Date: 20101123

File: 561-02-452

Citation: 2010 PSLRB 124

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

MONIKA MÉNARD

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Ménard v. Public Service Alliance of Canada

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: Chantal Beaupré, counsel

For the Respondent: Patricia Harewood, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
November 10, 2010.
(PSLRB Translation)

I. Complaint before the Board

[1] On April 26, 2010, Monika Ménard ("the complainant") filed a complaint against the Public Service Alliance of Canada ("the respondent" or PSAC), alleging that it had engaged in an unfair labour practice within the meaning of section 185 of the *Public Service Labour Relations Act* ("the *Act*"). In *Ménard v. Public Service Alliance of Canada,* 2010 PSLRB 95, the Public Service Labour Relations Board ("the Board") found that Ms. Ménard's complaint was well founded and that the respondent had failed to comply with section 187 of the *Act.* Therefore, the Board decided to call the parties to a new hearing on November 10, 2010, to determine the appropriate remedy.

[2] The complaint, dated April 26, 2010, was filed after the respondent withdrew a grievance that it had filed on November 4, 2009, on the complainant's behalf. The grievance statement and corrective action requested read as follows:

> [Translation]
>
> *Grievance statement:*
>
> *I contest the employer's actions because my workplace has not been harmonious and beneficial.*
>
> *Corrective action requested:*
>
> *That my workplace be made harmonious and beneficial, that I not be prejudiced for filing this grievance, that I receive compensation in salary and that I receive full redress.*

[3] Not long after the grievance was filed, the complainant found a job elsewhere in the federal public service and left the department against which the November 4, 2009 grievance had been filed. The department notified Raymond Brossard, a representative of the respondent, of the complainant's departure. Mr. Brossard contacted the complainant to confirm that she had a new job. The complainant did not respond. Mr. Brossard contacted the complainant again and asked her to confirm, before November 27, 2009, whether she had accepted a job elsewhere since, if that were true, he would not be able to follow up on the grievance "[translation] . . . because it would no longer be applicable." On November 26, 2009, the complainant responded to Mr. Brossard but did not indicate whether she had accepted a new job. On November 27, 2009, Mr. Brossard again asked the complainant whether she was in a new position. On December 7, 2009, the complainant replied but did not say whether she was in a new position. After receiving that reply, Mr. Brossard again asked the

complainant whether she had a new job. On December 13, 2009, the complainant replied that she had a new job in the federal public service and that she was still paying union dues to the PSAC.

[4] On January 26, 2010, Mr. Brossard wrote to the complainant to inform her that he was closing her file because she did not notify him before November 27, 2009, of her new job. He also wrote that her former employer could no longer grant the relief sought in the grievance because she was in a new position. Additionally, Mr. Brossard informed her that he would notify her former employer that he considered the file closed.

[5] After analyzing the evidence and the case law, the Board found in 2010 PSLRB 95 that the respondent had not acted in bad faith or in a discriminatory manner but that its decision to withdraw the complainant's grievance had been arbitrary. The Board explained the reasons for its finding in the following paragraphs of that decision:

. . .

> *[25] Referring to the definition and the case law on the notion of arbitrariness, I find that the respondent, and specifically Mr. Brossard, acted in an arbitrary manner when it decided to close or not to continue handling the complainant's grievance. The arbitrary element in this case is not the respondent's refusal to follow up on the grievance but rather the reasons for that refusal.*
>
> *[26] When Mr. Brossard informed the complainant and the employer on January 26, 2010, that he would no longer continue handling the grievance, the complainant had informed him on December 13, 2009, that she had a job elsewhere in the federal public service. He acted arbitrarily by not following up on the grievance because the complainant should have informed him, as he had requested, before November 27, i.e., two weeks earlier. Nothing submitted to me satisfies me that, in the circumstances, those two weeks would have changed anything. Clearly, the complainant should have acted with greater diligence and should have informed Mr. Brossard by November 17, 2009 that she had a new job. However, the fact that she did not does not excuse the respondent's decision. When it indicated to the complainant that it was closing the grievance file, the respondent had been informed six weeks earlier by the complainant that she had a new job. It seems that the respondent decided to "punish" the complainant because she failed to meet its deadline. The respondent did not provide*

> *me any explanation as to why the November 27, 2009 deadline was important. I have determined that it was imposed arbitrarily.*
>
> *[27] The other reason used for Mr. Brossard's decision not to continue handling the grievance was that the corrective action that it requested had become inapplicable given that the complainant's former employer could no longer grant it to her. In her grievance, the complainant requested a healthy workplace and that she not suffer prejudice for filing her grievance. On that point, Mr. Brossard's conclusion is self-evident given that the complainant no longer worked for her former employer. The complainant also asked for compensation in salary. The respondent did not submit any arguments to satisfy me that, in the circumstances, the complainant could not claim such compensation even through* [*sic*] *she no longer works for her former employer. Nor did the respondent establish that its conclusion was based on a serious study of the case, the nature of the lost wages at issue and the likelihood of being granted the requested redress. The decision to not continue handling the grievance might have been correct, but the reason given in this case is clearly arbitrary.*
>
> . . .

II. <u>Summary of the evidence</u>

[6] The complainant testified and filed several documents to support her claim that she suffered losses and damages because of the respondent's actions. The respondent did not summon any witnesses or file any documents.

[7] The complainant worked at the Translation Bureau until mid-November 2009 and then transferred to the Department of Justice. The complainant testified that she left the Translation Bureau because she could no longer work there after enduring harassment for seven years, especially since 2008. As shown by the medical certificates filed at the hearing, her physician had suggested that she change jobs.

[8] The complainant's experiences at work seriously affected her health. She had to take extended sick leave and then apply for long-term disability benefits. She was on paid sick leave for 13 weeks and then received disability benefits equal to 70% of her pay for 4 months. The monetary value of the 13 weeks of sick leave is $13 000. The difference between the disability benefits and the pay that she would have received is $8625.

[9] The complainant required the services of a psychologist from July 2008 to November 2009 to help her deal with her then-current and past experiences at work. She spent $859 on those services. She stopped seeing the psychologist after November 2009.

[10] In 2008, the complainant's salary was $83 547, and her union dues were $1099. Her union dues decreased in 2009 because she was on sick leave for part of that year.

[11] The complainant testified that she was depressed in fall 2009. In November and December 2009, Mr. Brossard repeatedly asked her whether she had changed jobs. The complainant felt harassed by Mr. Brossard's insistence. In January 2010, Mr. Brossard withdrew the complainant's grievance. The complainant felt abandoned and became anxious, which affected her work because she continued to doubt herself.

[12] The complainant declared outright that she did not want to reactivate her November 2009 grievance. She no longer wanted to take leave from her current job to face her former employer and deal with the problems of the past. Under cross-examination, the complainant qualified her statement, stating instead that she was not sure whether she was prepared to go through with it.

[13] The complainant filed a bill of costs detailing her lawyers' fees and disbursements incurred preparing for and participating in this hearing. The bill includes fees and disbursements totalling $6398.63.

III. Summary of the arguments

A. For the complainant

[14] The complainant claimed that she was entitled to appropriate redress for the hardship that she suffered because the respondent arbitrarily withdrew her grievance. Even though paragraph 192(1)(*d*) of the *Act* provides for a specific remedy, subsection 192(1) grants the Board the authority to order the remedy that it considers necessary.

[15] Were the Board to order the respondent to apply to the Chairperson of the Board to extend the time to file a new grievance, the application could be denied, and the complainant would gain nothing. She would have no further recourse to assert the rights that her employer and then the respondent failed to honour. Moreover, the

complainant no longer trusts the respondent. Therefore, the Board should discard that option, which could be of no benefit.

[16] For seven years, the complainant was in a difficult situation at work that made her ill. She then suffered significant monetary losses that she hoped to claim from her employer through her November 2009 grievance. She also paid for the services of a psychologist. Since the respondent arbitrarily decided to withdraw the grievance, it is accountable for those losses and expenses. The complainant believes that the respondent must learn from its deficiencies and that it must compensate her appropriately.

[17] The complainant experienced stress, anxiety and loss of enjoyment of life after the respondent withdrew her grievance. The respondent was fully aware of the problems that the complainant was experiencing at work. The respondent let the complainant down, contrary to the commitments made when the grievance was filed in November 2009. In that situation, common law provides for $7500 to $15 000 in damages. The Board should order the respondent to pay the maximum damages provided under common law.

[18] The complainant seeks a letter of apology from the respondent. In addition, she seeks a refund of union dues for the period in which she did not receive the representation to which she was entitled. Finally, she asks that the Board order the respondent to reimburse her legal fees incurred preparing for and taking part in this hearing.

[19] The complainant referred me to the following cases: *Lauscher v. Berryere,* [1999] S.J. No. 115 (QL), Saskatchewan Court of Appeal, and *Mundell v. Wesbild Holdings Ltd.,* 2007 BCSC 1326.

B. <u>For the respondent</u>

[20] The respondent agreed with the decision in 2010 PSLRB 95 and did not apply to the Federal Court of Appeal for judicial review. The respondent is willing to agree to an appropriate remedy for the breach that it committed.

[21] The respondent believes that the appropriate remedy is to have the Chairperson of the Board extend the time limit so that the complainant may file a grievance that would effectively reactivate the grievance withdrawn in January 2010. The respondent

would fully represent the complainant in the application for an extension of time. However, the respondent pointed out that the complainant might not be willing to file an application, which cannot be filed without her consent.

[22] The complainant asked the Board to order the respondent to reimburse her for the financial losses that she incurred in 2009. Nothing in the evidence suggests that the respondent caused the losses. Rather, the complainant's employer caused her losses. Its actions affected her health. Moreover, the evidence does not suggest that the complainant should be awarded punitive damages. The Board has never awarded those damages as a remedy for a duty-of-fair-representation complaint.

IV. Reasons

[23] In 2010 PSLRB 95, the Board stated that the respondent's decision to withdraw the complainant's grievance in January 2010 had been arbitrary. The Board found that the respondent had failed to comply with 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.*

[24] Subsection 192(1) of the *Act* deals with remedies that the Board may order when deciding whether a complaint is well founded. The parts of subsection 192(1) that apply to this case read as follows:

> ***192.*** *(1) If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> *. . .*
>
> *(*d*) if an employee organization has failed to comply with section 187, an order requiring the employee organization to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on any proceeding that the Board considers that the employee organization ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;*

[25] Subsection 192(1) of the *Act* states that the Board may make any order that it considers necessary in the case of a contravention of the *Act*, and paragraph 192(1)(*d*) deals specifically with a contravention of section 187. The question then becomes whether the Board's order in this case must be limited to the remedies provided in paragraph 192(1)(*d*) or whether it may include other remedies. The answer lies in the meaning given to the word "including" in subsection 192(1) ("*notamment*" in the French version of that subsection).

[26] The usual meaning of a word is assumed unless a definition has been provided in the legislation. In *The Interpretation of Legislation in Canada,* 3rd ed., Pierre-André Côté writes the following:

> . . .
>
> *As it is presumed that the legislator wishes to be understood by the citizen, the law is deemed to have been drafted in accordance with the rules of language in common use.*
>
> . . .
>
> *Of course, the judge is expected to be familiar with the usual meaning of words. Yet it is common practice to refer to dictionaries, as these supposedly reflect linguistic usage applicable in a community at a given time.*
>
> . . .

[27] The dictionary *Le Petit Robert* lists the following words as synonyms of *notamment* (including): *particulièrement* (specifically), *singulièrement* (particularly) and *spécialement* (especially). It defines *notamment* as follows:

> [Translation]
>
> *in a manner worthy of note (to draw attention to one or more specific parts of a whole previously defined or understood).*

[28] Paragraphs 192(1)(*a*) to (*f*) of the *Act* refer to specific orders about the different breaches of the *Act* for which a complaint may be filed under subsection 190(1). A cursory analysis of paragraphs 192(1)(*a*) to (*f*) shows that the legislator's intent was to set out specific orders for the different breaches of the *Act.* In general, each order aims to return to the complainant what was lost or not received because of the breach of the *Act.* Specifically with respect to the duty of representation, paragraph 192(1)(*d*) states

that the Board may require the employee organization to take and carry on on behalf of the complainant or to assist the complainant to take and carry on any proceeding that the Board considers that the employee organization ought to have taken and carried on on the complainant's behalf or ought to have assisted the complainant to take and carry on. Clearly, the remedy directly addresses the breach committed.

[29] Under that legal framework, the word "including" in subsection 192(1) of the *Act* serves to introduce or "include" specific measures adapted to different breaches of the *Act.* However, it should not be understood as limiting the power of the Board to order other measures as long as they are logically connected to the breach committed.

[30] Subsection 99(1) of the *Canada Labour Code* ("the *Code*") includes provisions similar to those of subsection 192(1) of the *Act.* On the limited remedial authority of the Canada Industrial Relations Board (CIRB), the Supreme Court of Canada wrote the following in *Royal Oak Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 S.C.R. 369:

. . .

> *The remedy directed by the Board was not patently unreasonable; rather, it was eminently sensible and appropriate in the circumstances. A remedial order will be considered patently unreasonable where: (1) the remedy is punitive in nature; (2) the remedy granted infringes the* Charter; *(3) there is no rational connection between the breach, its consequences, and the remedy; (4) the remedy contradicts the objects and purposes of the Code. A rational connection did indeed exist between the breach, its consequences and the remedy and the remedy affirmed the objects and purposes of the Code.*

. . .

[31] Given the wording of subsection 192(1) of the *Act* and the rule in *Royal Oak Mines,* the remedy corrective measures that I may order in this case are not limited to those set out in paragraph 192(1)(*d*) of the *Act*; however, they must be logically connected to the breach of the *Act* and its consequences. The measures must not be punitive in nature, infringe the *Canadian Charter of Rights and Freedoms* or contradict the objectives of the *Code*.

[32] The complainant asked that the Board order the respondent to pay her the following: more than $20 000 for financial losses incurred in 2009, $859 for

psychologist's fees, union dues paid to the respondent, $15 000 in damages and $6398 for legal fees. The complainant also asked that the respondent send her a letter of apology.

[33] It is not appropriate to order the respondent to compensate the complainant for financial losses that she incurred in 2009 while ill. The complainant admitted that she was made ill by how her employer had treated her. Moreover, the losses in question were incurred well before the respondent violated the *Act.* The respondent cannot be held responsible for losses that it did not cause. The same holds true for the psychologist's fees for appointments that occurred before the respondent violated the *Act.* It is clear that the complainant did not consult the psychologist for trauma or issues resulting from the respondent's actions or decisions.

[34] The complainant demanded the repayment of all the union dues that she paid for the period in question. She has not specified the period; however, it covers at most January to November 2010. It is true that the complainant did not receive union representation for her November 2009 grievance because the respondent withdrew it. However, the complainant received all the benefits and protections of a collective agreement. She could have made use of union services had she experienced other problems at work. In short, she benefited from being a member of her bargaining unit. Therefore, I am not prepared to accept her claim for the reimbursement of the dues that she paid.

[35] The complainant claimed $15 000 in damages. In *Honda Canada Inc. v. Keays,* 2008 SCC 39, the Supreme Court determined that punitive damages are not appropriate in situations of malicious wrongdoing. In *Lauscher,* to which the complainant has referred me, the Saskatchewan Court of Appeal wrote the following:

. . .

> *Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency.*

. . .

[36] Nothing submitted to me led me to conclude that the respondent acted in a malicious, oppressive or high-handed fashion or even in a discriminatory manner or in bad faith. Rather, the respondent made an arbitrary decision. Moreover, no case law

has been submitted to me in which an administrative tribunal or court awarded punitive damages for a breach of the duty of representation. Therefore, I am not prepared to order the payment of those damages.

[37] The complainant asked for the reimbursement of her legal fees and costs. I am not entitled to order the payment of costs. In *Canada (Attorney General) v. Mowat and Canadian Human Rights Commission,* 2009 FCA 309, the Federal Court of Appeal considered the word "costs" a legal term and determined that an administrative tribunal may award costs only if its statute explicitly grants that authority. In *Mowat,* which is about the Canadian Human Rights Commission's authority to award costs without an explicit legislative provision, the Federal Court of Appeal wrote the following:

. . .

> *[95] I return to where I began. The quest is to determine whether Parliament intended to endow the Tribunal with the authority to award costs to a successful complainant. For the reasons given, I conclude that Parliament did not intend to grant, and did not grant, to the Tribunal the power to award costs. To conclude that the Tribunal may award legal costs under the guise of "expenses incurred by the victim as a result of the discriminatory practice" would be to introduce indirectly into the Act a power which Parliament did not intend it to have.*

. . .

[38] The complainant also asked that the respondent send her a letter of apology. I cannot order the respondent to write such a letter because it is contrary to case law (*National Bank of Canada v. Retail Clerks' International Union et al.,* [1984] 1 S.C.R. 269). On one hand, the order might be perceived as violating the freedom of opinion. On the other hand, it would be meaningless, since true apologies cannot be forced. Therefore, I am not prepared to order such a remedy. In rendering its decision in 2010 PSLRB 95, the Board already determined that the respondent violated the *Act.* That acknowledgement is sufficient, in my opinion.

[39] The respondent indicated that the appropriate remedy would be for it to help the complainant file an application with the Chairperson of the Board, so that he would consent to extend the time for filing a grievance, allowing her to file a new one. Even though that remedy is connected to the respondent's error, I believe that it is

useless and not necessarily helpful to providing the complainant with an opportunity to assert her rights with her previous employer. In fact, as the complainant pointed out, there is no guarantee that the Chairperson will grant an extension of time. If the Chairperson were to deny the application, the complainant would have no further recourse.

[40] The best remedy directly related to the respondent's arbitrary withdrawal of the grievance would be to reactivate the grievance and to order the respondent to provide full and complete representation. That would return the parties to where they were before the respondent's wrongdoing. Moreover, that measure aligns closely with the one provided in paragraph 192(1)(*d*) of the *Act.*

[41] In *Riley et al. v. Amalgamated Transit Union, Local 1374,* 2008 CIRB 419, the CIRB found that the union had failed in its duty of representation by arbitrarily withdrawing the complainants' grievance. The CIRB, invoking its remedial authority, which is similar to the Board's, ordered the union to refer the grievance that had been withdrawn to an adjudicator and to pay the fees of the lawyer that would provide representation at the adjudication. The Federal Court of Appeal approved the CIRB's decision in *Amalgamated Transit Union, Local 1374 v. Riley,* 2010 FCA 11.

[42] As in *Riley,* the respondent's withdrawal of the complainant's grievance was unlawful because it contravened the *Act.* Therefore, the Board can order the respondent to pursue the grievance. The grievance would be treated as if it had never been withdrawn.

[43] This case is different from *Canada (Attorney General) v. Lebreux,* [1994] F.C.J. No. 1711 (C.A.) (QL). In that decision, the Federal Court of Appeal rescinded the Board's decision to order two grievances reactivated and referred to adjudication after the union had withdrawn them because of an agreement between the parties. Shortly after the agreement was signed, the union found that it was not satisfactory for the employee. Therefore, the union asked the Board to set a new hearing date for the two grievances. The Board ordered the case reopened and approved its referral to adjudication. The main part of the Federal Court of Appeal's reasons for rescinding the decision reads as follows:

> ***12.*** *From the time the respondent discontinued his grievances the Board and the designated adjudicator became functus officio since the matter was then no longer before*

> *them. The Board was not required either to inquire into the merits or feasibility of such a discontinuance or to agree to accept or reject it. The act of discontinuance forthwith and without more terminated the grievance process in respect of which it was filed. Accordingly, no order or decision could be or was made within the meaning of the Act that could be the subject of cancellation or review under s. 27.*

[44] Unlike in *Lebreux,* the discontinuance of the grievance in this case was a breach of the *Act.* In *Lebreux,* the union sought to reactivate the grievances because the employee was unsatisfied with the agreement between the parties. That discontinuance was legitimate and was permitted by the *Act.* For the Court, the act of discontinuance terminated the grievance. However, the rule in *Lebreux* does not apply to cases in which the discontinuance was unlawful.

[45] In such a case, the Board has the authority to rescind the discontinuance and reactivate the grievance; otherwise, it would not be able to directly reinstate the recourse that was unlawfully denied the employee. Moreover, the redress provided in paragraph 192(1)(*d*) of the *Act* would then be futile and inapplicable for a breach of the duty of fair representation involving a grievance dealing with the application or interpretation of a collective agreement. Under subsection 208(4), the employee may not pursue such a grievance without the support of the bargaining agent. Given that a complaint with the Board against a decision by a union to withdraw such a grievance clearly cannot be heard before the grievance is withdrawn, the redress set out in paragraph 192(1)(*d*) does not apply if the Board does not have the authority to rescind the discontinuance and reactivate the grievance. The Board must necessarily have an active grievance before it to order the employee organization, as set out in paragraph 192(1)(*d*), to take and carry on any proceeding that it ought to have taken and carried on had it not been for the contravention of the *Act.*

[46] My decision to rescind the withdrawal of the grievance and to reactivate it has a definite impact on the employer for which the grievance case had been closed. The Board sent a copy of the complaint to the employer when it was filed in April 2010. In her complaint, the complainant asked that the respondent "file her grievance and follow up on it." The Board then sent the employer copies of the parties' written submissions and a copy of 2010 PSLRB 95, in which the Board found that the complaint was well founded. The Board then informed the employer about the hearing on November 10, 2010, which dealt solely with redress. The employer chose not to become involved in this case, even though it had a number of opportunities. In my

opinion, the harm to the employer by reactivating the grievance is considerably less than the harm to the complainant by not reactivating it. My decision merely implies that, in November 2010, the employer will again have before it a grievance that was before it in January 2010, before it was unlawfully withdrawn by the respondent.

[47] The complainant testified that she did not know whether she was prepared to "reactivate" her grievance because she no longer wanted to take leave from work to face her former employer. Although I understand the complainant's fears, it remains that only her employer may resolve her grievance, and therefore, the remedy ordered is the only possible remedy.

[48] Since the relationship of trust between the complainant and the respondent has been at least shaken by the respondent's arbitrary withdrawal of her grievance, I strongly suggest that the respondent consult her when it chooses the person to represent her at the different levels of the grievance process and at the referral to an adjudicator, as the case may be. I am not suggesting that the respondent pay for a lawyer for the complainant but rather that it consult the complainant before choosing the representative for the grievance.

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

(The Order appears on the next page)

Order

[50] I rescind the respondent's withdrawal of the complainant's grievance.

[51] I order the respondent to provide full and complete representation for the complainant's grievance.

November 23, 2010.

PSLRB Translation

Renaud Paquet,
Board Member