

Date: 20090928

File: 561-34-382

Citation: 2009 PSLRB 114



*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

DAVID G. BABB

Complainant

and

JOHN GORDON

Respondent

Indexed as
Babb v. Gordon

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: [Jacquie de Aguayo, Public Service Alliance of Canada](#)

Decided on the basis of written submissions
filed February 20, July 21 and 28, 2009.

REASONS FOR DECISION

Complaint before the Board

[1] On January 19, 2009, David G. Babb (“the complainant”) filed a complaint with the Public Service Labour Relations Board (“the Board”) against John Gordon (“the respondent”), President of the Public Service Alliance of Canada (PSAC), under paragraph 190(1)(g) of the *Public Service Labour Relations Act* (“the Act”).

[2] In his complaint, the complainant alleged that the respondent failed in his duty to ensure that the complainant’s rights under paragraphs 188(b), (c), (d) and (e) of the *Act* and under the PSAC Constitution were protected, respected and upheld. He perceived the actions of the failure to be deliberate, biased and arbitrary and that they were done to protect representatives of the Union of Taxation Employee (UTE).

[3] On February 20, 2009, the respondent’s representative objected that the complaint was untimely and that it failed to establish a *prima facie* violation of the *Act*, and therefore, the respondent’s representative requested that it be dismissed without a hearing.

[4] On March 26, 2009, the Board asked the parties if they were available for a hearing from September 1 to 4, 2009. The complainant responded that he required accommodation for a disability and asked that, if no safe environment could be provided, all matters before the Board be dealt with through written submissions.

[5] In an email dated June 8, 2009, the respondent’s representative replied that the respondent did not object to the request for written submissions as long as the issues of timeliness and jurisdiction are raised. However, with regard to the substantive allegations raised by the complainant, the PSAC requested that a full hearing be held and that the appropriate accommodations be put in place to ensure that the complainant’s needs are met. He was also willing to consider alternatives, such as video conferencing, if required.

[6] A pre-hearing conference took place on June 29, 2009, even though the complainant would have preferred that it be done in writing. The parties agreed to proceed through written submissions on the jurisdictional issues first. The complainant was also asked to provide the Board with advice from his treating physician as to how he could be accommodated if a hearing were necessary.

Summary of the evidence

[7] The complainant was a member and also the president of UTE Local 70030. He began his leave without pay in February 2007 due to an injury that took place while on duty. The complainant later went on disability leave.

[8] The complainant was prevented from attending the Local's July 2008 monthly meeting.

[9] The complainant filed two complaints through the internal recourse mechanism of the UTE because he was not allowed to attend the July 2008 monthly meeting. He was turned down because, according to the UTE's records, the complainant was not a member in good standing. He was also informed about how to apply to maintain his membership.

[10] The complainant finally wrote to the respondent, but he was again turned down because of his status and was again informed on how to apply to maintain his membership.

Summary of the arguments

[11] The PSAC's understanding is that the allegations in this complaint relate to a decision by the Local to refuse access to its July 2008 monthly meeting.

[12] In August 2008, the complainant sought answers for why he was denied access to a meeting of the Local. On August 25, 2008, the Regional Vice-President, National Capital Region, UTE, advised the complainant that the reason was that the membership list for his local showed that he was no longer a dues-paying member in good standing with the UTE.

[13] To be a member in good standing, a member must pay dues to the UTE. The UTE's membership list is based, in large part, on information provided by the employer through its dues transfer to the bargaining agent following their deduction from the payroll. Subject to exceptions, persons who are on leave without pay do not pay dues and cease to be bargaining agent members. From there, a membership list is generated and distributed to various parts of the organization so that membership statuses can be verified for the purpose of internal bargaining agent activities.

[14] The respondent's representative stated that, effective August 25, 2008, the complainant knew or ought to have known that he was no longer considered a member in good standing of the UTE as a result of having been on leave without pay. He was advised that it was his responsibility to advise the UTE if he wished to have his membership continued despite not paying dues. Specifically, as his leave-without-pay status was based on disability, he was advised to write to the PSAC president, who had the authority to reinstate this membership despite his non-payment of dues.

[15] Despite that, in an email dated August 26, 2008, the complainant raised his concerns with the respondent about his status as a non-member. On September 12, 2008, the respondent advised the complainant in a letter that he had been provided with the necessary information on the process to have his membership status reinstated. The respondent also asked the complainant to provide a request for reinstatement accompanied by information confirming his disability-leave status, the date on which the leave began and his expected date of return. That information is necessary to accurately account for non-dues-paying members in the membership system.

[16] The complainant continued sending correspondence challenging that interpretation. He also failed to provide the information requested. The respondent sent letters to the complainant on October 6 and 24, 2008, requesting the necessary information so that the membership list could be updated accordingly. The complainant continued to fail or to refuse to do so.

[17] Despite being given all the necessary information on August 25, 2008, the complainant most certainly knew the subject matter giving rise to his complaint from the respondent's letter dated September 12, 2008. Despite that, the complaint was filed on January 19, 2009, more than 90 days after the time limit for a complaint to the Board, under the *Act*.

[18] On that basis, the respondent's representative submitted that the complaint is untimely and that it ought to be dismissed without a hearing.

[19] The respondent's representative also submitted that the complainant had failed to establish a *prima facie* violation of the *Act*, since the complainant had been given the procedure to follow to reinstate his membership.

[20] In particular, the complainant had failed to establish that the bargaining agent suspended his membership in a discriminatory manner pursuant to paragraph 188(b) of the *Act*.

[21] Membership in good standing is a fundamental tenet of participation in the UTE, including providing access to meetings and, where applicable, giving voice and vote to a member on a wide range of internal bargaining agent matters.

[22] The PSAC stated that its membership rules are not discriminatory. On the contrary, they expressly provide for a member to maintain membership in good standing while on leave without pay due to disability, the very circumstances invoked by the complainant. There is no way for the PSAC to know, from the dues deduction information provided by the employer, when an employee is on leave without pay for reasons of disability as opposed to another reason. The UTE relies on members to advise it that they are on leave without pay due to disability in order to maintain their status and rights.

[23] The UTE is simply awaiting confirmation from the complainant before reinstating his membership. The complainant's failure to provide information to date did not arise as a result of any discriminatory conduct or intent on the part of the respondent.

[24] The respondent has, on several occasions, provided the complainant with the opportunity to regularize his membership by providing the requested information. Yet the complainant has failed to provide the necessary information.

[25] The respondent's representative submitted that requiring members to provide information needed to update membership status does not constitute a violation under the *Act*.

[26] The respondent's representative reiterated that the UTE remains ready and willing to reinstate the complainant's membership status upon receiving the required information.

[27] For all the above reasons, the respondent requests that this complaint be dismissed.

[28] The complainant did not respond to the submissions of the respondent's representative that the complaint was untimely. He did not provide an explanation as to why the complaint was filed late.

[29] The complainant believes that his complaint falls under paragraph 190(1)(g) of the Act, which reads as follows:

190. (1) The Board must examine and inquire into any complaint made to it that

...

(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.

[30] Unfair labour practice is defined in section 185 of the Act as follows:

185. In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).

[31] Section 187 and paragraphs 188(b), (c), (d) and (e) of the Act state the following:

187. 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.

188. No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall

...

(b) expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;

(c) take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner;

(d) expel or suspend an employee from membership in the employee organization, or take disciplinary action against, or impose any form of penalty on, an

employee by reason of that employee having exercised any right under this Part or Part 2 or having refused to perform an act that is contrary to this Part; or

(e) discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has

(i) testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2,

(ii) made an application or filed a complaint under this Part or presented a grievance under Part 2, or

(iii) exercised any right under this Part or Part 2.

[32] The complainant indicated that he is required to be part of a trade union and pay dues as an employee of the Canada Revenue Agency. For reasons such as leave without pay for injury on duty or disability, he is exempted from paying dues but is still required to be a member of a trade union and subject to the collective agreement with the employer. He has no choice but to be a member of the PSAC.

[33] The complainant's membership status with the PSAC has been revoked. Therefore, he has lost his rights under the PSAC constitution. The complainant was not notified that his membership had been revoked until he filed a complaint of discrimination with the PSAC's regional vice-president of the National Capital Region, after he was prevented from attending a monthly meeting of Local 70030. At no time before the complaint was filed was it brought to his attention that his status had changed. It appears that the Regional Vice-President of the National Capital Region not only identified that the complainant was not on the membership list but also decided that the complainant was not a member. The Regional Vice-President did not have the right under the PSAC Constitution to revoke the complainant's membership based on an administrative list that was contrary to his knowledge and that of Local with regards to his situation.

[34] In fact, the Regional Vice-President and the National President of the UTE terminated the complainant's office of elected president of Local 70030 about

10 months before the incident, based on his absence from the workplace caused by his injury on duty and disability and his leave status. The Regional Vice-President was involved in the issues surrounding the complainant's injury on duty and disability. He used the knowledge of the complainant's disability and absence from work to dismiss the discrimination complaint. The Regional Vice-President knew that administrative list was incorrect.

[35] The complainant was denied access not because of his status but because of his intentions to raise concerns about his representation or lack thereof concerning his injury on duty and what he perceived to be a failure to address health and safety concerns, which led to his own injury and absence from work.

[36] The responsibility to ensure adequate membership records and to sign up new members is assigned to the Local. The complainant had acquired his union card through the Local. Monthly membership lists are sent out with the dues statement to the Local's president. The PSAC also sends letters to the Local asking it to identify the status and location of members.

[37] According to the PSAC Constitution, the complainant had adhered to his responsibilities as he had notified representatives of the PSAC on his status and his situation. The PSAC was representing him in several recourses.

[38] The complainant submitted another complaint of discrimination to the President of the UTE, who upheld the Regional Vice-President's decision to deny the complaint. He then requested that the complaint be forwarded to the appropriate body of the PSAC for recourse, which was denied.

[39] The complainant finally communicated with the respondent, who is the president of the PSAC. As his complaint and access to recourse were rejected by the UTE, contrary to his rights under the PSAC constitution, the respondent was responsible for ensuring that the complainant's rights under the *Act* the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and the PSAC Constitution were upheld. The respondent denied the complainant access to the internal complaint procedure. He would not recognize that the PSAC had disciplined the complainant by allowing the UTE to revoke his membership, which was discriminatory. All of this took place because the complainant is an injured worker absent from work due to a disability.

[40] The complainant concluded by submitting that the Board has the jurisdiction to determine whether he was discriminated against, whether the rules of the UTE were applied arbitrarily to him and whether or not he was a member at the time of the incident. If he was a member, he is entitled to a member's rights and privileges.

Reasons

[41] This complaint was filed under subsection 190(1) of the *Act*.

[42] The time limit set out as follows in subsection 190(2) of the *Act* is very clear:

190. (2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

[43] The complaint before the Board deals with the denial of a complaint of discrimination filed with the complainant's bargaining agent following his being prevented from attending a meeting of Local 70030 in July 2008. The complainant was provided with an answer to the complaint on August 25, 2008, from both the Regional Vice-President of the National Capital Region of the UTE and the National President of the UTE, and again from the respondent on September 12, 2008 when, at the latest, the complainant knew or ought to have known of the reasons for the denial and therefore the circumstances giving rise to the complaint. The complainant had 90 days from that date to file this complaint to the Board. He filed it on January 19, 2009, 129 days later.

[44] As well, the complainant has also failed to establish any *prima facie* violation. The PSAC outlined the procedure to be reinstated, but the complainant did not follow through.

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

(The Order appears on the next page)

Order

[46] The complaint is dismissed.

September 28, 2009.

**Michel Paquette,
Board Member**