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Public Service
Labour Relations Act

Before the Public Service
Labour Relations Board

BETWEEN

MARCEL MARTEL, PIERRE LÉGER, MARC NOVAK, STEPHEN THIBAULT, MARTIN GIRARD, FRANÇOIS BACAVE AND DANIELLE DAZÉ

Complainants

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Martel et al. v. Public Service Alliance of Canada

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

REASONS FOR DECISION

Before: Renaud Paquet, Board Member

For the Complainants: Marcel Martel

For the Respondent: Nathalie St-Louis, Public Service Alliance of Canada

Decided on the basis of written submissions
filed November 25 and December 10 and 22, 2008.
(PSLRB Translation)

I. Complaints before the Board

[1] On November 8, 2007, Marcel Martel, an employee of the Canada Revenue Agency ("the employer") and a member of the Public Service Alliance of Canada (PSAC), filed a complaint with the Public Service Labour Relations Board ("the Board") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 ("the *Act*"), against the PSAC ("the respondent") and its representatives, namely, Jacquie de Aguayo, Céline Petrin, Lyson Paquette, Michelle C. Tranchemontagne, Denise Lavergne and Linda Cassidy. Mr. Martel alleges that the respondent showed bad faith and that it acted in a discriminatory manner, violating section 187 of the *Act*. Mr. Martel's complaint concerns the quality of the representation that the respondent provided and its refusal to refer his grievances to adjudication. Section 187 reads as follows:

> ***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.*

[2] Between December 5 and 7, 2007, Pierre Léger, Marc Novak, Stephen Thibault, Martin Girard, François Bacave and Danielle Dazé (along with Mr. Martel, "the complainants") applied to the Board "[translation] to be added" to Mr. Martel's complaint. The Board considered their applications to be new complaints and combined them for the hearing since they concern the same alleged actions of the respondent and its representatives.

II. Preliminary remarks

[3] The dispute arises from the representation provided by the respondent for three series of grievances. Briefly, the first series dealt with the requirement to have a degree, the second with the statement of duties and the third with acting pay. The respondent decided not to refer the grievances to adjudication. The complainants were dissatisfied with that decision and filed these complaints. On December 5, 2007, the respondent objected that Mr. Martel's complaint had been made outside the 90-day time limit set out in subsection 190(2) of the *Act*, at least for the first two series of grievances.

[4] In *Martel et al. v. Public Service Alliance of Canada*, 2008 PSLRB 19, the Board allowed the respondent's objection and determined that the consideration of the

complaints would be limited to the representation provided by the respondent for the third series of grievances, those relating to acting pay.

[5] At the respondent's request, and with the complainants' agreement, the Board decided to dispose of the complaints on the basis of written submissions.

[6] The complainants filed submissions containing 73 points followed by an 8-point conclusion as well as a 14-page reply to the respondent's submissions. Many of the complainants' documents and submissions do not seem to me to be relevant to the complaints. The same can be said of the respondent's submissions, although to a lesser extent.

[7] According to the complainants, the first 35 points of their submissions seek to answer a question that they formulate as follows:

> [Translation]
>
> *Did the complainants have a reasonable chance of winning their grievances at adjudication if the union had agreed to refer the case to adjudication? That question relates both to their right to retroactivity and to the employer's refusal to recognize work done on an acting basis.*

That is not the question, however. Analyzing the question that the complainants formulated is of no assistance in determining whether the respondent violated section 187 of the *Act*. The criteria applicable in this case are very different, and I will return to that in my reasons for decision. Although I have thoroughly examined the first 35 points of the complainants' submissions and the documentation provided to support them, I will not discuss them in my decision because they are not relevant.

[8] The complainants' submissions also deal with deficiencies in the respondent's representation at the final level of the grievance process. The respondent's submissions are, in part, a reply to those submissions. Since the grievances were heard at the final level on June 4, 2007 and the complainants received the employer's decision on July 26, 2007, the complaints cannot be based on the events that surrounded presenting the grievances at the final level since those events occurred more than 90 days before the complaints were made. Subsection 190(2) of the *Act* is unequivocal about that limit:

> ***190.*** *(2) . . . 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.*

[9] The complainants knew of the events or circumstances related to representation for their grievances at the final level of the grievance process more than 90 days before their complaints were filed with the Board. Documents that the complainants themselves submitted to the Board confirm this. Among other things, the respondent informed them on June 7, 2007 that the grievances had been heard at the final level on June 4, 2007. Moreover, they acknowledged in writing on July 26, 2007 that they had received the decision that the employer had rendered at the final level of the grievance process. If they had planned to complain about the representation they received at the final level, they had to do it within 90 days. They did not.

[10] On the other hand, the complaints are timely insofar as they concern the actions, positions or decisions of the respondent in refusing to refer the grievances to adjudication. Accordingly, in this decision, I will discuss only those submissions relating to that refusal. Although the complainants' position differs from the respondent's, the parties agree on the facts giving rise to the complaints.

III. Facts giving rise to the complaints

[11] On July 24, 2007, Ms. Paquette, a labour relations officer with the Union of Taxation Employees, one of the PSAC's components, wrote to the complainants, sending them a copy of the employer's decision at the final level of the grievance process. In her letter, Ms. Paquette states that the files had been forwarded to the PSAC. She also states that the chances of their case succeeding before an adjudicator are low and that the employer's decision is consistent with case law on the matter. Mr. Martel replied to the letter by emailing Ms. Paquette to express his disagreement with her comment about the chances of succeeding in adjudication. On August 21, 2007, Ms. Paquette forwarded the email to Ms. de Aguayo, the coordinator of the PSAC's Representation Section.

[12] On September 11, 2007, Ms. Paquette informed the complainants by letter that the Board had granted the PSAC an extension of time until September 20, 2007 to refer the grievances to adjudication.

[13] On September 11, 2007, Ms. Petrin, a grievance and adjudication analyst with the PSAC's Representation Section, wrote to Ms. Paquette, copying the complainants, to inform her of the decision not to refer the grievances to adjudication. In the letter, Ms. Petrin explains the reasons for that decision in detail. After referring to the circumstances and the contents of the grievances as well as the employer's decision at the final level of the grievance process, Ms. Petrin analyzed the grievances in light of two Federal Court decisions. She concluded by asking Ms. Paquette to inform the complainants as soon as possible of the decision not to refer the grievances to adjudication, keeping in mind that an extension until September 20, 2007 had been obtained.

[14] On September 16, 2007, Mr. Martel wrote to Ms. Petrin to explain in detail why he disagreed with the decision not to refer the grievances to adjudication. Mr. Martel concluded by writing that he was convinced that an adjudicator could identify all the employer's contradictions and inconsistencies. He asked Ms. Petrin to review the decision not to refer the grievances to adjudication.

[15] On September 28, 2007, Ms. de Aguayo wrote to Mr. Martel after reviewing the file and the letter of September 16, 2007. She explained why she was upholding the decision not to refer the grievances to adjudication. On October 10, 2007, Mr. Martel wrote to Ms. de Aguayo to explain why he did not agree that the decision should be upheld.

IV. Summary of the arguments

A. For the complainants

[16] The complainants claim that the respondent acted in bad faith and that it was not sufficiently competent to deal with their grievances. The respondent completely disregarded and overlooked the economic importance of their grievances. The effect of the grievances represents an annual difference in pay of more than $22,000.

[17] The respondent never gave the complainants the chance to prove the relevance of their allegations. Yet, it is clear from the case law consulted that an employee must prove the allegations made in his or her grievance. The respondent had to objectively assist the complainants in preparing their allegations, not take over their grievances.

[18] The respondent did not seriously research the case law that could apply to the grievances. Rather, it limited itself to decisions that supported its position against going to adjudication or that were consistent with the employer's position.

[19] Ms. Paquette wrote to the complainants on September 11, 2007 to inform them that the respondent had until September 20, 2007 to make a complete assessment of the merits of the grievances. That same day, Ms. Petrin forwarded the conclusions of the respondent's assessment. According to the complainants, it is therefore difficult to argue that the assessment was fair and serious.

[20] The complainants reiterate their disagreement with the reasons the respondent provided for refusing to refer their grievances to adjudication. They also reiterate their own reasons in favour of a referral. In their view, the respondent is relying on cases that allow a bargaining agent to have economic interests that differ from those of the employees in the bargaining unit to justify its failure to comply with its duty of fair representation. A few employees do not count for much when assessing a case that could involve considerable representation costs for a bargaining agent.

[21] The complainants rely on the following decisions in support of their submissions: *Currie et al. v. Canada Revenue Agency*, 2008 PSLRB 69; *Cloutier and Rioux v. Turmel and Public Service Alliance of Canada*, 2003 PSSRB 12; *Eisen v. Union of Solicitor General Employees*, 2007 PSLRB 29; and *Moritz v. Canada Customs and Revenue Agency*, 2004 PSSRB 147.

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

[22] The respondent submits that the complainants have not discharged their burden of proving that it violated section 187 of the *Act*.

[23] The respondent refers to the written correspondence with the complainants concerning its decision not to refer their grievances to adjudication. It submits that the correspondence was supported by relevant case law. Ms. Petrin's analysis, dated September 11, 2007, was performed well before that date since the file had been forwarded to the PSAC's Representation Section at the end of July 2007. The fact that Ms. Paquette sent the analysis to Mr. Martel on September 11, 2007 in no way indicates that the analysis was not rigorous.

[24] According to the case law, an employee does not have an absolute right to adjudication, and the bargaining agent enjoys considerable discretion in that regard. However, that discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and the consequences for the employee on one hand and the legitimate interests of the bargaining agent on the other.

[25] The respondent relies on the following decisions in support of its submissions: *Kowallsky v. Public Service Alliance of Canada et al.*, 2007 PSLRB 30; *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13; and *Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40.

V. Reasons

[26] The complainants allege that the respondent showed bad faith and that it acted in a discriminatory manner in representing them, thus violating section 187 of the *Act*. That section reads as follows:

> ***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.*

[27] Section 187 of the *Act* does not impose an absolute duty on a bargaining agent to provide representation or to refer a grievance to adjudication in all cases. Rather, it prohibits a bargaining agent from acting in a manner that is arbitrary, discriminatory or in bad faith. The bargaining agent and its representatives must therefore exercise their discretion in accordance with those guidelines. In *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, the Supreme Court of Canada, interpreting legislative provisions comparable to section 187, states the following at page 510:

. . .

> *. . . This discretion however must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other. In short, the union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

. . .

[28] In this case, the complainants have not convinced me that the respondent's decision not to refer their grievances to adjudication was arbitrary, capricious, discriminatory, wrongful or in bad faith.

[29] In her letter of September 11, 2007, Ms. Petrin explained in detail why the respondent was not referring the grievances to adjudication. She based her analysis on the case law that, in her view, was not favourable to the complainants and that, in all probability, suggested that an adjudicator would dismiss the grievances. On September 16, 2007, Mr. Martel expressed his disagreement with Ms. Petrin's position and asked her to change it. Ms. de Aguayo reviewed everything and decided to uphold Ms. Petrin's decision.

[30] Analyzing the submitted documentation shows me that the respondent acted diligently and seriously in studying the complainants' grievances. After analyzing the facts in light of the case law, it concluded that the grievances should not be referred to adjudication. That decision was not arbitrary, discriminatory or made in bad faith. Nothing in the submitted file could lead me to such a conclusion.

[31] It is possible that the respondent would have reached a different conclusion if it had chosen different case law. However, that question is not relevant since it is not my role to consider the merits of the grievances. The respondent made no error under the *Act* by not sharing the complainants' opinion on the case law applicable to the merits of their grievances. It seems to have thoroughly studied the case, which is enough. It does not have to prove that it analyzed all existing case law, as long as its analysis was done in good faith.

[32] Instead, this case involves a difference of opinion between the complainants and the respondent's representatives. The complainants are convinced that they are right that the employer is treating them unfairly by not paying them in accordance with the complexity of the work they perform. They may be correct in claiming that the respondent should have referred their grievances to adjudication, but that is not the question. Rather, the question is whether the respondent breached the duties imposed on it by section 187 of the *Act*. In the circumstances of this case, I conclude that it did not.

[33] I have examined the case law submitted by the parties. *Currie et al.*, *Moritz* and *Bungay et al.* deal with the merits of the grievances and relate to work descriptions or

acting pay. I do not consider it relevant to discuss them here. The other decisions are consistent with the principles already established by *Gagnon et al.*, which is authoritative on this point.

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

(The Order appears on the next page)

VI. <u>Order</u>

[35] The complaints are dismissed.

February 6, 2009.

PSLRB Translation

Renaud Paquet,
Board Member