Date: 20090312

File: 525-34-15

Citation: 2009 PSLRB 31

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

FRANCINE BOUCHARD

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Bouchard v. Public Service Alliance of Canada

In the matter of an application for review of a decision under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, Vice-Chairperson

For the Applicant: Lise Pronovost, representative

For the Respondent: Amarkai Laryea, Public Service Alliance of Canada

Decided on the basis of written submissions
filed November 14, 2008, and January 7 and 19, 2009.
(PSLRB Translation)

I. Application before the Board

[1] On November 14, 2008, Francine Bouchard ("the applicant") filed an application under section 43 of the *Public Service Labour Relations Act* ("the *Act*") for a review of the decision rendered by the Public Service Labour Relations Board ("the Board") in *Bouchard v. Public Service Alliance of Canada et al.*, 2008 PSLRB 82.

[2] To clearly understand the nature of the application, it is appropriate to briefly set out the context of that decision.

[3] The Board was seized of a complaint that the applicant filed on September 24, 2007 under paragraph 190(1)(*g*) of the *Act* against the Public Service Alliance of Canada (PSAC). At the end of her complaint, the applicant criticized the PSAC for engaging in unfair labour practices against her by relieving her of her union position as local president of the Union of Taxation Employees, a component of the PSAC, and suspending her status as a PSAC member.

[4] The PSAC alleged that the complaint was premature because the applicant had taken advantage of the PSAC's internal right to appeal the two decisions affecting her and because the appeal procedures were still pending. The PSAC based its argument on subsection 190(3) of the *Act*. It is useful to reproduce subsections 190(3) and (4) of the *Act* to clearly frame the nature of the objection that was before the Board:

> ***190.****(3) Subject to subsection (4), no complaint may be made to the Board under subsection (1) on the ground that an employee organization or any person acting on behalf of one has failed to comply with paragraph 188(*b*) or (*c*) unless*
>
> > *(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the employee organization and to which the complainant has been given ready access;*
> >
> > *(b) the employee organization*
> >
> > > *(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or*
> > >
> > > *(ii) has not, within six months after the date on which the complainant first presented their grievance or appeal under paragraph (a), dealt with the grievance or appeal; and*

> *(c) the complaint is made to the Board not later than 90 days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.*
>
> *Exception*
>
> *(4) The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by an employee organization to comply with paragraph 188(b) or (c) that has not been presented as a grievance or appeal to the employee organization, if the Board is satisfied that*
>
> *(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or*
>
> *(b) the employee organization has not given the complainant ready access to a grievance or appeal procedure.*

[5] The hearing, held on September 26, 2008, dealt only with the PSAC's objection to the premature nature of the complaint. In its decision rendered on October 15, 2008, the Board allowed the PSAC's arguments and dismissed the complaint. The basic reasons for that decision are found at paragraphs 20 to 24:

> *[20] Moreover, unless the exception under subsection 190(4) of the* Act *applies, the Board cannot accept an employee's complaint until the employee has exhausted the employee organization's appeal procedure.*
>
> *[21] The evidence presented to me is unequivocal: the appeal procedure put in place by the PSAC is still pending. Accordingly, the complaint is premature and must be dismissed.*
>
> *[22] There was certainly some confusion in the PSAC's handling of the appeal. First, the complainant was told that she had to apply to the UTE for her first appeal. Then, she was told that the PSAC rather than the UTE would hear the appeal. After that, part of the complainant's right to appeal was taken away temporarily, owing to a misunderstanding of her intentions. The PSAC is not entirely to blame on that point because the intentions expressed by the complainant had several possible interpretations.*
>
> *[23] Nonetheless, the complainant was offered a full right of appeal, both for loss of her member status and for being relieved of her duties as president of Local 10005 of the UTE. The representatives for the complainant and the UTE have*

> *now been appointed to the three-person tribunal. The three-person tribunal that will hear the appeal appears to be about to begin its work and hear the appeal.*
>
> *[24] I also dismiss the complainant's allegation that I can determine the complaint under subsection 190(4) of the* Act *because the employee organization has not provided ready access to an appeal procedure. The evidence filed does not support that allegation. There was indeed some confusion over the handling of the complaints, but not to such an extent as to conclude that the conditions of subsection 190(4) were fulfilled.*

II. Summary of the arguments

A. For the applicant

[6] The applicant's reasons for filing the application for review are set out in the 55-paragraph application adduced by her representative. Those reasons can be grouped into two categories. First, the applicant puts forward that the Board erred in its assessment of the facts by finding that, with the PSAC's authorities, she benefited from a full right to appeal the two contested decisions. In that regard, the applicant maintains that the evidence clearly established that the PSAC did not follow its own internal rules, particularly concerning the appeal of the decision to relieve her of her union duties as president, and that it was obvious that the appeal procedure was not actually pending. The applicant also maintains that her appeals were not heard within the time limits set out in the PSAC's regulations.

[7] Second, the applicant brings up facts that occurred after the September 26, 2008 hearing that, in her opinion, establish that her complaints were still not processed and that the PSAC was acting in bad faith.

B. For the respondent

[8] The PSAC submits that the applicant's reasons supporting her application for review do not correspond to the intervention criteria developed in the jurisprudence for applying section 43 of the *Act*. The PSAC maintains that the points set out in the application for review constitute an attempt by the applicant to present, once again, the arguments presented at the September 26, 2008 hearing. The PSAC also maintains that the applicant did not establish changed circumstances, adduce new evidence or present new arguments that would justify a review of the Board's decision.

III. Reasons

[9] The application for review is based on subsection 43(1) of the *Act*, which reads as follows:

> ***43.*** *(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*

[10] That provision, which came into force on April 1, 2005, is identical to section 27 of the *Public Service Staff Relations Act*, which applied until April 1, 2005. Both the Public Service Staff Relations Board and the Board that replaced it in April 2005 have, through their jurisprudence, interpreted those provisions and developed intervention criteria. *Danyluk et al. v. United Food and Commercial Workers Union, Local 832,* 2005 PSLRB 179, clearly sets out the criteria developed by the Board:

. . .

> *[14] . . . The former Board had long been of the view, based on the wording of s. 27 of the* PSSRA*, that the purpose of s. 27 was not to allow an unsuccessful party to re-argue the merits of its case. Rather, the purpose was to enable the Board to reconsider a decision either in light of changed circumstances or to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where there was some other compelling reason for review. Furthermore, the Board's jurisprudence has held that any new evidence or arguments raised by a party in a request for review must have a material and determining effect. I am in agreement with the position adopted by the former Board regarding the interpretation to be given to s. 27 of the* PSSRA *and I see no reason why the same interpretation should not be applied to the present* Act. . . .

. . .

[11] Applying those criteria to this case, I see no reason to intervene since none of the reasons brought up by the applicant meet the criteria set out by the Board.

[12] First, the applicant alleges errors of fact in the decision and asks the Board to assess the adduced evidence in a different manner. In my opinion, that request is an attempt to appeal the October 15, 2008 decision, which does not correspond to the intervention criteria developed for applying section 43 of the *Act*. Nor does the

applicant present any argument that she might not have had an opportunity to present at the September 26, 2008 hearing.

[13] With respect to the new facts alleged by the applicant, they all occurred after the hearing and, in the circumstances, cannot form the basis of an application for review under section 43 of the *Act*. New facts that could form the basis of an application for review must be facts that existed on the date of the hearing but that the applicant could not reasonably have presented. By its nature, an application for review assumes that the Board will review a case as it should have been constituted at the original hearing had it not been for the particular circumstances that prevented a party from presenting the new facts. Thus, the facts put forward, which would have occurred after September 26, 2008, cannot form the basis of an application for review. In addition, nothing prevents the applicant from filing a new complaint with the Board if she considers that the facts occurring after the September 26, 2008 hearing may form the basis of a new complaint or another remedy under the *Act*.

[14] Thus, the applicant has not adduced evidence establishing changed circumstances that would justify a review of the decision nor demonstrated that there were compelling reasons for the Board to intervene.

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

(The Order appears on the next page)

IV. Order

[16] The application for review of the October 15, 2008 decision in PSLRB File No. 561-34-186 is dismissed.

March 12, 2009.

PSLRB Translation

Marie-Josée Bédard,
Vice-Chairperson