Date: 20101210

File: 561-02-165

Citation: 2010 PSLRB 129

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

KENNY ROBERTS

Complainant

and

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN (UCCO-SACC-CSN)

Respondent

Indexed as
Roberts v. Union of Canadian Correctional Officers - Syndicat des Agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

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

REASONS FOR DECISION

Before: Michele A. Pineau, Vice-Chairperson

For the Complainant: John M. Farant, counsel

For the Respondent: John Mancini, counsel

Decided on the basis of written submissions filed September 29 and October 18, 2010.

I. Complaint before the Board

[1] Kenny Roberts ("the complainant") is a member of the bargaining unit represented by the Union of Canadian Correctional Officers – syndicat des agents correctionnels du Canada – CSN ("the union").

[2] On August 31, 2010, I decided the matter of *Roberts v. Union of Canadian Correctional Officers - Syndicat des Agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2010 PSLRB 96, in which I dismissed as untimely three allegations that the respondent union had breached its duty of fair representation as provided in section 187 of the *Public Service Labour Relations Act* (*PSLRA*).

[3] However, I took under reserve of further written submissions one allegation in Mr. Roberts' complaint that the union had failed to seek judicial review of the adjudicator's decision in *Roberts v. Deputy Head (Correctional Service of Canada),* 2007 PSLRB 28 *(Roberts #1)*. Submissions were filed on September 29 and October 18, 2010.

II. The complainant's arguments

[4] In support of its position that the union was required to pursue judicial review of the adjudicator's decision in *Roberts #1*, Mr. Roberts' counsel argues the following:

- the complainant was not alerted to his right to judicial review in a timely fashion;
- the legal opinion provided by the union to the complainant was untimely;
- because the legal opinion was untimely, the complainant was unable to respond within the two weeks he had to consider it;
- the judicial review process is too complex to expect the complainant to address it on his own; and
- the union failed to meet a "general duty" of fair representation in that case.

III. The union's arguments

[5] The union denies that it breached its duty of fair representation, for the following reasons:

- the *PSLRA* allows an employee to grieve his termination and to have the grievance adjudicated without representation by the union;
- in disciplinary matters, including termination, the union does not have the exclusive right to represent the complainant after an adjudicator's decision;
- the complainant had the individual right and interest to seek judicial review on his own, without the union's assistance;
- the union met with the complainant 10 days after the issuance of the adjudicator's decision (on March 15, 2007) and informed him that there were no grounds for judicial review;
- the union provided the complainant with a legal opinion on March 21, 2007, reminding him that he had until April 5, 2007 to file an application for judicial review by the Federal Court;
- the Public Service Labour Relations Board ("the Board") has no jurisdiction to compel the union to initiate an application for judicial review or to decide on the timeliness of such an application; and
- the complainant has not demonstrated the existence of any grounds for judicial review.

IV. Reasons

[6] The single issue to be decided is whether the union was under an obligation to seek judicial review on Mr. Roberts' behalf following the adjudicator's decision in *Roberts #1* dismissing his termination grievance.

[7] Section 208 of the *PSLRA* provides that an employee may present an individual grievance, should he or she feel aggrieved as a result of a matter affecting his or her terms and conditions of employment. Section 209 further provides that an individual grievance may be referred to adjudication in the case of a disciplinary action resulting in termination. By contrast, an employee may not present an individual grievance concerning the interpretation of a collective agreement or an arbitral award nor refer it to adjudication without the approval and representation of the bargaining agent.

[8] This legislative regime differs from the general rule found in most collective agreements, in which the union has the exclusive authority to represent its members for the purpose of the grievance and adjudication procedures. Such aggrieved employees cannot refer a grievance to adjudication or be a party to an adjudication proceeding.

[9] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, and *Centre hospitalier Régina Ltée v. Labour Court,* [1990] 1 S.C.R. 1330, the Supreme Court of Canada set out two essential principles that should govern a union's obligations to represent its members at arbitration. In my view, these principles are relevant to a union's decision to pursue a grievance at adjudication process as well as where the grievor requests the judicial review of the decision of an adjudicator. While the union held an exclusive right representation in those cases, this aspect does not detract from the broader application of these principles to the union's relationship with any bargaining unit member.

[10] In *Noël*, the Supreme Court held that the adjudication process should be the normal and exclusive method of resolving conflicts arising in the course of administering a collective agreement and from disciplinary action. Judicial review should not routinely be viewed as a "right to appeal" because it compromises the parties' expectation of stability in labour relations. To apply for judicial review as a matter of course where adjudication is unsuccessful offends the very principle of the union's exclusive right of representation and the legislative intent of the finality of the adjudication process. Hence, a union's decision whether or not to commence judicial review proceedings was held to fall within the reasonable exercise of its discretion in conducting collective labour relations with the employer.

[11] In *Centre hospitalier Régina*, the Supreme Court held that a union's exclusive right of representation and its duty of fair representation do not necessarily cease once a grievance has been referred to adjudication. Thus, the union must take into account the nature of the rights that the grievor seeks to enforce by his or her grievance. The Supreme Court outlined two basic obligations. The first is that a union must carefully consider the merits of a grievance when deciding to refer it to adjudication and the second is that, if the union decides that the grievance has merit, it must represent the grievor diligently at all subsequent stages of the grievance procedure.

[12] I will now examine Mr. Roberts' arguments based on these principles.

[13] Mr. Roberts' first argument is that the union's decision not to refer the adjudicator's decision to judicial review and his individual right to do so were not communicated to him in a timely fashion. In support of his position, he states that my jurisdiction to determine such an issue is set out in *Lai v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 33, while the failure to alert him of his rights in a timely fashion should be viewed as discriminatory as stated in *Jakutavicius v. Public Service Alliance Canada*, 2005 PSLRB 70. Mr. Roberts further argues that, based on *Teeluck v. Public Service Alliance of Canada* 2001 PSSRB 45, the legal opinion provided to him came so late in the process that it equates to it not having been provided at all.

[14] In *Lai*, the grievor challenged the union's decision not to pursue judicial review of a decision rendered by an appeal board established under the *Public Service Employment Act* (*PSEA*). While the Board Member had some doubts that a bargaining agent's duty of fair representation extended to matters outside the scope of the *Public Service Staff Relations Act* (*PSSRA*), she decided the matter by examining how the duty was couched in subsection 10(2) of the *PSSRA*. She held that the bargaining agent in that case had not only turned its mind to the rights of the complainant, it had also sought and relied in good faith on a legal opinion from an expert independent from the bargaining agent. She stated that, even though an application in the Federal Court may be successful, in and of itself it would not mean that a complainant did not receive fair representation from his or her bargaining agent.

[15] In *Jakutavicius*, the bargaining agent decided not to refer the complainant's grievances to adjudication. The bargaining agent also failed to inform her of her right to file a judicial review application against the final-level reply given to her classification grievance, a subject matter that is not within the jurisdiction of the Board. The Board Member allowed that part of the complaint with respect to the failure to advise the complainant in a timely fashion of her right to file a judicial review and referred the matter back to the parties for them to agree on a remedy.

[16] In *Teeluck*, an employee member of the same bargaining unit accused the grievor of sexual harassment. Contrary to its usual policy, the Public Service Alliance of Canada (PSAC) represented the grievor on the issues of termination and reinstatement and not only on the issue of remedy, as was provided in its policies on representation in that type of case. The PSAC was ultimately unsuccessful in having the grievor

reinstated. The grievor pursued the matter before the Federal Court and was unsuccessful. Before the Board, the complainant alleged that, by representing him, the PSAC had put itself in a situation of conflict of interest so that he was not given the opportunity to respond fully to the accusations. The Board Member held that the bargaining agent was not accountable for the outcome of the adjudication process. She held that the PSAC's decision to discontinue representation beyond the adjudication stage was based on a comprehensive analysis by its legal services provided in writing to the complainant and that it did not reflect on the quality of the representation the complainant had received during the adjudication process.

[17] With respect to Mr. Roberts' argument that he was not advised of his right to individually seek judicial review or that the advice provided to him was untimely, the chronology is the following. The adjudicator issued his decision on March 5, 2007. Mr. Roberts met with Michel Bouchard, the union representative, on March 15, 2007 and was told that there were no grounds for judicial review. Mr. Bouchard provided him with a legal opinion on March 21, 2007 that the judicial review of the adjudicator's decision would be futile, followed with an email on March 23, 2007 that stated that Mr. Roberts had the option of applying for judicial review on his own before April 5, 2007.

[18] Consequently, when the union told Mr. Roberts on March 15, 2007 that he had until April 5, 2007 to file an application for judicial review, Mr. Roberts had the necessary knowledge to understand that the timelines for filing an application for review were finite. At that point, he had 21 days left to file an application within the 30-day period for such a filing. After he received the legal opinion, Mr. Roberts still had 13 days to file the application. Those two periods were ample time. Therefore, on this point, I dismiss Mr. Roberts' argument that the union's notice was so short that it constituted an absence of notice.

[19] I also find that the union turned its mind to Mr. Roberts' rights, as set out in *Centre hospitalier Régina*. It met with him within days of the adjudicator's decision to inform him that judicial review was not being considered and provided him with a legal opinion shortly after. As explained in *Noël*, judicial review is not just a matter of course; the union is entitled to its own opinion as to whether there are reasonable chances of success in pursuing avenues of redress. In this case, the union's decision not to proceed with judicial review was within the reasonable exercise of its discretion

in the conduct of its business with the employer and the finality of the adjudication process and more generally in keeping with its duty to balance the interest of an individual grievor with those of the overall membership.

[20] I am not persuaded that *Lai* is dispositive of my discretion to order the union to proceed to judicial review, as the complainant proposes. *Lai* is easily distinguished on several fronts. First, the matter involved the decision of an appeal board established under the *PSEA*, which is reviewable only by the Federal Court. Second, the Board Member was clearly hesitant about a bargaining agent's duty of fair representation other than within the parameters of the *PSSRA*. Third, *Lai* held that the union was entitled to rely in good faith on a legal opinion in making its decision not to proceed to judicial review.

[21] Nor does the decision in *Jakutavicius* assist Mr. Roberts' position. In that case, the bargaining agent clearly failed to inform the grievor of her right to file a judicial review application. This does not equate to the union's alleged failure to provide timely advice. *Teeluck* is also unhelpful. In that case, the Board agreed that the union was entitled to rely on an analysis provided by its legal services to decide whether to pursue judicial review.

[22] Mr. Roberts' evidence was that he consulted Angus McLeod, counsel in private practice, who apparently stated that there were grounds for judicial review of the adjudicator's decision in *Roberts #1*. Mr. Roberts did not provide details at any stage of the hearing or in his written submissions as to what those grounds might be. His sole reason for not retaining Mr. McLeod's services was his financial circumstances. Mr. Roberts then admitted in cross-examination that he did not file an application for judicial review because he felt that it was the union's responsibility. These facts negate his position that he was unable to act on his own on a timely basis.

[23] Pursuant to sections 208 and 209 of the *PSLRA*, a union does not have an exclusive right to represent a grievor with respect to disciplinary matters, including termination. In practical terms, this means that, if a union decides not to pursue a grievance at any stage of the process, the grievor may do so on his or her own. In this case, Mr. Roberts could have filed an application for judicial review without the assistance of the union, but failed to do so.

[24] Mr. Roberts also argued that, because the legal opinion that he received was untimely, he was unable to respond within the two weeks he had to consider it. Mr. Roberts' evidence at the hearing contradicts this argument. In an email to Mr. Bouchard, dated March 20, 2007, he stated the following:

. . .

> *Yet you clearly stated in your office (March 15, 2007) that UCCO was through with this case and that you felt there were not grounds for review.*
>
> *Once again, I disagree with you. I have sought the assistance and guidance of a lawyer who adamantly agrees that there are grounds for a Judicial Review and was shocked that the UCCO representatives would so easily give up on an opportunity to represent a Union Member to the fullest …*

. . .

[Emphasis added]

In view of these circumstances, I find that Mr. Roberts' had ample time to file an application for judicial review.

[25] With respect to the allegation about the judicial review process being too complex for him to address on his own, Mr. Roberts provided me with no evidence of this, either in his testimony or in his written submissions. His evidence is that he did not engage the services of Mr. McLeod because of his limited financial circumstances and because he eventually decided that it was the union's responsibility. Mr. Roberts did not provide any evidence that he even attempted to file an application for judicial review.

[26] I must also dismiss the argument that Mr. Roberts was owed a "general duty" of fair representation as a union member based on *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79. In *Savoury*, the Board Member held that the union had breached its duty of fair representation because it had not explained to the complainant that he could have proceeded to adjudication on his own. The Guild assessed the unlikely success of the grievance at adjudication based on a cursory and biased view of the case by an inexperienced Guild representative. The facts in *Savoury* are dissimilar with those in the instant matter and do not persuade me that this case stands for a so-called "general duty" as opposed to a legislated duty of fair representation. In his

submissions, Mr. Roberts did not explain what he meant by a "general duty" of fair representation or why section 187 of the *PSLRA* should be applied any differently in the circumstances of this case.

[27] Moreover, Mr. Roberts did not provide any convincing arguments or legal authority for his position that the Board has the jurisdiction to compel the union to initiate an application for judicial review. Judicial review does not focus on a re-examination of the facts but rather on the degree of deference to be accorded to a decision maker with respect to a particular category of question. Judicial review is not a means for a court to substitute its decision for that of an adjudicator. The existence of a privative clause, as found in section 233 of the *PSLRA* is the indication that adjudicators' decisions are assessed by reviewing courts founded on what is now known as the reasonableness standard, as set out *Dunsmuir v. New Brunswick*, 2008 SCC 9. The legal opinion provided to Mr. Roberts, addresses these very issues, even though it pre-dates *Dunsmuir*.

[28] In this case, I find that the union's decision to discontinue representation beyond the adjudication stage was based on a comprehensive analysis of the legal issues involved and their application to the adjudicator's decision.

[29] As challenging as the duty of fair representation in discharge cases may be for the union and as distressing as the loss of employment by discharge may be for a grievor, requiring a union to routinely seek judicial review of an unsuccessful adjudication is not a wise nor desirable solution. Keeping in mind the institutional interests of the collective bargaining relationship, unions must be able to make the difficult call of the extent of its representation in discharge cases.

[30] Consequently, I find that the union did not breach its duty of fair representation as provided in section 187 of the *PSLRA* by not referring the adjudicator's decision in *Roberts #1* to judicial review.

[31] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[32] The complaint is dismissed.

December 10, 2010.

Michele A. Pineau,
Vice-Chairperson