Date: 20060821

File: 561-33-16

Citation: **2006 PSLRB 98**

Public Service Staff Relations Act

Before the Public Service Labour Relations Board

BETWEEN

DIANE DUCLOS

Complainant

and

MICHEL BUJOLD

Respondent

Indexed as
Duclos v. Bujold

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

REASONS FOR DECISION

Before: Sylvie Matteau, vice-chairperson

For the Complainant: Herself

For the Respondent: Karl Chemsi, counsel

Heard at Bathurst, New Brunswick,
June 14, 2006.
(P.S.L.R.B. Translation)

Complaint before the Board

[1] On July 12, 2004, Diane Duclos ("the complainant") filed two complaints with the Public Service Staff Relations Board ("the Board") dated July 4, 2004. One pertained to the duty of representation of her union representative and was heard and determined on January 10, 2006 (2006 PSLRB 2). The other, now before me, is against Michel Bujold, the respondent, her supervisor at the time. This complaint reads as follows:

> [Translation]
>
> *It is very difficult for me to go into specific details because he had so much discrimination. It would be advantageous for me to have a hearing. To process and activate my case. Section (23) is based by the rules that they have supposedly been violated!*
>
> *To elaborate on the first sexual assaults by my boss Michel Bujold, the superintendent in the years 1992-2002 until the last week of my contract on October 11, 2002*
>
> [*Sic* throughout]

[2] The representative of the respondent and the employer, Mr. Chemsi ("the representative"), objected to the Board's jurisdiction. He argued that, on their face, the facts and circumstances raised in the complaint were not in keeping with the terms and objectives of the prohibitions set out in sections 23 and 8 of the former *Public Service Staff Relations Act (PSSRA)* (now sections 190 and 186 of the new *PSLRA*).

[3] Furthermore, in his opinion, the complainant failed to file her complaint within a reasonable time, having done so more than 20 months after her contract ended. Lastly, in light of the serious allegations against the respondent and the fact that he had very few details about the allegations against him, the representative asked that a decision first be rendered on these preliminary matters, that he be provided with details about these allegations, and that the hearing be adjourned to give him an opportunity to properly prepare his defence with full knowledge of the facts, if necessary.

[4] The complainant had no objection to this way of proceeding. I thus agreed to the representative's request and invited the parties to proceed only on the preliminary matters raised by the latter. The complainant was also asked to provide more details concerning the basis of her complaint against the respondent.

[5] In order to determine these matters, I have heard the complainant's evidence and the parties' arguments with regard to the objections raised. The parties did not call any witnesses, but I nonetheless agreed to receive documentary evidence, subject to its relevance and weight and pending more thorough evidence at a potential hearing on the merits of the case. The hearing lasted one day.

[6] The respondent was not present at the hearing. However, the representative was accompanied by a representative of the employer. This decision thus pertains solely to the matters of jurisdiction and timeliness.

[7] On April 1, 2005, the new *PSLRA,* 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 of this complaint, which is to be decided in accordance with the new *PSLRA*.

Summary of the evidence

Facts and circumstances surrounding the complaint

[8] The representative filed his objections and adduced documents in evidence. The complainant was asked to responded to them, which she did by testifying abut the situation that was the subject of her complaint and describing the circumstances surrounding her two complaints, adding details to her allegations against the respondent. She recognized that the facts she presented corresponded to those she had presented at the hearing of the complaint that had previously been determined (2006 PSLRB 2).

[9] The complainant was a registered Indian by marriage. She was divorced in 1993 but has maintained this status under the law. She says she is thus a member of the Mi'qmag community of Listuguj, even though she lives off the reserve.

[10] The complainant was employed as a security guard by the private firm Sécurité Gaspeneq Inc. and worked at the historic site of the battle of Restigouche from July 8 to August 15, 1992, as indicated on the record of employment that the complainant filed (Exhibit P-6). During this employment she was allegedly sexually assaulted. Her marriage to the reserve's chief of police ended as a result of these incidents.

[11] In summer 1998 the complainant contacted the Band Council and obtained a position as an interpretive guide with Parks Canada at the same historic site. As she noted at the previous hearing, these offers of employment took place under an Aboriginal hiring program in which the Band Council had some input. This term position for the 1998 summer season was renewed for the following years, until October 2002 (Exhibit E-2).

[12] On March 19, 2003, Parks Canada notified the complainant of its decision to proceed with a staffing competition for a seasonal indeterminate position open only to Aboriginal candidates who were members of the Mi'qmag community of Listuguj (Exhibit E-3).

[13] The complainant applied for the position and was interviewed. On May 28, 2003, the employer informed her that she was not qualified for the position (Exhibit E-4). The interview apparently took place on a Friday at the end of the day and lasted barely 10 minutes. The respondent gave the complainant a brief two-week delay to participate in the competition, because she had been hospitalized from April 30 to May 4, 2003, as a result of a car accident. Her doctor had prescribed four weeks of complete rest (Exhibit P-9). She indicated that, in the end, she had rested for four months. She maintained that the time the respondent had given her was inappropriate in the circumstances. This represents one of the numerous allegations of harassment against the respondent that she intended to prove.

[14] The complainant asserted that the outcome of the competition had been determined in advance by the respondent and the Band Council, and that the two candidates selected for the position were in no way qualified for such work.

[15] She further alleged that the respondent had put up a picture of an old woman with two faces close to his office, and that he regularly referred to it as a picture of her. She further alleged that this was the result of the decision she had made in 2000 to "break the silence" about her allegations of sexual assault at work.

[16] She stated that her co-workers deliberately used cleaning products and perfumes that caused her to have serious allergic reactions. She also stated that a co-worker had brought a turtle to work, which also caused a serious allergic reaction. The same person allegedly poisoned her food with foods to which she is highly allergic, to the point that the complainant then had to keep her food in her car rather than in the

refrigerator made available to employees. She added that the employer had even provided this person with a refrigerator for the person's own use, since all of the employees complained about this person's poor food hygiene and no longer wanted to share the refrigerator with this person.

[17] The complainant mentioned these incidents to the respondent, who held a staff meeting and circulated the employer's harassment policy. According to her, this had no effect on her co-workers' attitudes. She stated that she was also subject to heightened and exceptional supervision by the respondent, adding that her work was filmed as a way to intimidate her. Even her co-workers made remarks to that effect, calling her "Madame La Pompadour", mistress of the King of France. According to her, the two Aboriginal employees who had the position in 2003 were not subjected to such behaviour.

[18] The complainant explained that her hours of work, unlike those of the other employees, were often very long, and that she did not obtain the leave to which she was entitled or that she believed she deserved, such as leave for a major Aboriginal holiday or leave to attend a court hearing on the custody of her children.

[19] She also raised the fact that she did not have access to direct deposit of her pay, and the fact that her tax exemption was handled differently from one year to the next, causing her difficulties with the tax authorities. In addition, she never received the new uniform adopted in 2002, as the other employees did, while the two people hired following the competition in 2003 were given it immediately. According to her, this set her apart from the other employees. The students hired for the summer season remarked about this to her.

[20] The complainant further alleged that there was a conspiracy between her ex-husband, the Chief of Police, his new partner, the daughter of the head of the Band Council, and the respondent. She also alleged that she had been the victim of discrimination by the Band Council in the 2003 competition, which she said favoured the two candidates born on the reserve.

<u>Facts and circumstances surrounding the steps taken by the complainant</u>

[21] The complainant referred to the efforts she had made in explaining the length of time she had taken to file her complaint with the Board. She said she began by

complaining to her superiors, including Raynald Bujold of the Quebec office, who did nothing. She did not give the date of that conversation. The complainant began communicating with her union representatives in March 2003, communicating with the president of her union, Heather Brooker, in July 2003, and then with Nycole Turmel in April 2004. She also contacted local politicians to complain about her situation at work.

[22] On September 10, 2003, the complainant signed a complaint under section 23 of the former *PSSRA* against her union delegate and the respondent. In it she alleged sexual harassment and harassment in the workplace (Exhibit P-1), and referred to paragraphs 23(1)(*c*) and (*d*) of the former *PSSRA*. The Board returned the complaint to the complainant, indicating that it was impossible to identify which decision of an adjudicator or which regulation respecting grievances she was referring to. She also filed a complaint with the Canada Industrial Relations Board (CIRB) on May 18, 2004. This letter was forwarded to the Board on May 20, 2004.

[23] In June 2004 the Board contacted the complainant and gave her more information about filing a complaint under section 23 of the former *PSSRA,* informing her that it could not handle the complaint without further details. The complainant thus sent the Board the complaint dated July 4, 2004.

[24] The complainant said that she acted with diligence. She took steps as soon as she found out that her term contract would not be renewed for 2003. She said she did not have the support of her employer or her union. The latter question was dealt with in 2006 PSLRB 2.

[25] The representative filed the complaint form that the complainant had filed against Parks Canada Agency with the Canadian Human Rights Commission (CHRC) on May 3, 2004 (Exhibit E-5). The complainant alleges therein that her contract was not renewed, and that her application for the subsequent competition was not chosen, because she is white and because of her Aboriginal status. She also alleges therein that she was treated differently in 2002 and 2003, for the same reasons as she indicated at this hearing.

[26] The representative also filed the investigation report dated June 13, 2005 (Exhibit E-7), as well as two CHRC decisions in this regard. The first, an interim decision dated March 7, 2005 (Exhibit E-6), states that the CHRC would rule only on the

allegation pertaining to the outcome of the May 2003 competition given that "[Translation] . . . the other allegations contained in the complaint are based on acts that occurred more than a year before the complaint was filed".

[27] The other decision, dated August 31, 2005 (Exhibit E-8), dismisses the complaint because the allegations investigated by the CHRC were not supported by the evidence. The complainant indicated that she had not met with the investigator.

<u>Summary of the arguments</u>

[28] According to the representative, the fundamental question is that of the Board's jurisdiction to hear the complaint. The complainant failed to discharge her burden of proving that, under subsection 8(1) or 8(2) of the former *PSSRA*, the employer interfered with the complainant's union activities, refused to continue employing her or imposed terms and conditions on her employment in violation of that legislation. She also failed to establish that the employer had engaged in any actions intended to prevent her from participating in union activity. The complainant did not establish any connection with the mechanisms of section 23 of the former *PSSRA*. It is clear that paragraphs 23(1)(*b*) and (*c*) do not come into play. 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 :*
>
> . . .
>
> b) *to give effect to any provision of an arbitral award;*
>
> c) *to give effect to a decision of an adjudicator with respect to a grievance; or;*
>
> . . .

[29] The remaining provision to be considered is paragraph 23(1)(*a*), which reads as follows: " . . . to observe any prohibition contained in section 8, 9 or 10. . . ." This paragraph refers to the prohibitions set out in sections 8, 9 and 10 of the former *PSSRA*. Only section 8 could apply in the present case, but the employer and the respondent do not know what they are being accused of in relation to this section and its very clear prohibitions. Section 8 of the former *PSSRA* reads as follows:

> ***8.*** *(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the*

> *employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*
>
> *(2) Subject to subsection (3), no person shall:*
>
> (a*) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> (b*) impose any condition on an appointment or in a contract of employment, or propose the imposition of any condition on an appointment or in a contract of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or;*
>
> (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.*
>
> *(3) No person shall be deemed to have contravened subsection (2) by reason of any act or thing done or omitted in relation to a person who occupies, or is proposed to occupy, a managerial or confidential position.*

[30] The first subsection of section 8 does not apply in the circumstances presented by the complainant. Subsection 2, which contains three paragraphs setting out very specific circumstances, does not apply either, because the complainant is unable to establish, and does not even intend to establish, any such circumstances. The decision in *Sabiston and Government of Canada, Department of National Defence Management and Representatives***,** PSSRB File Nos. 161-2-280 to 288 and 161-2-289 to 299 (1983) (QL) was submitted in support of this argument, in that this provision cannot be used to file a complaint against the employer for things other than those set out therein. Nothing in the facts reported by the complainant demonstrates any actions or even an

intention on the employer's part to prevent her from exercising her rights protected under or provided for in the former *PSSRA*.

[31] The representative noted that the complainant did not file a harassment grievance based on a provision of her collective agreement or a sexual harassment complaint under the employer's policy. This type of complaint cannot be filed under section 8 of the former *PSSRA*. A number of decisions were cited in support of the employer's and the respondent's argument: *Rioux v. LeClair,* 2006 PSLRB 12; *Reekie v. Thomson,* PSSRB File No. 161-02-855; and *Pereverseff v. Canada Customs and Revenue Agency,* 2005 PSLRB 60.

[32] With regard to the time it took to file the complaint, it is undeniably unreasonable. The complainant's employment ended in October 2002. The complainant has not been employed by Parks Canada since that time, and could file a complaint or grievances only on facts that took place before that date. She was required to do so with diligence. More than 20 months passed between the end of her employment and the filing of her complaint in July 2004. This is an unreasonable delay. The burden of proof was on the complainant, who had to show that she acted with diligence. She did not do so.

[33] Finally, under section 8, the complainant is unable to complain about the outcome of the 2003 competition. Only the Public Service Commission has the authority to intervene in this regard. Although it is reasonable to think that the complainant wishes to return to her position, nothing in the complaint she has filed can lead to the satisfaction of this request. For all these reasons, the representative has asked that the complaint be dismissed because of lack of jurisdiction.

[34] The complainant, for her part, stated that she had filed her complaint on September 10, 2003 (Exhibit P-1), and that the union had returned the document to her. On March 31, 2003, she wrote to a manager in Gaspé (Exhibit P-2). She received a letter dated July 25, 2003, from Gordon Prieur (Exhibit P-3), confirming that her correspondence had been received.

[35] According to her, Parks Canada discriminated against her in the competition in which she participated. She stated that she had to keep silent, despite the harassment, for fear of retaliation by her supervisor, the respondent. She needed her job and could not jeopardize her income.

[36] She stated that she had put all her complaints in writing, but that the union had always rejected them. According to the *Public Service Staff Relations Board Regulations and Rules of Procedure*, no time limit is set out for filing a complaint under section 23 of the former *PSSRA*. She made an effort and was diligent, but her union representatives did not help her. She should not have to pay the price for their negligence.

[37] When the complainant finished her submissions, I reiterated the three points raised by the representative. I then asked the complainant to make representations on the question of the Board's jurisdiction, which she still had not done. She indicated that, in her opinion, the Board had all the jurisdiction necessary to hear her complaint.

[38] The complainant wishes to resume her work at Parks Canada Agency, possibly to be transferred, and to be compensated for the last two years.

[39] In reply, the representative noted that a number of the facts raised by the complainant relate to the possible definition of harassment in the workplace. In no way do those facts lead to the application of the provisions of sections 23 and 8 of the former *PSSRA* that could have given rise to grievances or complaints to the CHRC. Moreover, one of these complaints to the CHRC was dismissed because of insufficient evidence.

Reasons

[40] The complainant had the opportunity at this hearing to elaborate on the allegations she intended to prove against the respondent. Although she did not submit any arguments on the objection with respect to the application of sections 23 and 8 of the former *PSSRA* (now sections 190 and 186 of the new *PSLRA*), as raised in her complaint of July 4, 2004, I have concluded, on the basis of her explanations and the documents she adduced, that, on its face, the complaint does not lie within the Board's jurisdiction.

[41] This is clearly a complaint that is not covered by the provisions of sections 23 and 8 of the former *PSSRA*. The initial sexual harassment allegations date back to a time when Parks Canada was not the complainant's employer. At that time she was employed by the private firm Sécurité Gaspeneq Inc. The complainant did not become a term seasonal employee of Parks Canada until 1998. Her contract was not renewed in 2003. She was notified of this. The position was changed by the employer to make it

seasonal indeterminate, and a staffing process was initiated. The decision to do so lies exclusively with the employer under the *Public Service Employment Act.* The complainant participated in this competition but was unsuccessful. A complaint pertaining to this staffing process is not within this Board's jurisdiction.

[42] Nor can the complainant argue before this Board that the reasons behind the employer's decision to change the position or to staff it in a way that resulted in the loss of her employment stemmed from discrimination against her by the employer, the respondent or even the Band Council, which had input into this staffing process.

[43] A complaint was filed with the CHRC, an investigation was conducted and the complaint was deemed to be without merit.

[44] As for the entire matter of workplace harassment that the complainant described at this hearing, as well as at the hearing of her complaint against her union representative, it was open to the complainant to avail herself of the process provided for in the employer's harassment prevention policy or to file a grievance under her collective agreement for events that took place during her employment with Parks Canada. She failed to do so, and I do not see how the Board can rectify this failure.

[45] The complaint that has been filed is based on provisions of the former *PSSRA* pertaining to unfair labour relations practices. This does not appear to be the situation the complainant has presented. The Board therefore has no jurisdiction, and the objection must be upheld.

[46] In light of my decision regarding the objection with respect to the Board's jurisdiction, I need not consider the objection concerning the time taken to file the complaint. However, I note that the fact that the complainant filed an initial complaint with the Board on September 10, 2003, does not establish diligence on her part, since the request for clarification that the Board sent on September 29, 2003 (Exhibit P-7), was not answered until July 2004, following a second request for clarification after the Board received another complaint via the CIRB in May 2004.

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

(The Order appears on the following page.)

Order

[48] The objection with respect to the Board's jurisdiction is upheld and the complaint is dismissed.

August 21, 2006.

Sylvie Matteau,
Acting Chairperson