Date: 20090812

File: 561-02-358

Citation: 2009 PSLRB 96

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

MITCHEL R. CUNNINGHAM

Complainant

and

CORRECTIONAL SERVICE OF CANADA AND UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Respondents

Indexed as
Cunningham v. Correctional Service of Canada and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN

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 Respondents: Mark Sullivan, Correctional Service of Canada
Jessie Caron, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN

Decided on the basis of written submissions.
Filed December 24, 2008; January 6, 22, 27, February 10, 11, 18, 27, March 23, 2009.

Complaint before the Board

[1] On November 14, 2008, Mitchel R. Cunningham ("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* (*PSLRA*) against the Union of Canadian Correctional Officers- - Syndicat des agents correctionnels du Canada - CSN (UCCO). On December 15, 2008, he added the Correctional Service of Canada (CSC) as a respondent under paragraphs 190(1)(*e*) and (3)(*b*) and (*c*).

[2] On December 24, 2008, the CSC's representative asked for clarification from the complainant as he could not understand the alleged *PSLRA* violations.

[3] The complainant replied to the CSC's representative by providing photocopies of documents related to the events that took place in 2005 and 2006.

[4] The CSC's representative raised an objection on January 22, 2009, with respect to timeliness and also submitted that the *PSLRA* violations were still not clear.

[5] The complainant replied that his complaint was about his resignation from the CSC on September 23, 2005.

[6] The UCCO misplaced the photocopies associated with the complaint and did not reply until February 18, 2009. The UCCO also raised an objection on timeliness and could not identify the alleged violations of the *PSLRA*.

Uncontested facts

[7] The complainant started working as a correctional officer at the Grande Cache Provincial Institution in Manitoba in October 1988. He was involved in a serious motor vehicle accident in 1990, sustaining head and other life-threatening injuries.

[8] In 1995, the Grande Cache institution was converted to a federal institution. The complainant remained employed there as a correctional officer.

[9] In 2004, the CSC had concerns about the complainant's behaviour and assigned him to another position, pending a medical evaluation. On January 10, 2005, the complainant's doctor pronounced him ready to return to his regular duties, however, the CSC was not satisfied. It asked the doctor to review his opinion and informed him that it would also ask for a Fitness to Work Evaluation from Health Canada. The

request for the Fitness to Work Evaluation was sent to Health Canada with the complainant's consent on February 22, 2005.

[10] On July 4, 2005, the complainant went on leave without pay for a year to work in the oil fields.

[11] On September 23, 2005, the complainant submitted his resignation effective October 1, 2005. The CSC accepted it on the same day. He then tried to retract his resignation in writing on September 28, 2005, but the CSC refused the retraction on October 4, 2005.

[12] On October 6, 2005, Health Canada provided the CSC with a report that the Fitness to Work Evaluation was inconclusive and that more tests were needed. However, since the employee had resigned, the CSC decided not to proceed with more tests.

[13] The complainant contacted his bargaining agent, and a grievance on the employer's decision to not accept the retraction of his resignation was filed on October 20, 2005.

[14] The grievance was sent to adjudication, and through mediation, it was settled on November 8, 2006. The Board closed the file on February 2, 2007.

[15] The complainant filed a complaint with the Canadian Human Rights Commission (CHRC) on August 30, 2007, alleging discrimination based on disability for events that occurred between February 2004 and November 2006, including his resignation. The CHRC rejected the complaint on September 11, 2008. It concluded that the allegation with respect to the resignation had been dealt with through the grievance process and that the complainant did not contact the CHRC within one year of the alleged discrimination.

Summary of the arguments

[16] The CSC's representative submitted that the complaint was not filed within the mandatory 90-day time limit prescribed by subsection 190(2) of the *PSLRA.*

[17] The complainant submitted his resignation and ceased to be a CSC employee effective October 1, 2005.

[18] Under subsection 190(2) of the *PSLRA*, a complaint filed under section 190 must be made to the Board no later than 90 days after the date on which the complainant knew or ought to have known of the circumstances giving rise to the complaint. The Board has determined that it has no discretion to extend that time limit; see *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78.

[19] It is still not clear how the original unfair labour practice complaint and the subsequent clarifications from the complainant form the basis for a complaint under section 190 of the *PSLRA*. However, what is abundantly clear is that all the incidents that are alleged to be the source of this unfair labour practice complaint occurred during the complainant's tenure as a CSC employee. That tenure ended 38 months before he submitted his complaint. In light of the foregoing, and considering the mandatory 90 day time limit prescribed by subsection 190(2), the CSC submitted that the complaint should be dismissed without a hearing because it is untimely.

[20] As for the merits, the CSC submits that the complaint and the subsequent documentation from the complainant do not provide the necessary clarity for the CSC to determine how it has allegedly breached the *PSLRA*. The complainant provided the following in support of his complaint:

- that he had been fined and punished a total of seven times by the Acting Warden of Grande Cache Institution;
- that he had been placed in a post where he was working a "five and two shift" by himself; and
- that management had denied a transfer request.

[21] The CSC's position is that none of the above constitutes a violation of sections 117, 157 or 185 of the *PSLRA*.

[22] Any issues that the complainant may have had with respect to his employment with the CSC were dealt with through the grievance and mediation processes. The complainant cannot (assuming that he is trying to and, again, it is not clear), in excess of two years later, seek to have the same issues dealt with through a complaint under section 190 of the *PSLRA*.

[23] In *Exeter v. Canadian Association of Professional Employees*, 2009 PSLRB 14, the Board Member examined the issue of a complainant's responsibilities for the details provided in a complaint under section 190 of the *PSLRA*. At paragraph 13 of his decision, the Board Member stated the following:

. . .

> *Any complainant bears a responsibility to outline the details of his or her complaint to the extent necessary to establish how the alleged act or omission breaches a specific prohibition under the* Act *on a* prima facie *basis. Should the complainant fail to do so, the Board may dismiss the complaint or may strike from it references to cited provisions of the* Act *for which it finds no* prima facie *foundation.*

[24] At paragraph 14 of the same decision, the Board Member added the following:

. . .

> *The threshold requirement is not high. A* prima facie *basis exists for the allegation where the purported facts — assumed for this preliminary purpose to be true — reveal an arguable case that there has been a breach of the statute.*

. . .

[25] The CSC stated that the complainant has not met the very basic threshold that is required to establish that there has been a breach of the *PSLRA*. His complaint should therefore be dismissed without any further proceedings.

[26] The UCCO's representative submitted that, although the complainant refers to a variety of events giving rise to his section 190 complaint and provides different dates for those events, one thing remains certain: the complainant did not submit his complaint to the Board within the time limit prescribed by the *PSLRA*.

[27] The complaint form submitted to the Board identifies October 1, 2005 (i.e., the effective date of the complainant's resignation) as the moment on which he knew of the matter giving rise to the complaint. To the CHRC, however, the complainant identified the period ranging from February 12, 2004 to November 17, 2006 as the dates of the alleged misconduct.

[28] Because it refers to the UCCO's alleged misconduct, the UCCO fails to understand how the complainant's complaint could be based on any event occurring after November 8, 2006. On that date, the complainant, represented by the UCCO in a

legitimate mediation procedure, entered into a principle agreement with the CSC that resolved his resignation grievance. Therefore, should the present complaint refer to the bargaining agent's handling of that grievance, the complainant submitted his complaint at least 22 months after the time limit prescribed by subsection 190(2) of the *PSLRA*.

[29] Given the above, and considering all other accounts, this complaint is untimely. The UCCO concurs with the CSC's arguments on the admissibility of untimely complaints. As such, the UCCO respectfully requests that the Board make use of its power under the *PSLRA* and reject this complaint without a hearing.

[30] The information on file does not allow the UCCO to gain a firm understanding of the alleged misconduct supporting a complaint under section 190 of the *PSLRA*, let alone of the party (the UCCO or the CSC) that would be responsible for each violation.

[31] In his completed PSLRB Form 16, the complainant refers to three provisions of the *PSLRA* that have allegedly been breached. Section 117 (duty to implement provisions of the collective agreement), section 157 (duty to implement provisions of the arbitral award) and, finally, paragraphs 188(*b*) and/or (*c*) (unfair labour practices). The UCCO submits that none of them apply to this case, as follows:

> *Section 117 – Duty to implement provisions of the Collective Agreement and Section 157 – Duty to implement provisions of the Arbitral award*
>
> *As these provisions relate to the process of collective bargaining, and pertains more to the recognition of the binding nature of collective agreements or arbitral awards, we respectfully submit that they cannot form the basis of any complaint against the Union in the case at hand. Neither the Union, not the Employer, has ever claimed that the Collective Agreement – or parts of it – did not apply.*
>
> *Section 188 (b) and/or (c) – Unfair labour practices*
>
> *In his complaint, Mr. Cunningham also refers to section 190(3)(b)(ii) of the* PSLRA. *We can only assume that in the Complainant's opinion, the Union had not dealt with a complaint or a grievance within six months after the date on which the Complainant had first presented such. However, this provision refers clearly to section 188(b) or (c) of the* PSLRA, *which is concerned with a Union's internal affairs (issues such as expulsions, suspensions or other disciplinary actions that a Union may undertake against its members). As*

> *such, Mr. Cunningham's complaint on that ground is most irrelevant. In fact, the only provision that could potentially be applicable to the Complainant's case – although it was never explicitly mentioned – would be section 187 (Unfair representation by Bargaining Agent). But here again, the Union submits that it did not breach its duties of fair representation in any manner.*
>
> *Section 187 – Unfair representation*
>
> *In light of all the foregoing factual background, we request, once more, that the Board reject the complaint. The Union's action in the case of Mr. Cunningham resignation and throughout the entire procedure of his grievance – up to and including the mediated settlement conclude on November 8, 2006 – reflected anything but bad faith, discrimination or arbitrariness towards the Complainant. When Mr. Cunningham submitted his resignation on September 23, 2005, he did not mention any motives; he did not give any reasons. When he regretted his decision and attempted to rescind his resignation, the Union fulfilled its duties of representation in a diligent fashion, hence going beyond the applicable statutory requirements. The Union did not breach section 187, nor any other provision of the* PSLRA*.*
>
> [*Sic* throughout]

[32] Given those reasons, the UCCO submits that the Board should reject this complaint under section 190 of the *PSLRA* without proceeding to a hearing.

[33] In response to the objection on timeliness raised by the CSC, the complainant provided copies of documents dating back to 2004 and 2005 and submitted that his official complaint was made on the day of his resignation, September 23, 2005.

[34] As for the objection on the merits from the CSC, the complainant provided more photocopies of documents from the past and submitted that an employee cannot be discriminated against, threatened, intimidated or restrained from exercising his or her rights as a member of a bargaining agent. The complainant described some examples of the CSC's conduct that has been found to constitute unfair labour practices as follows:

- belittling and intimidating an employee who files a grievance;

- threatening to remove certain benefits from employees who have filed grievances unless the grievances are withdrawn (such as overtime or a "five and two" post); and

- retaliating against an employee for testifying at an adjudication hearing.

[35] In response to the objections raised by the UCCO, the complainant provided photocopies of documents similar to those provided in response to the CSC's objection and submitted that the information provided by the UCCO was incomplete. The UCCO never notified the CHRC and could not harass and discriminate against him. The fact is, the complainant has supplied concrete evidence, and the UCCO failed to act on the day on which he submitted his resignation form, September 23, 2005.

Reasons

[36] The time limit set out in subsection 190(2) of the *PSLRA* is very clear:

> ***190.*** *(2) … a complaint … must be made to the Board not later then 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.*

[37] The complainant filed his complaint on November 10, 2008. His complaint is not very explicit, but he did indicate on Form 16 at point 5 that the date on which he knew of the *PSLRA* omission or other matter giving rise to the complaint was October 1, 2005. When asked for clarification, he stated that his resignation in 2005 and the CSC's refusal to agree to rescind it are the circumstances giving rise to the complaint. Everything occurred 36 months before he filed his complaint, long past the prescribed 90 days to file a complaint and I do not have the discretion to extend the time limit, as specified in *Castonguay*.

[38] As for the part of the complaint against the UCCO, he was represented until November 8, 2006 when he agreed to settle his grievance through a legitimate mediation process. This is 24 months before he filed his complaint. It is therefore also untimely.

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

(The Order appears on the next page)

Order

[40] The complaint is dismissed.

August 12, 2009.

Michel Paquette,
Board Member