Date: 20071123

File: 561-02-37

Citation: 2007 PSLRB 112

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

ALAIN OUELLET

Complainant

and

UNION OF CANADIAN CORRECTIONAL OFFICERS — SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA — CSN

Respondent

Indexed as

Ouellet v. Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada — CSN

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

REASONS FOR DECISION

Before: Georges Nadeau, Board Member

For the Complainant: Himself

For the Respondent: Éric Lévesque, counsel

Heard at Montréal, Quebec,
May 16, 2007.
(P.S.L.R.B. Translation)

I. Complaint before the Board

[1] On March 22, 2005, Alain Ouellet ("the complainant"), who was employed by the Correctional Service of Canada (CSC), filed a complaint with the Public Service Staff Relations Board (predecessor to the Public Service Labour Relations Board ["the Board"]) under section 23 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the former *Act*"), alleging that the Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada — CSN ("the respondent") had contravened subsection 10(2) of the former *Act* by acting in bad faith and in an arbitrary manner.

[2] More specifically, the complainant accused the respondent of failing to take steps to strike a Public Service Commission (PSC) decision declaring that the complainant's allegations of forgery were unfounded.

[3] The respondent objected to the Commission's jurisdiction to hear this complaint. It essentially argued that at the time of the dispute underlying the forgery allegations, which is to say the staffing of the coordinator of correctional operations positions at the Drummondville and Port-Cartier institutions, the complainant held a position that was excluded from the bargaining unit. Furthermore, the respondent maintained that the PSC's decision fell outside of the collective agreement and even outside of the former *Act*. Appointments to positions in the federal public service and the recourse provided fall under the *Public Service Employment Act* and are not part of the items deemed negotiable under the labour relations regime in the federal public service. The respondent also maintained that the Board does not have jurisdiction to order it to undertake recourse involving a judicial review of a PSC decision.

[4] 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. 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*.

[5] Immediately following a telephone conference, I ordered a one-day hearing for the parties to address the jurisdiction issue.

II. Summary of the evidence

[6] In spring 2003, the complainant participated in a competition for coordinator of correctional operations positions, which were excluded from the bargaining unit. At that time, he was in a position that was also excluded from the bargaining unit. The complainant disagreed with the selection committee's decision to reject his application at the pre-selection stage and filed an appeal against the employer's proposed appointments. By the time the appeal hearing took place, the complainant was in a position that came under the bargaining unit. Even though the complainant was accompanied by two representatives of his union local, he represented himself before the review tribunal. The appeal board allowed the complainant's appeal.

[7] In his decision, the Chairperson of the appeal board made certain comments about the evidence before him that led the complainant to conclude that the members of the selection committee had falsified a document about the merit criteria to justify their decision. The complainant then decided to file a complaint with the Director of Human Resources at the CSC, who referred the complaint to the PSC (Exhibit P-1).

[8] The PSC's Recourse Branch decided to conduct an investigation under section 7.1 of the former *Act.* From the start of the investigation, the complainant requested and obtained assistance from his union. On April 29, 2004, with the help of Céline Lalande, Union Counsel, he sent a letter (Exhibit P-2) to the Recourse Branch requesting that the scope of the investigation be broadened. It should be noted that during the investigation meeting on November 25, 2004, the complainant was accompanied by a CSN representative, Robert Deschambault. On March 1, 2005, the PSC investigator concluded that the complainant's forgery allegations were unfounded. On March 8, 2005, the complainant asked the president of his local, André Chenevert, to represent him before the Federal Court to invalidate the investigation report. On March 18, 2005, Mr. Chenevert informed the complainant that his request had been denied. The complainant did not attempt to pursue the matter on his own other than filing this complaint.

[9] The respondent circulated a file entitled "Staffing at the CSC" (ExhibitP-3) that contained a section on the appeal decision rendered in the matter involving the complainant.

III. Summary of the arguments

A. For the respondent

[10] The respondent's representative notes that the root of the dispute is the rejection of the complainant's application for a competition for a position that was excluded from the bargaining unit. He also notes that the complainant was not a member of the bargaining unit when his application was rejected. The representative submits that as a result, the respondent cannot have any obligation toward a member of the bargaining unit concerning a dispute that predates the member joining the bargaining unit.

[11] The representative also submits that the assistance provided by Mr. Deschambault and the other union representatives in this case does not change the nature of the obligation toward the complainant and that it must be considered as exceptional assistance. The consequence of accepting that the duty of representation applies to such a situation would be that unions would refuse to help anyone who asks for assistance under exceptional circumstances.

[12] The use of union dues beyond deducting and remitting them to the union is an internal management issue. Any member who questions the use of funds can and should do so in a union meeting, where union dues are set under the union's statutes and regulations.

[13] The representative points out that the subject of the dispute has nothing to do with the application of the collective agreement or with recourse under the former *Act*. Appointments to positions in the public service are not part of the negotiating jurisdiction under the labour relations regime in force in the public service.

[14] The representative also points out that the duty of representation stems from the union's monopoly on representation associated with its certification. Yet this monopoly exists only in connection with matters that it can negotiate, and consequently, the duty of representation does not exist for non-negotiable matters.

[15] The representative draws my attention to the decision rendered by Board Member Maclean in *Downer v. Public Service Alliance of Canada et al.*, PSSRB File Nos. 161-02-846, 847 and 848 (19980604). Among other things, he points to the passage where Board Member Maclean quotes the decision in *Lopez v. Canadian Union of Public Employees*, [1989] O.L.R.B. Rep. May 464:

. . .

> *. . . the Board regards the duty of fair representation as restricted so that the extent of the duty is coextensive with the extent of the union's authority as exclusive bargaining agent. . . .*

. . .

[16] He also points out the passage in which Board Member Maclean agrees with the principles stated in *Lopez*, where the Ontario Board affirms that:

. . .

> *. . . Nor can the Board rely on a doctrine akin to estoppel to require the union to continue its representation as a matter of equity because of the union's conduct in initially representing the complainant, when the Board lacks the jurisdiction to supervise the relationship between the union and its members beyond the confines of the collective agreement, its negotiation and administration . . .*

. . .

[17] He also points out that Board Member Maclean concludes that the principle of preclusion cannot be invoked to force the execution of a relationship between the union and a member who, at the time of a grievance, was not subject to the collective agreement.

[18] The representative refers me to *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79, in which Board Member Bertrand uses the principles set out by Supreme Court Justice Chouinard in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, about the duty of representation. The principles stipulate that the exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit; that the employee does not have an absolute right to arbitration and the union enjoys considerable discretion; that this discretion must be exercised in good faith, objectively and honestly, after a thorough study of the

grievance and of its consequences for the employee; that the union's decision must not be arbitrary, capricious, discriminatory or wrongful; and that the representation by the union must be fair, genuine and not merely apparent, without serious or major negligence, and without hostility towards the employee.

[19] The representative mentions the decision rendered in *Lai v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 33. It should be noted that the Board Member leans toward the view that the duty of representation is limited to the rights under the former *Act*.

[20] The representative also points out that when the complaint under section 23 of the former *Act* was filed with the Public Service Staff Relations Board, the new provisions under the new *Act* concerning the application of the union's internal policies and rules were not in force.

B. <u>For the complainant</u>

[21] The complainant submits that it is incorrect to claim that he was not unionized at the time of the dispute. He submits that there are several events: the competition, the rejection of his application and the appeal. He notes that he was accompanied by two union representatives at the appeal. The complainant adds that he had filed a complaint with the Director of Human Resources, with copies to the interested parties and to the President of the local. That was when he received the letter from the Director of Human Resources (Exhibit P-1).

[22] The complainant also points out that when he filed his complaint, it was no longer a question of getting the position he had initially coveted but rather of complaining about the forgery. In his opinion, nothing can be gained from this recourse in terms of getting the position.

[23] The complainant submits that the pivotal moment in this dispute, considering the January 23, 2004 letter (Exhibit P-1), is when he asked the President of the local for representation. He points out that because of his request he was represented by Ms. Lalande, and he indicates that she signed the April 29 letter to the Recourse Branch on his behalf (Exhibit P-2).

[24] The complainant submits that he was never informed of the exceptional nature of that service. He submits that the Union Representative did not provide any documents indicating the exceptional nature of the representation. He also submits that the duty of representation was not limited to the collective agreement.

[25] He maintains that the union is required to protect its members from arbitrary actions by the employer. He notes that the staffing file (Exhibit P-3) clearly shows that the well-being of every one of the respondent's members was at stake. The union's position was to denounce the impact of the employer's conduct on the negotiations. The complainant submits that it is the respondent's role to protect its members from that type of action; it has to protect the collective interest. According to him, that is the purpose of union dues. Thus, the duty of representation cannot be limited to the strict provisions of the collective agreement.

[26] The complainant maintains that the Board can understand the basis for his complaint and that it should not dismiss the complaint because of its formulation. He accuses the respondent of abandoning him after assisting in his efforts to denounce the conduct of the employer's representatives and in so doing jeopardizing his career.

C. Respondent's rebuttal

[27] In response, the respondent's representative submits that the staffing file (Exhibit P-3) simply creates a link between the way the employer could have conducted itself at the bargaining table and the way it did conduct itself in two staffing situations.

[28] The respondent's representative also submits that the complainant attempted to change the nature of his complaint before the Board. He notes that the second point in the third paragraph of his complaint is specific and accuses the respondent of having failed to begin the process of striking an investigation report before the Federal Court. His complaint does not relate in any way to the respondent's behaviour or to the quality of the representation.

IV. Reasons

[29] In section 187, the new *Act* states that no employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit. Many consider that notion to be the "duty of representation." However, in reading that section, it is clear that it is not the certified union organization's duty to provide representation in every case submitted by the members of the bargaining unit. The jurisprudence on the duty of representation also clearly establishes that it is a duty strictly related to the representation of members in connection with the employer and that it must not be arbitrary, discriminatory or carried out in bad faith.

[30] That obligation, which is contained in every act governing labour relations across the country, stems from, as indicated by Justice Chouinard in *Gagnon*, the mandate of exclusive representation that the union acquires through its certification. However, some aspects of the labour relationship, including staffing, are excluded from the scope of the new *Act* and are instead governed by the *Public Service Employment Act*. It is also notable that the right to file a grievance is not limited to the provisions of the collective agreement and that in disciplinary matters, the union does not have the monopoly on representation. It is only in matters concerning the application of the collective agreement that the union has exclusivity of representation.

[31] That said, I believe that the respondent's objection to the Board's jurisdiction for hearing the complainant's complaint must be allowed for the reasons that follow.

[32] The complainant accuses the respondent of not having taken steps to strike a decision rendered by the PSC Recourse Branch, which found that the allegations of forgery filed by the complainant were unfounded.

[33] However, the forgery allegations are directly related to the rejection of the complainant's application in a competition for a position that was excluded from the bargaining unit at a time when the complainant himself was excluded from the bargaining unit. The dismissal of the allegations, which can be considered the true subject of this dispute, does not directly involve the employer, even though it is one of the parties that is interested in the outcome of the action based on the allegations. What the complainant intended to contest was not a decision by the employer but

rather a decision by the PSC. I conclude that the decision by the respondent not to take steps against that decision is not related to the complainant's representation in his relationship with his employer but rather to a situation that preceded his joining the bargaining unit. For those two reasons, I do not have the jurisdiction to hear this case on its merits.

[34] Moreover, staffing is not negotiable under the new *Act*. Staffing is governed by the *Public Service Employment Act*, which provides its own recourse mechanisms. This was not a matter of ensuring the application of a collective agreement provision or even the exercise of recourse under the new *Act. A priori*, barring a specific commitment by a union to provide representation outside of those areas, it cannot have the duty of representation. The complainant asked the respondent to act on his behalf. It refused to in an area where it can choose to refuse to provide representation. Equally for that reason, I dismiss the complaint.

[35] I also believe that the assistance provided by the union representatives to the complainant in his efforts to validate his accusations before the PSC Recourse Branch do not in any way constitute a commitment or a promise that would mean that the duty of representation would apply to the complainant's situation.

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

(The Order appears on the next page)

V. Order

[37] The complaint is dismissed.

November 23, 2007.

P.S.L.R.B. Translation

Georges Nadeau,
Board Member