section 39 of the *Public Service Modernization Act*, the Board remains seized with this complaint, which must be decided in accordance with the new Act.

Summary of the evidence

[6] At the hearing, the complainant testified on his own behalf and called as a witness Yvon Méthot, union representative. For its part, the union called Rachel Dugas. The parties adduced a number of documents and referred to the correspondence sent by the Board and which appears in the file.

[7] The complainant stated that in September 2003, after receiving his disciplinary notice, he resigned as president of the local union and was replaced by Daniel Landry.

He then asked Mr. Méthot (union representative) and Mr. Landry to take the necessary action to defend his interests. The complainant urged Mr. Landry to question the employees who complained.

[8] The complainant referred to letters sent to or issued by the union's national component during the period from November 2003 to February 2004 (Exhibit P-1 to P-3).

[9] In February 2004, the complainant found out that, on January 28, 2004, the representatives of the local union had sent Linda Vaillancourt, union official with the national component, a report of the status of the complainant's case (Exhibit P-4).

[10] Referring to this letter from the local union (Exhibit P-4), the complainant pointed out that the local union admits that management's investigation is complete and conducted in accordance with standard practice. However, he insisted that the union conduct its own investigation. The complainant further criticized the local union for denigrating him to national officials by stating that, in face of the claims, [translation] "he never admitted it and instead feels like a victim" (Exhibit P-4).

[11] The complainant stated that he lost faith in his local union and that he contacted representatives of the national component of his union so that they could conduct an investigation. He obtained documentation related to the statements of principle 23A and 23B (Exhibit S-1) and requested that the rules governing complaints of harassment, as set out in the documents of the Public Service Alliance of Canada (national union), be applied.

[12] For his part, Mr. Méthot, who was a union representative in 2003, stated that he accompanied the complainant during the meeting with the employer. He told the complainant that it would do him no good to say that he had done nothing wrong because the employer did not appear to believe him.

[13] Subsequently, the complainant insisted that Mr. Landry (new president of the local) conduct an investigation. Several weeks later, Mr. Landry told him that he had met with the employees who had made the complaint. Mr. Méthot stated that he checked with one of the employees who had complained and that Mr. Landry had not met with her.

[14] Mr. Méthot stated that he reacted when he saw the letter from the local union (Exhibit P-4). He told the complainant that the union was harming him by the letter: [translation] "The union is sticking it to you", he said.

[15] The complainant reported that he made an additional request in his complaint that the union reimburse him his legal fees for his lawyer, and his own expenses and those of the witnesses for the hearing of the harassment complaint.

[16] Ms. Dugas testified for the union (national component). She was a union representative from 1997 to 1999 and since then, she has been a grievance officer. She represents employees at mediation sessions and grievance hearings. She is required to conduct investigations, meet with witnesses and prepare cases. She handles complaints and analyses files.

[17] In this instance, the national component asked her to conduct a detailed examination of the complainant's grievance files and to make recommendations on the action to be taken by the unions. In her testimony, she referred to the documents adduced in a bundle (Exhibit S-2). In a letter dated February 27, 2004, she recommended to Ms. Vaillancourt that three grievances be sent to adjudication. However, in the case of the harassment grievance, she recommended that the Alliance present arguments solely on the severity of the sanction. A copy of that letter was sent to the complainant.

[18] Ms. Dugas testified that the complainant was insisting that a specific investigation be conducted by the union of the witnesses or complainants in the sexual harassment file. She referred to the letter of December 18, 2003, sent to Gaétan Scherrer (local union) by Ms. Vaillancourt. At that time, Ms. Vaillancourt indicated the following:

> [Translation]
>
> . . .
>
> *The PSAC's policy on harassment in the workplace requires that the local conduct an investigation. Your investigation perhaps you can use the investigation conducted by the employer (if you are satisfied that the investigation is complete and respects the policy on harassment in the workplace and that all procedures and employee rights have been respected. [sic] If you disagree with the manner in which the investigation was conducted, you can conduct a*

> *new investigation to assure yourself that the investigation complies with the procedure and respects the rights of all employees concerned. I am available to advise you on this matter, if you want to discuss it.*
>
> . . .

[19] In this regard, Ms. Dugas indicated that harassment policies 23A and 23B were sent to the complainant (Exhibit P-3; February 17, 2004). She mentioned that policy 23B applies to complaints within the union and therefore includes requirements for an impartial local investigation. In the case of policy 23A, it refers to harassment in the workplace and the employer must conduct the investigation. The union can conduct an investigation, but if it is satisfied with the validity of the one done by the employer, it can refer to it, while verifying certain elements with the person concerned and with witnesses or the employee who filed the complaint.

[20] According to Ms. Dugas, the local union acted on behalf of the employees who had complained and it considered that these employees were satisfied with the investigation conducted by the employer. She referred to the letter of January 20, 2004 sent by the local president, Mr. Landry (Exhibit P-4).

[21] In her analysis, Ms. Dugas took into account the fact that the complainant's actions were not intentional. When informed by the employer, the complainant stated that he did not recall some of them. He considered that, overall, they were trivial things. In a work context, these actions amount to harassment. According to the union, it was required to defend the complainant but only on the severity of the sanction.

[22] Ms. Dugas prepared the written arguments that the union sent to the Board on June 16, 2004 and other arguments appearing in Exhibit P-2.

[23] Ms. Dugas also prepared an addendum concerning the union's reply to the complainant's complaint. This addendum dealt with the complainant's requests for reimbursement of legal fees and travel expenses incurred for his appearance at the hearing of the harassment grievance. On this point, Ms. Dugas pointed out that she had suggested to the complainant that he wait for the hearing of his harassment grievance and proceed with the complaint against the union pursuant to section 23 of the former Act. In this situation, if the Board ruled in the complainant's favour, the union would handle the representation and would reimburse costs in accordance with

the Board's order. However, the complainant preferred to have his own lawyer for the harassment grievance.

Summary of the arguments

[24] The complainant argues that he made every effort to explain to the local union and the national component of the Alliance that he never intended to offend anyone and that he was prepared to apologize, if even unintentionally, he had offended anyone. He refers to all of the correspondence sent to and issued by the union (letters found in the file). He claims, as stated in the wording of his complaint (exhibit P-5), that the employer's investigation was not impartial. He believes that the union should have met with the witnesses and verified the allegations, because in his view, these actions were not harassment.

[25] Lastly, the complainant argues that the local union did not have to mention his actions nor comment on his attitude but rather, should have held to the facts of the employer's investigation.

[26] For its part, the union argues that it acted transparently and extended considerable effort to reach an informed decision. The union refers in particular to the written notes, prepared by Ms. Dugas, regarding the duty to represent its members in good faith and with full impartiality.

[27] The union refers to pages 6 and 7 of the written notes that read as follows:

> [Translation]
>
> *Duty to be impartial:*
>
> *The complainant alleges that* [translation] *"since the complaint is between members of the union, it is their duty to be impartial and not to take sides, something that was not done".*
>
> *The Supreme Court considered this point in* Gendron *[1990] S.C.R. 1298, at page 1329:*
>
> > *"In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by improper motives and as long as it turns its mind to all the relevant considerations."*

In keeping with this extract from the Supreme Court decision, Chairperson Tarte states in Jacques *(161-2-731) that "Subsection 10(2) of the Act thus creates no absolute obligation for the employee organization to represent a member during the grievance procedure or even in referral to adjudication before the Board" [page 23].*

Still referring to Jacques, *the respondents must take into consideration the interests of all their members but, when these interests are divergent, they may and must make difficult choices on the representation to provide to an individual member [page 23]. Obviously, such discretion may not be arbitrary, discriminatory or exercised in bad faith.*

As Chairperson Tarte explains, "decisions of an employee organization in a case such as this must be made in compliance with the established rules, after study and analysis of the case and the case law …" [page 23]. Thus, Chairperson Tarte finds: "PSAC has established a policy [policy 23] to guide itself in the discharge of its duty of fair representation when the victim of harassment and the perpetrator are both members of the union in good standing. This policy requires that a thorough study be conducted before a decision is made. The policy also does allow representation of a member guilty of harassment if study of the case reveals that the penalty imposed was excessive" [page 23].

In the complainant's case, the respondents looked after the interests of all their members, studied the situation, acted in accordance with the established rules, competently and without a desire to punish or to harm the complainant in particular.

*The respondents complied with Policy 23A in that, during the employer's investigation, the local ensured that the process was fair and honest [**Exhibit D-11**]. The local observed the process so that it was fair and normal and determined that the investigation was complete. Linda Vaillancourt then intervened given the local's lack of experience.*

*Note that Linda Vaillancourt had previously questioned the complainant about the employer's allegations of harassment in the context of the presentation of his grievances at the final level [**Exhibit D-4**]. Essentially, the complainant had no recollection of the alleged incidents and therefore did not provide any witness to substantiate his version of each of the events in question. If he recalled the events in question, he considered them trivial. The respondents still agreed to file a grievance and defended the complainant's position to the final level.*

> *The local and Linda Vaillancourt therefore did conduct a more thorough investigation and found that there had been harassment by the complainant [**Exhibits D-5, D-6, D-7, D-9 and D-11**]. That decision was communicated to the complainant. Accordingly, the Alliance complied with the investigation process of Policy 23A, as set out in items 2 and 3 therein at pages 13 to 16 of said policy.*
>
> *Note that Policy 23A provides for a mechanism to appeal a decision of the union that results in it not providing any representation. The undersigned indicated to the complainant that this recourse existed in the Alliance but refused to take this route.*
>
> *Moreover, as in* Ruda *(161-2-821), the respondents agreed to represent the complainant at adjudication. The Alliance displayed diligence in examining the documents in the file and deciding that the question of the sanction could be defended [**Exhibit D-13**].*
>
> *Furthermore, despite the complaint filed against the respondents, Linda Vaillancourt is still being asked by the complainant to represent him and she continues to do so. Consequently, there is no bad faith or discrimination in the treatment accorded the complainant.*
>
> . . .
>
> [Emphasis added]

Reasons

[28] The complainant filed a complaint against his union because the latter allegedly did not provide fair representation.

[29] The PSSRA states as follows, among other things:

> ***BASIC RIGHTS AND PROHIBITIONS***
>
> . . .
>
> ***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.*
>
> . . .

[30] It should be noted that in the new Act the provisions of subsection 10(2) are found in section 187.

[31] The Board is required to consider a complaint filed by an employee within the context of the wording of the Act. The employee must show that the union acted in an arbitrary or discriminatory manner or in bad faith.

[32] The examination of the wording of the complaint (Exhibit P-5) and of the documents adduced reveals that the main reasons for the complainant's criticism of the union are as follows:

> *(a) The employee complains that the investigation conducted by management was not impartial and that the union did not conduct a thorough investigation;*
>
> *(b) He feels that the alleged actions were not intentional on his part and that they are trivial things that he does not consider harassment;*
>
> *(c) He criticizes the local union for expressing an opinion on his behaviour (P-5);*
>
> *(d) He states that the union is handling his personal file like a survey (P-8).*

[33] I do not believe that the attitude of the local union toward conducting an investigation can be described as discriminatory or arbitrary or of bad faith in the circumstances established in evidence.

[34] In actual fact, we find that management gathered statements from the employees. The latter made brief statements and management held strictly to these without making further inquiries. In the record of the disciplinary meeting of August 15, 2003 (Exhibit S-2, bundled), we note that each employee's statement is summarized in a few lines (placed his hand on her knees; made a gesture to another person who was having a problem with his radio; looked at Ms. X from head to toe, etc.).

[35] The local union met with the employees who denounced these actions and found that [translation] "each of the employees involved seemed satisfied with management's explanations of the investigation" (Exhibit P-4).

[36] The complainant is asking for a new investigation by the union; that is his position. However, in this case, the statement (complaint) of each employee is very specific and/or there is no need for a detailed investigation. A distinction must be

made with respect to a complaint in which an employee refers to many facts and actions spread over several years, which requires a more in-depth investigation.

[37] In her letter of December 18, 2003 (appears on file), Ms. Vaillancourt clearly explains to Mr. Scherrer that he can conduct an investigation or he can rely on the investigation conducted by the employer if he is satisfied that the investigation is complete. The local union considered the employer's investigation and checked with the employees. In such circumstances, it cannot be accused of bad faith.

[38] Another aspect of the complainant's complaint is the qualification or scope of his actions. In his view, he never intended to harass and some of the actions must be deemed trivial. In her letter of January 27, 2004, Ms. Vaillancourt properly summarizes this point (Exhibit P-2). Her position has no discriminatory or arbitrary connotation:

> [Translation]
>
> . . .
>
> *It is my view that harassment did occur, however, I must clarify that I do not believe that it was intentional by Martin Cyr. He does not appear to understand that it is not the intent that counts, but rather the perception by others.*
>
> . . .

[39] The complainant criticizes the union for expressing an opinion on his personal behaviour and treating his file like a survey. With respect to these points, the complainant refers in his testimony to paragraph 5 of the letter from the local union, dated January 28, 2004 (Exhibit P-4).

[40] To understand paragraph 5 of this letter, it must be placed in the context of the entire letter. This is an internal letter of the local union addressed to Ms. Vaillancourt. The local union states that it met with the employees concerned, that the investigation conducted by management appears to them to be complete, and that the complainant appears to feel that some gestures were [translation] "trivial". The union states that it has little experience to evaluate the validity of the sanction imposed by the employer. Lastly, in paragraph 5, it states that the complainant is a person who is very insistent, that he [translation] "questions management" and that he feels like he is a victim. The union concludes by stating that opinions will be split among the 70 employees of Parks Canada.

[41] I understand from all of the elements of this letter that the representatives of the local union express that, in their view, they did their work, the employer's investigation is valid, but that the complainant is a very insistent person. As for the disciplinary sanction, they do not have the expertise to assess whether it is correct, but they believe that management had to act, although opinions would be split among the 70 employees.

[42] I consider this to be the union's read of the events. Whether this opinion is correct or not, it does not constitute discriminatory or arbitrary action. The evidence does not show that there was a survey by the union of the employees; there is an assumption that the opinions of the complainant's colleagues could be split on this matter.

[43] In light of the file as a whole, the national component offered to represent the complainant with respect to the fairness or severity of the sanction and not on the merit in terms of arguing that there was no harassment in this case.

[44] I believe that this position by the union does not compromise its duty of impartiality. The case law cited by the union in its arguments appears totally applicable to this case. In particular, in *Jacques v. Public Service Alliance of Canada*, PSSRB file No. 161-2-731 (1995) (QL), Chairperson Tarte finds: "PSAC has established a policy [23] to guide itself in the discharge of its duty of fair representation . . . The policy also does allow representation of a member guilty of harassment if study of the case reveals that the penalty imposed was excessive". The complainant decided to retain the services of private counsel to defend his case for several reasons. Given the evidence, it appears that the complainant lost confidence in his local union following the letter sent by the local representatives to Ms. Vaillancourt on January 28, 2004 (Exhibit P-4).

[45] Based on the testimony, when the complainant showed this letter to Mr. Méthot, the latter told him that the union (local) wanted to [translation] "stick it" to him. The complainant insisted that the union conduct a new investigation. He expected to have the support of the national component (the Alliance). However, it offered to represent him on the severity of the sanction, not on the merit of the file.

[46] As I mentioned earlier, the union made an informed choice, after an exhaustive examination of the file. The complainant did not show that the union acted in a discriminatory or arbitrary manner or in bad faith.

[47] For the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[48] The complaint is dismissed.

May 18, 2006.

P.S.L.R.B. Translation

Jean-Pierre Tessier,
Board Member