Date: 20101105

File: 561-02-181

Citation: 2010 PSLRB 118

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CHANTAL RENAUD

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
Renaud v. Canadian Association of Professional Employees

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: Herself

For the Respondent: Lise Leduc, counsel

Heard at Ottawa, Ontario,
October 12 and 13, 2010.
(PSLRB Translation)

Complaint before the Board

[1] On September 24, 2007, Chantal Renaud ("the complainant") filed an unfair labour practice complaint against the Canadian Association of Professional Employees (CAPE or "the respondent"), her bargaining agent, under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). The complainant alleged that the respondent failed to fulfill its duty of fair representation within the meaning of section 187 of the *Act*. In her complaint, the complainant set out her criticisms of the respondent as follows:

. . .

> [Translation]
>
> *Unfair representation complaint . . .*
>
> *On August 13, 2007, the respondent, the CAPE, refused to apply for an extension of time for referring my grievance to adjudication.*
>
> *By that refusal on August 13, 2007, the CAPE also refused to correct an error that it had committed in June 2006 by failing to refer my grievance to adjudication within the time limit.*
>
> *On August 13, 2007, by refusing to apply for an extension of time and by refusing to correct its error, the CAPE acted in a manner that was arbitrary, discriminatory or in bad faith with respect to my representation, in violation of section 187 of the Public Service Labour Relations Act, S.C. 2003, c. 22.*

. . .

[2] The respondent raised an objection about the admissibility of the complaint, alleging that it had been filed outside the 90-day period set out in subsection 190(2) of the *Act*. In *Renaud v. Canadian Association of Public Employees*, 2009 PSLRB 177, the Public Service Labour Relations Board ("the Board") allowed the respondent's objection in part. The following paragraphs of that decision summarize its conclusions:

. . .

> *[78] That said, the complainant cannot cover the events of 2006 or the circumstances surrounding the July 2006 decision not to refer the grievances to adjudication because, with respect to those events, the complaint was filed outside the 90-day period set out in subsection 190(2) of the* Act. *On the other hand, the events of 2006 may be put forward as*

> *the context surrounding the events of 2007, which are covered in the complaint.*
>
> *[79] With respect to the events of 2007, in her complaint the complainant criticizes the respondent for not agreeing to again submit an application to the Board for an extension of time for referring her grievances to adjudication. The complaint does not refer to the respondent's refusal to represent the complainant in her application for a judicial review of the CHRC's decision.*
>
> *[80] Therefore, the Board will address the issue of whether, by refusing in August 2007 to submit an application for an extension of time for referring the complainant's grievances to adjudication, the respondent failed to fulfill its duty of fair representation of the complainant.*
>
> . . .

[3] Given the Board's conclusions in 2009 PSLRB 177, the issue before me is whether, in August 2007, the respondent failed to fulfill its duty of fair representation by refusing to apply for an extension of time for referring the complainant's grievances to adjudication. In fact, at the hearing, the complainant and the respondent confirmed that the dispute between them is about an application to extend the time for referring only one grievance, and not a number of grievances, to adjudication.

[4] The parties were not available for a hearing before October 12, 2010.

Summary of the evidence

[5] The complainant testified at the hearing. She adduced 20 documents in evidence. The respondent called Jean Ouellette as a witness. Mr. Ouellette is Labour Relations Director for the CAPE. The respondent adduced four documents into evidence.

[6] In December 2004, the complainant filed a grievance in which she alleged that her employer had subjected her to discrimination. On June 16, 2006, the employer dismissed the grievance at the final level of the grievance process. The complainant also filed a complaint in December 2004 with the Canadian Human Rights Commission (CHRC), again alleging that her employer had subjected her to discrimination.

[7] After the employer dismissed the grievance at the final level of the grievance process, Lionel Saurette, a union representative working for the respondent, suggested that the complainant refer her grievance to adjudication, even though he believed that

an adjudicator would dismiss it. According to Mr. Saurette, referring the grievance to adjudication would have made mediation a possibility, during which it might have been possible to negotiate a settlement satisfactory to the complainant. Given the date of the employer's response at the final level of the grievance process, the grievance had to be referred to adjudication before July 25, 2006. For the reference to be valid, the complainant had to authorize it. She did not.

[8] The complainant admitted that the respondent contacted her and that it advised her to refer her grievance to adjudication. At that time, she responded that she preferred to pursue her discrimination complaint with the CHRC instead of referring her grievance to adjudication. Therefore, the respondent did not refer the grievance to adjudication. In October 2006, the CHRC's manager of investigations wrote to the complainant, informing her that the investigation report to be submitted to the CHRC would recommend that the CHRC not rule on the discrimination complaint because the complainant's allegations had already been investigated during the grievance process. In February 2007, the CHRC wrote to the complainant, informing her of its decision not to rule on her discrimination complaint.

[9] Since the period for referring the grievance to adjudication had expired several months earlier, in a way, the complainant found herself without recourse for the discrimination that she had experienced. The complainant then contacted the respondent, requesting that it apply to the Chairperson of the Board for an extension of time for referring her grievance to adjudication. The respondent refused. Because of the respondent's refusal, the complainant was unable to have an adjudicator hear her grievance.

[10] The complainant adduced several documents that established that her employer had discriminated against her. On that basis, she thought that her grievance would have succeeded at adjudication, particularly since she would have been able to rely on some co-workers testifying in her favour. The complainant admitted that, in 2007, the period for referring the grievance to adjudication had expired but stated that that situation was caused not by lack of diligence on her part but by poor advice from the respondent.

[11] Under cross-examination, the complainant admitted that the discrimination grievance that she filed in December 2004 referred to events that had occurred well before the 25 days provided for filing a grievance and that, in that sense, the grievance

was late. She also admitted that the respondent had so notified her as soon as the grievance was filed. Mr. Ouellette also confirmed that fact in his testimony. Additionally, he stated that an adjudicator did not have jurisdiction to take much of the corrective action requested in the grievance because it involved staffing or classification.

[12] Mr. Ouellette analyzed the complainant's request that the respondent apply on her behalf to the Chairperson of the Board for an extension of time for referring her grievance to adjudication. Mr. Ouellette testified that he used the criteria set out in the case law in his analysis. Based on his analysis, he concluded that it was highly unlikely that the Chairperson would allow the application for an extension of time, were it made. Furthermore, in his opinion, even had the Chairperson accepted the application for an extension of time, the grievance had almost no chance of success at adjudication. He then decided to refuse the complainant's request. His superiors reviewed his decision. They maintained the refusal and informed the complainant accordingly.

[13] The complainant adduced in evidence an email that Mr. Ouellette sent to the Association of Canadian Financial Officers (ACFO) on October 31, 2005. In it, Mr. Ouellette notified the ACFO that the complainant had become a member of a bargaining unit that the AFCO represented and added that she had recently occupied a position reporting to the ACFO, so it should represent her. Mr. Ouellette testified that, after his discussions with the ACFO and after obtaining a legal opinion, he changed his mind and decided that the CAPE would continue to represent the complainant because she was a member of a bargaining unit represented by the CAPE when she filed her grievance.

[14] In her testimony, the complainant explained that her employer had discriminated against her. She also explained that the respondent had represented her poorly at the hearings of her grievance, had not given her good professional advice, had not taken the time to clearly inform her of her rights and, at times, had provided her with erroneous information. The consequence was that the complainant was never able to fully exercise her rights or to obtain justice with respect to the discrimination to which she had been subjected.

Summary of the arguments

[15] The complainant alleged that it is illogical that the respondent believed that her grievance was defensible when it was filed in 2004 but that it was no longer defensible in 2007, when the time came to apply to the Chairperson of the Board for an extension of time. In addition, when the respondent decided to refuse the complainant's request, it did not meet with her or provide her with the case law or detailed reasons justifying its refusal. Contrary to Mr. Ouellette's statements, the complainant did not believe that the respondent carried out a detailed analysis of her case. In her opinion, the respondent's decision to refuse to apply to the Chairperson for an extension of time was arbitrary and was made in bad faith. Therefore, the respondent failed to fulfill the duty of fair representation required under the *Act*.

[16] According to the complainant, she established that an adjudicator could have allowed her grievance, that she acted with diligence and that the delay in referring the grievance to adjudication was justified.

[17] The complainant regrets the fact that, following the respondent's refusal to apply to the Chairperson of the Board for an extension of time, her employer and her manager, who had discriminated against her, avoided having to answer for their actions.

[18] The respondent alleged that it discharged its duty of fair representation. The decision not to apply to the Chairperson of the Board for an extension of time was made following a serious analysis of the case. The respondent had no hope that the Chairperson would allow an extension of time.

[19] The respondent referred me to the following decisions: *Chan v. Treasury Board (Office of the Chief Electoral Officer)*, 2008 PSLRB 86; *Detorakis v. Professional Institute of the Public Service of Canada,* 2009 PSLRB 139; *Featherston v. Deputy Head (Canada School of Public Service) and Deputy Head (Public Service Commission)*, 2010 PSLRB 72; *Grouchy v. Deputy Head (Department of Fisheries and Oceans),* 2009 PSLRB 92; *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509; *Hébert v. Public Service Alliance of Canada et al.,* 2005 PSLRB 62; *Martel et al. v. Public Service Alliance of Canada,* 2009 PSLRB 16*; Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSLRB 1; *Vaid v. House of Commons*,

2007 PSLRB 32; *Vidlak v. Treasury Board (Canadian International Development Agency),* 2006 PSLRB 96; and *Vidlak v. Canada (Attorney General)*, 2007 FC 1182.

Reasons

[20] In this case, I must determine whether, in August 2007, the respondent failed to fulfill its duty of fair representation when it refused to apply for an extension of time for referring the complainant's grievance to adjudication. A bargaining agent's duty of fair representation, in this case the respondent's, is set out in section 187 of the *Act*, which 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.*

[21] The facts of the issue before me are relatively simple. In 2004, the complainant filed a grievance against her employer, alleging that she had been subjected to discrimination. At that time, she was a member of a bargaining unit represented by the CAPE. The grievance was filed even though the CAPE knew that the grievance was late and that part of the requested corrective action could not be implemented were the grievance referred to adjudication. The respondent's strategy was to proceed with the grievance in the hope of making gains in mediation. The employer dismissed the grievance at all levels of the grievance process. In 2006, when the time came to refer the grievance to adjudication, the complainant informed the respondent that she preferred to pursue the discrimination complaint that she had filed in 2004 with the CHRC instead of referring her grievance to adjudication. Therefore, the respondent did not refer the grievance to adjudication. Later, the CHRC informed the complainant of its decision not to proceed with her discrimination complaint. The complainant then again contacted the respondent to apply for an extension of time for referring her grievance to adjudication. The respondent refused.

[22] Mr. Ouellette testified that he carried out a detailed analysis of the complainant's case to assess the chances of success of an application for an extension of time for referring the grievance to adjudication. In light of the case law and the criteria that it set out, he concluded that those chances were very slim. Mr. Ouellette also testified that, even had the Chairperson of the Board allowed the extension of time, the chances of the grievance succeeding before an adjudicator were similarly

remote. His testimony led me to conclude that the respondent did not act in a manner that was arbitrary, discriminatory or in bad faith when it decided to refuse the complainant's request. The respondent had logical reasons for its refusal, and the decision was not made lightly.

[23] Section 187 of the *Act* does not require a union to provide representation in all cases; instead, it prohibits the union from acting in a manner that is arbitrary, discriminatory or in bad faith. In exercising its discretionary authority, the union must respect those guidelines. In *Gagnon et al.*, the Supreme Court of Canada wrote as follows 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.*

. . .

[24] Nothing in the submissions made to me suggests that the respondent acted in a manner that was arbitrary, discriminatory or in bad faith by deciding not to follow up on the complainant's request to apply for an extension of time for referring her grievance to adjudication. Granted, the respondent could have been more transparent in its communications with the complainant by explaining to her the details of the basis for its refusal and by providing her with the case law supporting its decision. However, section 187 of the *Act* and the case law on the scope of that provision do not require the respondent to act in such a transparent manner.

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

(The Order appears on the next page)

Order

[26] The complaint is dismissed.

November 5, 2010.

PSLRB Translation

Renaud Paquet,
Board Member