Date: 20101207

Files: 561-24-454 and 455

Citation: 2010 PSLRB 127

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

BONNIE-GALE BAUN

Complainant

and

NATIONAL COMPONENT, PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Baun v. National Component, 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: Ian R. Mackenzie, Vice-Chairperson

For the Complainant: Herself

For the Respondent: Chantal Homier-Nehme, Public Service Alliance of Canada

Decided on the basis of written submissions filed July 2, September 22 and October 20, 2010.

I. Complaints before the Board

[1] Bonnie-Gale Baun ("the complainant") filed two unfair labour practice complaints against Local 20140, National Component, Public Service Alliance of Canada ("the respondent" or "PSAC") on April 23 and 26, 2010, respectively. The two complaints relate to the decision of the respondent to no longer represent her, with minor differences in the requested remedy. The complaint filed on April 26, 2010 is to be regarded as an amendment to the original complaint.

[2] The relevant section of the *Public Service Labour Relations Act* (*PSLRA*) is 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.*

[3] The respondent requested that the Public Service Labour Relations Board ("the Board") dismiss the complaints because the complainant did not demonstrate a *prima facie* breach of section 187 of the *PSLRA*. The respondent also submitted that the complaints were untimely.

[4] The Board has the authority under section 41 of the *PSLRA* to decide any matter without holding an oral hearing. An oral hearing is not required when determining whether a complainant has established a *prima facie* violation of the *PSLRA*. The requirement to establish a *prima facie* case has been described as follows in *Halfacree v. Public Service Alliance of Canada,* 2009 PSLRB 28 (at paragraph 16): "[e]ven if the complainant were to prove that the facts alleged in the complaints are true, it would not represent an arguable case that the respondent acted in bad faith or in a manner that was arbitrary or discriminatory." For the purposes of deciding whether the complainant has established a *prima facie* case, the board will assume the alleged facts of the complainant to be true. For this reason, an oral hearing is not required, because there is no need to prove the truth of the allegations at this stage of the analysis. If a complainant establishes that he or she has a *prima facie* case, the complaint would be scheduled for an oral hearing in order for the complainant to prove the alleged facts. If the complainant is not able to establish a *prima facie* case, the complaint will be dismissed.

II. Background

[5] The complainant was a term employee at Statistics Survey Operations ("the employer"). Her employment was terminated for cause on August 26, 2009. At the time of the termination, approximately six to eight weeks were left in her term.

[6] Before her employment was terminated, the employer asked that she provide the required consent to conduct a fitness to work evaluation. The complainant filed a harassment grievance against named employees of the employer. She also filed two other related grievances. At that time, the complainant was represented by Gail Myles, a labour relations officer with the National Component of the PSAC. The complainant also made representations to her employer on her own behalf, without consulting her bargaining agent representative (see the letter of August 23, 2009 that she sent to her employer). On August 25, 2009, a Steward and the local President wrote to the complainant and advised her that she should sign the fitness to work evaluation consent form, as requested by the employer, since, ". . . if you are terminated because of your refusal to obey the order, it may be very difficult to have you reinstated." The letter concluded by stating that the recommendation was "…without prejudice as to our support for your position." The complainant did not provide the requested consent to the employer, and her employment was terminated for cause on August 26, 2009.

[7] The complainant filed a grievance against her termination. On September 25, 2009, the Steward and local President of the respondent wrote to the complainant, seeking clarification on certain matters related to her file and seeking further information about her allegations against the employer. The letter also stated as follows:

. . .

> *As you know, the role of the Union is to represent you, which we have done since the start of the employer's negative allegations. It is important however to clarify that we can only provide advice and representation based on the information you provide to us and on a reliance that you will follow the advice and work with us. Our concern is that on a few occasions you have not followed the advice and acted without our knowledge or contrary to our advice.*

. . .

[8] After meeting with the complainant and receiving some correspondence from her, Ms. Myles, on behalf of the respondent, sent the following letter, responding to the issues raised by the complainant about her representation (October 17, 2009):

. . .

> *The union has provided you with strong representation from the beginning of the issues arising in May 2009 and we will continue to do so only with your explicit written agreement to follow our advice . . . Generally when a union is representing a member, all communication is between the union and the employer. The member does not continue to communicate with the employer without the union's full knowledge and agreement. Otherwise, the union is left without the required knowledge of the ongoing circumstances and often is left not able to represent their members in a capable manner; and it is for this reason that the employers are urged not to contact grievors directly. . . Should you agree to follow the union's advice from today forward, we are prepared to represent you in relation to your four grievances.*

. . .

[9] The letter concluded that, if she did not provide the respondent with her written agreement to follow its advice and to "…allow us to properly represent you…" by October 30, 2009, the respondent would conclude that she had chosen to represent herself, and it would close her file.

[10] The complainant replied to the letter on November 16, 2009 as follows:

> *I continue to expect my union to represent me . . . I will continue to tape all phone calls and that is the stipulation that I have from this point forward. I made the point last week that if you have any integrity in your actions you should have no problem being taped. . . I will be taping every conversation I have with you. I do not trust you and I definitely do not trust my employer.*

[11] The complainant wrote to Ms. Myles on October 29, 2009, providing information about her grievances and her position on them. With respect to the respondent's position that she should negotiate a resignation, she said, "Do you wonder why I have no faith in this process? This is unacceptable."

[12] Ms. Myles wrote to the complainant on November 17, 2009 requesting further information about her grievance and clarification about its basis. The letter also set out

the difficulties that the respondent had encountered trying to reach her on numerous occasions. She also noted that the employer had requested hearing dates for her termination grievance. She stated that it was difficult to provide representation without communication. She concluded by stating that, if the respondent did not receive a written response to the letter by December 2, 2009, the complainant's grievance files would be closed.

[13] The complainant did provide written submissions to the respondent (on October 29 and November 16 and 23, 2009) but did not provide a written agreement to follow the advice of the respondent. In addition, during this period she was taping her telephone conversations with the respondent. Although the respondent's representatives knew of the taping, it was not being done with their permission. On November 30, 2009, Ms. Myles wrote to the complainant as follows:

. . .

> *In addition to undermining the union and our ability to represent you through some of your letters to management, all of your correspondence to us has made it clear that you do not trust the union and therefore do not trust in our ability to represent you. Your total lack of confidence in the union is made evident by your insistence on taping all conversations with union representatives; and even more so through your disagreement that the employer terminated you based on insubordination.*
>
> *For all of the above reasons, your grievance files are now closed.*

[14] The complainant spoke to the President of the National Component on December 3, 2009, and agreed to follow the advice and direction of the respondent. She confirmed it in writing on the same day. On December 10, 2009, she wrote a letter directly to the employer requesting written reasons for her termination, without advising the respondent.

[15] The complainant, Ms. Myles and another representative of the respondent conversed by telephone on January 8, 2010 to discuss the complainant's options with respect to her termination grievance. Ms. Myles asked her to confirm in writing whether she would agree to withdraw her grievances in exchange for her resignation and the removal of all disciplinary documents from her file. Ms. Myles wrote as follows in a letter to the complainant dated that same day:

. . .

> *I would also reiterate that the union has agreed to provide you with representation in relation to trying to attain a settlement if you decide that is the direction you wish to take; and you have agreed to not communicate with the employer during this time-frame.*
>
> *I look forward to your quick response.*

. . .

[16] On January 20, 2010, Ms. Myles wrote to the complainant stating that she had until January 29, 2010 to respond to the January 8 letter, or her file would be closed. Ms. Myles advised her of her right to represent herself were her file closed.

[17] The complainant responded on January 24, 2010, maintaining her position on her grievances and not agreeing that the respondent should discuss a settlement of her grievance. On January 27, 2010, Ms. Myles wrote to the complainant, stating that her file with the respondent would be closed. The reasons given for closing the file were that the complainant did not agree to allow the respondent to pursue a settlement of the grievances, that she continued to communicate directly with the employer (as shown by her correspondence of December 10, 2009) and that she had little or no trust in the respondent. The complainant was also advised of her right to represent herself for her termination grievance.

[18] On January 28, 2010, the complainant asked the respondent to take her grievances to a hearing. The respondent did not reply to this request. On September 17, 2010, she asked for representation at the grievance hearing; the respondent refused.

[19] On January 24, 2010, the complainant asked for a copy of her file, held by the respondent, in accordance with "National Component Policy 25." The respondent refused.

[20] The complainant filed a complaint with the PSLRB on April 23, 2010 and another complaint on April 27, 2010. As noted, the two complaints have been joined because they both relate to the same events. In her complaint, the complainant alleged that:

- the respondent refused to continue representing her in her grievances against her employer;
- the respondent threatened her that if she did not resign from her position "they would blacklist me and I would never work again"; and
- the respondent failed to investigate her grievances.

[21] In her complaint, the complainant states that the respondent did not listen to tapes she had made of conversations related to her dispute with the employer and "therefore, they have never fully investigated the situation".

[22] In her rebuttal to the respondent's submissions, the complainant provided further particulars of the alleged threat by the respondent:

> *. . . The union intimidated me by telling me that every time a potential employer calls the SSO they would be told I was fired and this is a personal blemish that will follow me both personally and professionally for the rest of my life. This is known as blacklisting and blackmail. . . .*
>
> . . .

[23] Also in her rebuttal to the respondent's submissions, the complainant alleged that grievances filed by her union on her behalf (other than the grievance against her termination of employment) were filed outside of the time limits in her collective agreement. She also stated that the employer had agreed to hear her grievances in October of 2010.

III. Summary of the arguments

A. For the complainant

[24] In her complaints, the complainant alleged that the respondent breached its duty of fair representation (as set out in section 187 of the *PSLRA*) by closing her file and by not representing her, by threatening to blacklist her and trying to intimidate her to resign, and by its failure to fully investigate the problems that led to the termination of employment. She also alleged that the respondent failed to provide her a copy of its file of her grievances.

B. For the respondent

[25] The respondent denied that it threatened the complainant or that it attempted to intimidate her. The complainant was repeatedly advised that, as a term employee, her rights with respect to any grievance filed about the termination of her employment

would be limited. The complaints contained no new information that would have warranted a change to the respondent's approach to the grievance.

[26] The respondent submitted that the complainant provided no evidence to establish a *prima facie* violation of section 187 of the *PSLRA*.

[27] The respondent submitted that a bargaining agent is allowed a fair amount of discretion when deciding whether to represent a member of the bargaining unit in the grievance process and how to represent that member, as long as it does not do so in bad faith or in an arbitrary or discriminatory manner. The parameters of a bargaining agent's duty of fair representation were established by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509. The Court held that a bargaining agent sufficiently meets the duty by demonstrating that it has examined the circumstances of the grievance, considered its merits and made a reasoned decision as to whether to pursue the grievance. I was also referred to *Kowallsky v. Public Service Alliance of Canada et al.*, 2007 PSLRB 30 (upheld in 2008 FCA 183). In the present complaints, the respondent submitted that, after a careful review of the file, it provided the complainant with a detailed explanation of the reasons for not continuing to represent her. At all times, the respondent represented the complainant in good faith, objectively, with honest integrity, with competence and without hostility.

[28] The respondent submitted that the complainant refused to follow its advice and guidance and that she decided to represent herself to the employer. The complainant also stated in writing her lack of trust in the respondent, which she demonstrated by taping all conversations with her representatives. Her actions made it virtually impossible for the respondent to continue to represent her. The decision to withdraw representation was not taken lightly. The respondent repeatedly tried to obtain the complainant's cooperation. Only when she refused to follow its advice did the respondent withdraw its representation. In *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107 (at paragraph 32), the Board held that a grievor must take the necessary steps to protect his or her own interests and that he or she must collaborate with his or her bargaining agent by providing the required information and by following its advice. If a grievor neglects those obligations, he or she risks having his or her complaint dismissed.

[29] The respondent submitted that an employee does not have an absolute right to be represented by his or her bargaining agent and that he or she cannot dictate the extent or the manner of the representation. In *Ouellet*, the Board recognized that there was no absolute right to representation and that, in light of the parties' irreconcilable positions on the grievance, the respondent did not breach its duty of fair representation in that case when it withdrew its representation.

[30] The respondent also submitted that the complaints were untimely. Issues that form part of the complaints go back to August 2009, when the grievances were filed, and to fall 2009. At this time, the complainant expressed her distrust of the respondent and commenced taping phone conversations. This complaint is clearly outside the 90-day time limit provided for in subsection 190(2) of the *PSLRA*. The complainant knew the facts that gave rise to her complaints yet did nothing to assert her rights. Complaints filed outside the time limit should be dismissed without hearing the merits: *Panula v. Canada Revenue Agency and Bannon,* 2008 PSLRB 4.

C. Complainant's reply

[31] The complainant submitted a lengthy reply as well as documentation relating to the complaints and more broadly, to her disputes with her employer. I have summarized only those portions of her submission that relate to the complaint against the respondent. In addition, the complainant provided medical reports related to her dispute with her employer. The medical reports are not relevant to the complaint and contain personal medical information. For those reasons, I have ordered sealed those documents containing medical information.

[32] The complainant alleged in her submissions, that the respondent did not meet the deadlines for filing her grievances (other than for her grievance against the termination of her employment). She alleged that the respondent was building a case for closing the files because it had not filed the grievances in a timely manner.

[33] The complaint stated that the respondent did not adequately investigate her grievances and that it did not listen to her taped conversations with employer representatives and others. She submitted that that demonstrated bad faith and that it was arbitrary and discriminatory.

[34] The complainant submitted that she had always cooperated with the respondent.

[35] The complainant submitted that the respondent agreed to represent her only if she agreed to resign, which she submitted was bad faith. She stated that the respondent intimidated her by telling her that, every time a potential employer called her employer, they would be told that she had been fired and that it would be a blemish on her personal and professional record for the rest of her life, which she submitted was "blacklisting and blackmail."

[36] The complainant submitted that the respondent's refusal to provide her with a copy of her file demonstrated bad faith and was arbitrary and discriminatory.

[37] The complainant submitted that the respondent made its decision to close her file before she had sent her reply.

[38] The complainant submitted that she filed her complaints against the respondent within the 90-day time limit.

D. Respondent's reply

[39] The respondent submitted that it filed all the grievances in a timely manner.

IV. Reasons

[40] The respondent raised the following two issues: the timeliness of the complaints and the failure of the complainant to establish a *prima facie* case of a breach of the duty of fair representation (section 187 of the *PSLRA*).

[41] The final decision of the respondent to no longer represent the complainant was made on January 27, 2010. The complaints were filed on April 23 and 26, 2010, respectively. Although the complainant had expressed concerns over her representation before January 27, 2010, the final decision of the respondent is the appropriate date for calculating the time limit for filing a complaint under the *PSLRA*, in the circumstances. Therefore, I find that the complaint is timely.

[42] One of the allegations raised by the complainant was the failure of the respondent to provide her with the grievance files in its possession. This allegation was not part of her original or amended complaint and is therefore not timely.

[43] The complainant raised the failure of the respondent to file grievances within the time limits in the collective agreement in her submissions but not in the original or amended complaint. This allegation is therefore untimely and I cannot consider it. I

note, however, that the complainant has stated that the employer is considering her grievances and there is no evidence that the employer has raised an objection to timeliness.

[44] Before turning to the allegations contained in the complaint, it should be noted that the evaluation of the merits of an unfair labour practice complaint does not involve an assessment of the merits of the complainant's grievances. The scope of the decision on the duty of fair representation is to determine whether the respondent's decision not to represent the complainant was made in bad faith or was arbitrary or discriminatory.

[45] The complainant is of the view that the respondent should have provided her with representation. She also complained that the respondent attempted to intimidate or coerce her into reaching a settlement. For the reasons to follow, I have concluded that the complainant has not made a *prima facie* case of a breach of the *PSLRA*. In other words, even were all her allegations proven, there would be no grounds for a finding that the respondent acted in bad faith or in an arbitrary or discriminatory manner.

[46] The right to representation by a bargaining agent is not an absolute right. As stated as follows in *Halfacree*:

. . .

> ***17.*** *The respondent, as a bargaining agent, has the right to refuse to represent a member, and a complaint to the Board is not an appeal mechanism against such a refusal. The Board will not second-guess the bargaining agent's decision. The Board's role is to rule on the bargaining agent's decision-making process and not on the merits of its decision….*

. . .

[47] It is sufficient for a bargaining agent to demonstrate that it has examined the circumstances of a grievance, considered its merits and made a reasoned decision as to whether to pursue the case (*Canadian Merchant Service Guild*). In addition, a grievor is obligated to cooperate with his or her bargaining agent and to follow its advice (*Ouellet*). A grievor is also obligated to ensure that all representations made to the employer about the grievance either go through his or her bargaining agent representative or are made by the grievor with the bargaining agent's knowledge. A

bargaining agent is not required to act as if it were counsel for the complainant: *Grant v. British Columbia Labour Relations Board,* 2008 BCSC 1576; affirmed 2010 BCCA 246; leave to appeal to the SCC denied (November 4, 2010).

[48] The respondent made sufficient efforts to obtain information from the complainant about her grievances and it gave her opportunities to provide further information. The respondent gave the complainant a number of opportunities to agree with a proposed course of action that was reasoned and based on an objective evaluation of the file. The complainant refused to accept that advice. Its conclusion that a settlement of the termination grievance was the best outcome for the complainant was not unreasonable, in the circumstances of this case. The respondent reconsidered its intention to close the grievance files after the complainant spoke to the president of the National Component. These actions of the respondent do not demonstrate a closed mind on the part of the representatives and are not arbitrary or discriminatory.

[49] The respondent directed the complainant to refrain from corresponding directly with the employer about her grievances. She refused to comply. It is not bad faith, arbitrary or discriminatory to insist that a grievor not deal directly with his or her employer about specific grievances.

[50] The respondent denies that any threats were made by its representatives or that it in any way intimidated the complainant. Since I am assessing the complaint on a *prima facie* basis, I will assume that the comments alleged to have been made by the respondent are true. The alleged comments by the respondent do not constitute a breach of section 187 of the *PSLRA.* In cases of discipline, a grievor has the right to pursue a grievance on her own, so a determination by a bargaining agent not to represent the grievor cannot be regarded as intimidation. The alleged statement made by the respondent is not a threat but an honest and forthright observation of the possible outcome of failing to reach a settlement. This statement cannot be regarded as arbitrary, discriminatory or as having been made in bad faith.

[51] The complainant alleged that the respondent had not fully investigated the events that led to her dispute with the employer. In the complaint, she linked this directly to the refusal of the respondent to listen to conversations she had recorded. A bargaining agent is not required to conduct an investigation of a grievance in accordance with the grievor's instructions. The bargaining agent is free to conduct an

investigation in the way he sees fit, as long as that investigation is not in bad faith, arbitrary or discriminatory. In this case, the respondent discussed the grievance directly with the complainant and did not conduct its investigation in bad faith, nor in an arbitrary or a discriminatory manner.

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

(The Order appears on the next page)

V. Order

[53] The complaints (PSLRB File Nos. 561-24-454 and 561-24-455) are dismissed.

December 7, 2010.

Ian R. Mackenzie,
Vice-Chairperson