Date: 20091022

File: 561-03-406

Citation: 2009 PSLRB 139

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

JOHN DETORAKIS

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Detorakis v. Professional Institute of the Public Service of Canada

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

REASONS FOR DECISION

Before: Renaud Paquet, Board Member

For the Complainant: Himself

For the Respondent: Geoffrey Grenville-Wood and Isabelle Roy, Professional Institute of the Public Service of Canada

Decided on the basis of written submissions
filed July 29 and September 28, 2009.

I. Complaint before the Board

[1] On July 13, 2009, John Detorakis ("the complainant") filed a complaint against the Professional Institute of the Public Service of Canada (PIPSC) ("the respondent") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). The complainant alleged that the respondent had committed an unfair labour practice within the meaning of section 185 of the *Act*.

[2] In his complaint, the complainant stated that, on May 20, 2009, the respondent refused to file, on his behalf, a complaint against his employer with the Public Service Labour Relations Board ("the Board"). The complainant stated that the respondent partly rescinded its initial refusal and filed a grievance on May 29, 2009. The complainant accuses the respondent of waiting 18 days to advise him that the employer denied the May 29, 2009 grievance and of refusing to refer the grievance to adjudication. The complainant requests that the Board declare that the respondent committed an unfair labour practice, that the Board award him damages and that the president of the PIPSC apologize.

II. Summary of the submissions

[3] The complainant was employed by the Canadian Nuclear Safety Commission ("the employer") as a professional engineer from 1982 until his retirement on May 29, 2009.

[4] In 2003, the complainant was involved in several conflicts with the employer. In July 2003, he filed three grievances about those conflicts (PSSRB File Nos. 166-03-33854, 33930 and 33931). In September 2003, the respondent also filed an unfair labour practice complaint against the employer (PSSRB File No. 161-03-1269). That complaint involved several employees of the employer, including the complainant. On January 11, 2005, the three grievances and the complaint were resolved in mediation, and the parties signed a settlement.

[5] The complainant contends that the employer breached some provisions of the January 2005 settlement. In another complaint, filed in December 2007 (PSLRB File No. 561-03-208), the complainant reproached the respondent and its representative for their actions in handling his 2005 complaint and his three 2003 grievances. The complainant alleged that the respondent and its representative did not observe the

prohibition contained in section 187 of the *Act*. That complaint was resolved in mediation, and a settlement was signed on March 6, 2009.

[6] The respondent provided a copy of the March 6, 2009 settlement in its July 29, 2009 submission. Clause 9 of the settlement specified that the respondent could disclose the settlement in its defence in any proceeding commenced by the complainant against the respondent in relation to issues related to or arising out of the settlement.

[7] In the March 6, 2009 settlement, the respondent agreed to seek a legal opinion as to any recourse or remedy available to the complainant against the employer about its breach of the 2005 settlement. The legal opinion was also to cover the complainant's possible recourses about a letter from the employer advising him that it wished to sever the employment relationship and issues related to two workers' compensation claims that the complainant filed with the New Brunswick Workers' Health, Safety and Compensation Commission (WHSCC). In the March 2009 settlement, the respondent also agreed to offer representational services to pursue any recourses having ". . . a reasonable chance of success, which the parties agree, will exist if at least 60% of chance of success is identified." In exchange for that commitment, the complainant agreed to ". . . forever release the respondent from all proceedings of whatever kind or nature arising from, or in any way related to, the time period covered by the complaint."

[8] The promised legal opinion was sought on March 9, 2009 and was received on March 24, 2009. It is 29 pages, single-spaced. It provides a response to every issue, as per the March 2009 settlement, and it explores the possible recourses and remedies. On April 1, 2009, the legal counsel who provided the legal opinion wrote to the respondent, providing some clarifications to his March 24, 2009 opinion. The respondent sent the complainant copies of the legal opinion and the clarifications.

[9] On April 2, 2009, the respondent wrote to the complainant to inform him that (1) it was prepared to retain legal counsel to assist him in proceeding with an appeal against the WHSCC decision; (2) it wanted to discuss with him the risks and benefits of trying to have the 2005 settlement set aside; (3) it was not prepared to file a section 190 complaint with the Board because that complaint would be almost identical to a complaint previously made by the respondent and withdrawn in 2007, and would be well beyond the 90-day time limit set by the *Act*; (4) it could not support the grievances

filed by the complainant about the employer's January 2009 letter unless there had been a material change in the prognosis offered by his medical specialists; and (5) it did not accept the complainant's request that it support a judicial review of a decision of the Public Sector Integrity Commissioner. The essential content of the respondent's April 2, 2009 letter was reiterated in another letter it sent to the complainant on April 29, 2009.

[10] On May 7, 2009, the complainant wrote to the PIPSC President to express his dissatisfaction about the actions of the respondent's representatives and the April 2009 letters. In a reply dated May 14, 2009, the PIPSC President reiterated some of the positions that the respondent had already expressed in its April 2009 letters.

[11] On May 29, 2009, the respondent filed a grievance on behalf of the complainant, grieving the employer's comments to the WHSCC in August 2007 and alleging that those comments were defamatory and contrary to the terms of the January 2005 settlement. On June 11, 2009, the employer denied the grievance on its merits. It also stated that the grievance was untimely because the grievor had had the information giving rise to the grievance on February 25, 2009. The employer sent its response to the respondent on June 16, 2009. The respondent claims that it faxed the employer's response to the complainant on June 17 and again on June 29, 2009. The complainant claims that he received only the June 29, 2009 fax and not the June 17 fax.

[12] On July 2, 2009, the complainant wrote to the respondent to request that the May 29, 2009 grievance be referred to adjudication and to reiterate his request that the respondent file a section 190 complaint against the employer. According to the complainant, on July 2, 2009, the respondent called him to inform him that it would not refer his grievance to adjudication, nor file a complaint with the Board or pursue enforcement of the breached 2005 settlement in court or with the Board. During the telephone conversation, the respondent informed the complainant that it would support an application for judicial review of the employer's decision to reject his grievance. In its submission, the respondent provided the Board with a copy of that application, filed with the Federal Court on July 8, 2009.

[13] On July 3, 2009, the complainant wrote to the respondent indicating his disagreement with the positions that it had expressed on the phone the previous day.

III. Summary of the arguments

A. For the complainant

[14] The complainant submits that his complaint deals with the respondent's conduct after March 24, 2009 and after the settlement of the complaint in PSLRB File No. 561-03-208. The complainant argues that that settlement does not prevent him from filing a complaint about issues that occurred subsequently.

[15] The complainant also submits that the respondent's refusal to file a section 190 complaint after receiving the legal opinion in March 2009 is discriminatory and in bad faith. By refusing to enforce the 2005 settlement, the respondent failed to observe the prohibitions of section 187 of the *Act*.

[16] Finally, the complainant submits that the respondent's refusal to support the referral of the May 29, 2009 grievance to adjudication was also discriminatory and arbitrary and was done in bad faith. By its refusal, the respondent failed to observe the prohibitions of section 187 of the *Act*.

B. For the respondent

[17] The respondent argues that the complainant is barred, by the settlement he signed in March 2009, from raising in his complaint issues related to the January 2005 settlement with the employer. The respondent submits that the complaint should be summarily dismissed based on the doctrine of estoppel.

[18] The respondent submits that it never acted in a discriminatory or arbitrary manner in dealing with the complaint and that it has not acted in bad faith in its representation of the complainant. On the contrary, the respondent submits that it acted, at all times, above and beyond its duty of fair representation in trying to assist the complainant.

[19] The respondent considered the complainant's request that it file an unfair labour practice complaint and a grievance and informed the complainant on several occasions of the reasons for its decisions. In addition to filing a grievance for the complainant, the respondent also filed an application for judicial review of the employer's decision to reject the grievance.

IV. Reasons

[20] This complaint involves the following provisions of the *Act*:

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> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
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> . . .
>
> (g) *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
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> . . .
>
> ***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).*
>
> . . .
>
> ***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.*
>
> . . .

[21] The complainant accuses the respondent of refusing to file, on his behalf, a complaint against his employer with the Board, of waiting 18 days to advise him that the employer denied the May 29, 2009 grievance and of refusing to refer that grievance to adjudication. Those accusations are the substance of this complaint.

[22] The respondent received a lengthy legal opinion about the procedures and remedies available to the complainant to resolve the problems that he was experiencing with his employer. Based on that legal opinion, which I have reviewed, and also on its own internal expertise, the respondent decided not to file a complaint with the Board. That decision was surely not arbitrary. Furthermore, the complainant did not submit anything that would make me conclude that that decision was discriminatory or that it was made in bad faith.

[23] The same logic applies to the respondent's decision not to refer the May 29, 2009 grievance to adjudication. The respondent did not make an arbitrary

decision; that decision was also not discriminatory or made in bad faith. It was a rational decision based on an assessment of the chances of success at adjudication.

[24] The *Act* does not oblige a bargaining agent to refer employees' grievances to adjudication or to file complaints on their behalf. In *Canadian Merchant Service Guild v. Gagnon et al.,* [1984] 1 S.C.R. 509, the Supreme Court of Canada established that it is sufficient for a bargaining agent to demonstrate that it has examined the circumstances of the case, considered its merits and made a reasoned decision as to whether to pursue the case. The respondent amply met that test.

[25] With respect to the delay of 18 days, the respondent submitted that it sent the employer's response to the complainant the day after it was received from the employer. Even had the respondent waited 18 days to transmit the information to the complainant, I would not have qualified that delay as an unfair labour practice. That delay did not create any prejudice against the grievor since the information was sent quickly enough for the grievance to be referred to adjudication if necessary. In delaying sending the information to the complainant, if it did delay, the respondent did not commit an unfair labour practice within the meaning of paragraph 190(1)(*g*) of the *Act*.

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

(The Order appears on the next page)

V. Order

[27] The complaint is dismissed.

October 22, 2009.

Renaud Paquet,
Board Member