**Date:** 20091002

**File:** 561-02-378

**Citation: 2009 PSLRB 119**

*Public Service Labour Relations Act*

Before the Public Service Labour Relations Board

BETWEEN

**DAVID TENCH**

Complainant

and

**CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES**

Respondent

Indexed as
*Tench v. Canadian Association of Professional Employees*

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

**REASONS FOR DECISION**

***Before:*** Michel Paquette, Board Member

***For the Complainant:*** Himself

***For the Respondent:*** Fiona Campbell, counsel

Decided without a hearing.

## Complaint before the Board

[1] On November 26, 2008, David Tench ("the complainant") filed a complaint with the Public Service Labour Relations Board ("the Board") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act,* S.C. 2003, c.22 ("the *Act*"), against the Canadian Association of Professional Employees ("the respondent" or CAPE).

[2] In his complaint, he alleged that the CAPE failed him by not filing a grievance on his behalf with regard to a refusal by the Department of National Defence ("the employer") to accommodate him. He also alleged that the CAPE discriminated against him in their representation.

[3] On December 18, 2008, the respondent's representative objected that the complaint was untimely and asked that it be dealt with via written submissions on the jurisdictional issue and the merits if applicable.

[4] On January 5, 2009, the complainant argued that the complaint was timely and that it had merit. He objected to proceeding via written submissions. The complainant also requested an extension of time to make amendments to the complaint.

[5] On January 20, 2009, the Board informed the parties that it would proceed via an oral hearing on the timeliness issue and that the hearing would be scheduled in due course.

[6] On February 4, 2009, the respondent's representative requested that the complaint be held in abeyance pending determinations by the Board of two previous complaints about the duty of fair representation against the CAPE brought by the complainant. The complainant objected to the request.

[7] On February 11, 2009, the Board informed the parties that the request was denied.

[8] On June 19, 2009, the complainant requested that the Board make an interim relief order to order the respondent, who is also his bargaining agent to file one or more grievances on his behalf about his employer's Fitness to Work Evaluation (FTWE) request. He asked for a deadline for compliance of June 26, 2009. He is also seeking costs from the respondent for legal representation concerning the FTWE issue if it is not prepared to represent him.

[9] This decision is for that request. An application for interim relief is based on a limited review of the merits of the case. In this case, there was no hearing, and the evidence was drawn from information provided by the parties and from a pre-hearing conference held on July 2, 2009.

**Summary of the evidence**

[10] In July 1999, the complainant was appointed, under a disability priority, to the Formation Construction Engineering Division of the Department of National Defence in Halifax, Nova Scotia. A letter from Health Canada (HC), dated January 1, 1998, indicated that he was fit to work.

[11] The complainant raised the issue of a medical condition while working with the employer on a workplace issue in November 2006 which prompted the employer to initiate discussions with the complainant about workplace accommodation in spring 2007. The complainant was advised to provide supporting documentation from a health care professional or alternatively to undergo an FTWE through HC to clarify the precise job-related limitations and the nature of the accommodations required. The complainant did not provide the additional information, and therefore, his request was refused at that time.

[12] In October 2007, the employer asked that an FTWE be arranged as the complainant had medical information for HC that it could use to produce a report on his limitations. Subsequently the complainant raised objections about the content of the employer's written request and withdrew his consent to the FTWE in July 2008.

[13] On August 11, 2008, the complainant commenced an absence from the workplace due to a non-work-related injury that affected his mobility. On August 12, 2008, he requested a telework arrangement for the period from August 11 to September 15, 2008. His manager informed him on that same day that the request was not approved and requested specific employment-related medical limitations from his doctor for review.

[14] On August 13, 2008, the complainant again requested a telework arrangement from his supervisor and also requested that the CAPE file a grievance on his behalf with respect to the employer's denial and/or that it file an interlocutory injunction with the Federal Court. A representative from the CAPE replied to the complainant that

same day and informed him that, after considering the circumstances, the CAPE would not file a grievance or an interlocutory injunction, but the representative suggested another approach.

[15] Furthermore, on August 13, 2008, the complainant was allegedly insubordinate toward his supervisor. The disciplinary investigation into that allegation has not yet concluded as the complainant has been absent from work.

[16] Between August 14 and 19, 2008, the complainant and the CAPE discussed filing a grievance on the telework denial. They disagreed about how to proceed.

[17] On August 20, 2008, the complainant arrived at his workplace unannounced and later alleged that there was inadequate handicap access to accommodate his disability. He later filed a complaint against his employer under section 128 of the *Canada Labour Code* (*CLC*). There was also an incident involving his supervisor that led to an allegation of misconduct. Again, the disciplinary investigation has not concluded. On that same day, the complainant informed the respondent that he was initiating steps to bring it into compliance.

[18] On August 21, 2008, a CAPE representative informed the complainant that the representative made a specific request should the complainant require any assistance with his complaint under section 128 of the *CLC*. On that same day, the complainant responded and stated that no action was required from the CAPE.

[19] On August 25, 2008, the employer informed the complainant that, after conducting an investigation under section 127 of the *CLC*, it concluded that the workplace presented no danger to his health and ordered him back to work.

[20] On August 26, 2008, the complainant informed the respondent that he had obtained additional medical information and that he needed its support in filing a grievance about the denial of his telework request. The complainant reiterated his request for a telework arrangement to the employer and included the additional medical information. The employer requested clarification on the identity of the author of the medical note, but the complainant felt that the request was an unfounded allegation of falsifying documents and that it was intended to stall his telework application. He requested that the CAPE file a disguised-discipline grievance.

[21] On August 27, 2008, the complainant again requested the CAPE to file a grievance on the denial of his telework request.

[22] On August 28, 2008, the complainant received a package from the employer requiring him to undergo an FTWE and an organizational health assessment to be performed by HC, and directing him to remain away from the workplace, without pay, following the incidents of August 13 and 20, 2008. The complainant informed the CAPE on August 29, 2008 and asked for assistance.

[23] The parties exchanged emails between August 29 and September 9, 2008 about the CAPE filing grievances on behalf of the complainant. On September 8, 2008, the CAPE advised the complainant that the employer was within its rights to require an FTWE and reiterated the CAPE's decision not to file a grievance with respect to his telework arrangement request and the employer's subsequent response. On September 9, 2008, the complainant indicated to the respondent that he had retained legal counsel and that he no longer wished the respondent to contact him directly.

[24] On January 26, 2009, the complainant received, at his home, a package from the employer for the FTWE. The complainant informed the employer that he felt that the issue was under dispute in complaints before the Board (PSLRB Files Nos. 560-02-50 and 561-02-351) and that he would not act on the FTWE request.

[25] On May 4, 2009, the complainant received, at his home, a package asking him to sign consent forms to undergo the FTWE with HC and to return them by May 21, 2009 or his employment would be terminated. On that same day, the complainant wrote to the CAPE for advice.

[26] On May 5, 2009, the CAPE responded to the complainant that it had already advised him in September 2008 to submit to the employer's request and requested that he provide the CAPE with a copy of all relevant information in order for the CAPE to properly advise him. The complainant wrote to the employer, with a copy to the respondent on May 7, 2009, indicating that he had signed the FTWE consent forms and that he would forward them to the employer. On May 8, 2009, the complainant provided the respondent with copies of documents related to the employer's FTWE request along with a chronology of events.

[27] On May 19, 2009, the complainant again requested the CAPE's advice on the employer's FTWE request. On May 21, 2009, the respondent replied stating its understanding that the matter was no longer time sensitive given the correspondence of May 7, 2009.

[28] On May 20, 2009, the complainant provided the employer with his signed consent to undergo the FTWE at HC.

[29] In early June 2009, the parties exchanged emails about the FTWE.

[30] The complainant received a letter from the employer on June 17, 2009 in which the employer requested that he resubmit the consent forms. The forms as originally signed were not valid for the necessary one-year period and failed to identify the name of the treating physician. The employer also had to provide additional details to HC. Failure to complete the forms by June 26, 2009 would result in a recommendation that his public service employment be terminated. He forwarded a copy to the CAPE on June 18, 2009.

[31] On June 19, 2009, a CAPE representative informed the complainant that the CAPE would review the letter and would provide him with advice the following week.

[32] The complainant filed his applications for interim relief with the Board on June 19 and 22, 2009.

[33] I held a pre-hearing conference with the parties on July 2, 2009. I informed the parties that I would address the complainant's request after the July 21, 2009 deadline for filing a grievance with respect to the employer's FTWE request. It was also understood that the complainant was to withdraw his request for interim relief should the respondent provide representation.

[34] The CAPE filed a discrimination grievance on behalf of the complainant on July 3, 2009. The complainant acknowledged that the grievance had been filed but requested that the Board continue to reserve its decision until July 21, 2009.

[35] On July 13, 2009, the respondent informed the Board that, in response to the complainant's actions, it had decided to withdraw its representation. Since the grievance concerned the interpretation or application of the collective agreement, the complainant could not represent himself.

[36] On July 20, 2009, the complainant sent further submissions on his request for an interim relief order. The respondent objected on July 28, 2009, stating that the further submissions were, in essence, a new complaint under section 190 of the *Act*.

**Summary of the arguments**

[37] The complainant submitted that the Board has the authority to grant interim relief. The Federal Court transferred that authority to the Board, and it is found in sections 36, 37, 40 to 43, 98, 185 to 188, 189, and 190 of the *Act*.

[38] The complainant cited the judgment in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, as the test for interim orders. The test specifies is that a serious question has to be tried, that irreparable harm must exist and that the balance of inconvenience must favour the complainant.

[39] The complainant argued that the respondent's failure to provide information and advice, to provide representation and to file a grievance on his behalf have had a negative impact on his mental well being, physical health and financial situation. He added that access to the grievance procedure is a fundamental right. For those reasons, he submitted that the serious question criteria was met.

[40] As for irreparable harm, the complainant submitted that issues of termination and compensation are very serious and that the respondent's failure to press the employer was just plain wrong.

[41] Finally, as for the balance of inconvenience, the complainant indicated that there is little impact on the union in filing a grievance or in providing funds for filing while the impact on the complainant is significant.

[42] The respondent argued on June 23, 2009 that the complainant's request should be dismissed because the Board lacks the jurisdiction to order interim relief. There is no provision in the *PSLRA* or the *Public Service Labour Relations Board Regulations*, SOR/2005-79, that authorizes the Board to grant interim relief.

[43] Alternatively, the respondent argued that the request should be dismissed because it is premature as the complainant can still file grievances within the prescribed time limits and, therefore, has not suffered any prejudice or harm.

[44] The respondent also argued that the application should be dismissed because it had indicated to the complainant that it would provide him with advice concerning the FTWE request in time for him to respond by the employer's deadline.

[45] Furthermore, the respondent submitted that the test for interim relief has not been met — there is no serious question to be tried, and the complainant has not suffered any irreparable harm. There is still time to file a grievance, and he has not suffered any prejudice.

[46] The complainant has not suffered irreparable harm, and the balance of inconvenience favours the respondent. Furthermore, the respondent denied the complainant's allegations and asked that the Board decline to exercise its discretion to allow the complainant to amend his complaint because allowing amendments would add new elements to the dispute. The respondent also asked that the issue of the interim relief order be decided by way of written submissions.

**Reasons**

[47] I find that the following three issues arise from this application for interim relief: 1) Is the request related to the original complaint? 2) Does the Board have the authority under the *Act* to grant interim relief? 3) If so, do the circumstances of the case justify granting relief?

[48] I examined the original complaint. It alleges that the CAPE failed to file a grievance on the complainant's behalf concerning a denial of telework by the employer and that it discriminated against him in its representation.

[49] As for the interim relief order, it is intended to force the respondent to file a grievance against the employer's request for an FTWE.

[50] This is in no way related to the original complaint, and I am not prepared to authorize a change to the complaint within my authority under section 36 of the *Act.*

[51] Furthermore, the respondent did file a grievance on behalf of the complainant on July 3, 2009 rending moot the interim relief order request.

[52] Ultimately, the respondent withdrew its representation on July 13, 2009. This is a new action that gives rise to a possible new complaint.

[53] Having determined that the request for interim relief is not related to the original complaint, and that in any event the request was rendered moot when the respondent did file a grievance on July 3, 2009, I see no need to address the other two further issues mentioned at paragraph 48.

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

*(The Order appears on the next page)*

**Order**

[55] The request for an interim relief order is denied.

October 2, 2009.

**Michel Paquette,**
**Board Member**