Date: 20101130

File: 525-34-27

Citation: 2010 PSLRB 126

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

IRENE J. BREMSAK

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Bremsak v. Professional Institute of the Public Service of Canada

In the matter of a request for the Board to reconsider a decision under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Paul Love, Board Member

For the Applicant: John Lee

For the Respondent: Steven Welchner, counsel

Decided on the basis on written submissions filed December 31, 2009, and February 5 and 28, 2010.

I. Request before the Board

[1] Irene J. Bremsak ("the applicant") requested that the Public Service Labour Relations Board ("the Board") reconsider a decision, *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103 ("the 2009 decision"), rendered on an unfair labour practices complaint (PSLRB File No. 561-34-202) against the Professional Institute of the Public Service of Canada (PIPSC or "the respondent"). The respondent submitted that the application should be dismissed because of a delay in filing and because it is without merit.

[2] This application for reconsideration was decided based on written submissions filed December 31, 2009, and February 5 and 28, 2010. The applicant has also filed other related applications with the Board.

II. Background

[3] The applicant was an elected official with the PIPSC. She initially filed two complaints with the Board, which were adjudicated in the 2009 decision. The background to the complaints is set out in that decision as follows, at paragraph 3:

> *[3] The first complaint started with an email sent by the complainant involving a controversy over a local election within the bargaining agent. The complaint was concerned that another member, who was selected as a successful candidate based on regional representation, did not step aside because of "ethical" issues and a "lack of morals." The person who had not stepped aside made a complaint to the president of the bargaining agent alleging that the complainant's comments were harassing and defaming. The bargaining agent's Executive Committee agreed with the complaint and wrote to the complainant on September 12, 2007, requesting that she apologize. The complainant declined to apologize, and the bargaining agent's Board of Directors apologized on the complainant's behalf. . . .*
>
> . . .

[4] The applicant's first complaint, PSLRB File No. 561-34-202, dated November 16, 2007, alleged that the request that she apologize and the apology given by the respondent's Board of Directors on her behalf was a form of penalty and discipline and was discriminatory, contrary to paragraph 188(*c*) of the *Public Service Labour Relations Act* ("the *Act*").

[5] After the applicant filed her first complaint with the Board, the respondent applied its *Policy Relating to Members and Complaints to Outside Bodies* ("the policy") to her. On April 9, 2008, it temporarily suspended her from four positions within the respondent to which she had been appointed or elected. The respondent advised the applicant that her temporary suspension would end once the outside procedures were terminated for any reason.

[6] The applicant filed a second complaint with the Board (PSLRB File No. 561-34-339), dated April 11, 2008, and filed with the Board on July 8, 2008, alleging that both the policy and its application to her situation were discriminatory.

[7] In both complaints, the applicant alleged violations of paragraph 188(*c*) and subparagraph 188(*e*)(ii) of the *Act*. An employee organization is prohibited from taking disciplinary action or imposing any form of penalty on an employee by applying its disciplinary standards in a discriminatory manner, as outlined in paragraph 188(*c*). Subparagraph 188(*e*)(ii) prohibits intimidation or coercion or the imposition of a financial or other penalty on a person because that person made an application under the *Act*.

[8] A hearing before a Board member was held from October 27 to 31, 2008 and from May 5 to 7, 2009. The parties filed further written submissions on May 22 and June 1, 17 and 25, 2009. The Board Member rendered a decision on August 26, 2009, the 2009 decision. The applicant was successful in part in her second complaint, and the respondent was directed to

1) rescind the application of the policy to the complainant;

2) amend the policy to ensure its compliance with the *Act*; and

3) restore the complainant's status as an elected official of the bargaining unit and to advise its members and officials in the form described in paragraph 131 of the 2009 decision that she was reinstated to all her elected and appointed positions, subject to the normal operation of the respondent's constitution and by-laws.

[9] The Board Member dismissed the applicant's first complaint. In this application, the applicant seeks a reconsideration of that decision. I note that other matters are

before the Board and the Federal Court about the respondent's alleged failure to restore the applicant's elected official status.

[10] The parties filed written submissions. This application for reconsideration can be dealt with appropriately by a decision based on those submissions. Therefore, I exercise my discretion under section 41 of the *Act* to decide this matter without an oral hearing.

III. The application

[11] The application for reconsideration sets out the following grounds in support of the applicant's request for a review of the decision concerning the finding of harassment and the apology made by the executive of the respondent:

> - *The Complainant submits that Board Member Steeves' decision was unreasonable.*
>
> - *The complaint submits that Natural Justice has not been complied with*
>
> - *The Complainant submits that the Respondents failed to conduct a hearing.*
>
> - *The Complainant submits that the Respondents failed to conduct an investigation as required by the Bylaws and policy.*
>
> - *The Complainant submits that she was not given a copy of Ms. Ramsay's complaint until well after the decision was rendered by the Respondents.*
>
> - *The Complainant submits that she was not given an opportunity to respond to Ms. Ramsay's complaint prior to the decision of the Respondents.*
>
> - *The Complainant submits that she was not given an opportunity to face her accuser.*
>
> - *The Complainant submits that she was not given an opportunity to cross-examine her accuser.*
>
> [*Sic* throughout]

IV. Summary of the arguments

A. For the applicant

[12] The applicant submitted that the respondent did not follow its own procedures when it penalized her. She was not given a copy of the complaint against her until after the decision was rendered, and she was not formally informed of the complaint and was not given an opportunity to respond. The respondent never appointed an investigator to submit a report before determining the complaint's validity. The respondent failed to conduct a fair hearing, which is an independent, unqualified right of procedural justice to which any person affected by an administrative decision is entitled: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at para 23.

B. For the respondent

[13] The respondent submitted that the Board Member addressed the applicant's argument of a breach of the principles of natural justice in the 2009 decision.

[14] The applicant did not raise any new evidence or arguments, and she seeks to re-litigate the merits of her allegation: *Czmola v. Treasury Board (Solicitor General - Correctional Service Canada)*, 2003 PSSRB 93. A reconsideration application is not an alternative method of appeal and does not permit the Board to draw a different conclusion from the evidence: *Quigley v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 125-02-77 (19980604).

[15] The reconsideration application should be summarily dismissed: *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39.

[16] In the alternative, the respondent submitted that, if the Board Member erred in the 2009 decision, such an error would not have any material or determining effect on the outcome of 2009 PSLRB 103.

[17] The request for review is untimely. No reasonable explanation has been advanced for the delay: *Chaudhry*.

C. Applicant's reply

[18] The applicant submitted that the *Act* stipulates no restrictions that would prevent the Board from reviewing, rescinding or making an order. There are no time restrictions. The applicant provided a 36-paragraph argument in support of her

allegation of a breach of natural justice. The applicant had the right to formal notice of the complaint filed against her, to examine and cross-examine witnesses, to present evidence and to make arguments (*Cardinal*). The applicant referred to the respondent's "Bylaw 24" and to a policy referred to by the applicant as Complaints *by Institute Members Holding Office or Appointed Positions*. The Board member referred to this policy as *Complaints by Institute Members Against Members Holding Office or Appointed Positions*. That policy provides only one level, not multiple levels, to deal with complaints. Therefore, the applicant was denied natural justice because she was not given her "full rights."

V. Reasons

[19] The applicant suggested that there are no restrictions on the reconsideration powers of the Board. That is an incorrect view of section 43 of the *Act*, which reads in part as follows:

> *Review of orders and decisions*
>
> ***43.*** *(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*
>
> . . .

[20] The word "may" means that the Board has discretion to review or re-hear a matter on its merits. Generally, reviews are not conducted in every case, as the parties must present all their evidence and arguments at the hearing. The hearing is meant to be a final determination of a matter, subject to the rights of review. Reconsiderations are not meant to be another kick at the can or a fresh attempt to re-litigate the merits.

[21] The scope of the reconsideration power under the former *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, was set out as follows at paragraph 11 of *Czmola*:

> *[11] As was acknowledged in* Public Service Alliance of Canada v. Treasury Board *(Board file no. 125-2-83), applications of this type under section 27 of the Act have been the subject of relatively few decisions. However, this is not to say that the Board has not, in the relatively few decisions it has issued, given parties clear and consistent directions on what is required in any such application. The seminal decision on the issue is* Public Service Alliance of Canada v. Treasury Board *(Board file no. 125-2-41). In this*

> *decision, the Board interpreted the scope of section 27 (formerly section 25) and decided that the purpose of section 27 was not to enable an unsuccessful party to reargue the merits of its case. Rather, the purpose was to enable the Board to reconsider a decision either in light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists: see* C.A.T.T. and Treasury Board and Federal Government Dockyard Trades and Labour Council East, *Board file no. 125-2-51. The Board held that it would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of. The power to reconsider a decision must be used judiciously, infrequently and carefully.*

[22] I am satisfied that it is appropriate to apply that standard when considering applications made under section 43 of the *Act*.

[23] A reconsideration application is not intended to be an alternative appeal or a re-hearing of an original decision. It is meant to deal with new evidence or arguments that could not have reasonably been anticipated or presented at the hearing. The authorities make it clear that the power should be used judiciously and sparingly. The steps of the test for considering reconsideration applications before the Board were summarized as follows at paragraph 29 of *Chaudhry*:

> *. . . The reconsideration must:*
>
> - *not be a relitigation of the merits of the case;*
> - *be based on a material change in circumstances;*
> - *consider only the new evidence or arguments that could not reasonably have been presented at the original hearing;*
> - *ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;*
> - *ensure that there is a compelling reason for reconsideration; and*
> - *be used ". . . judiciously, infrequently and carefully . . ." (*Czmola*).*

[24] As the applicant pointed out, in the 2009 decision, the Board Member set out the evidence, including information about the election in question and the complaint made against the applicant. The respondent had attempted to informally resolve the complaint against the applicant. The respondent had found that the language that the applicant had used in an email was intemperate, and it had apologized to the person targeted by the email.

[25] The Board Member dealt with the allegation of a breach of natural justice in detail as follows at paragraphs 78 to 80 of the 2009 decision:

> *78. This is an opportune time to address two factual issues raised by the complainant.*
>
> *79. It is true that the complainant was not given a copy of Ms. Ramsay's complaint at the first stage of the informal resolution process. The bargaining agent acknowledges that that was not done. There is no evidence that this was done deliberately or otherwise prejudiced the complainant (other than her speculation); I find it was a result of inadvertence on the part of the bargaining agent rather than any discrimination under paragraph 188 (c) of the Act. It is also the case that the complaint knew what Ms. Ramsay's complaint was about from the discussions she had in the informal process used to try and resolve the complaint. There were no particular factual issues because everyone knew the complaint was about the complainant's email of July 1, 2007. In addition, the complainant provided a lengthy submission dated October 22, 2007, to the Board of Directors as part of an appeal process (appealing the decision to allow Ms. Ramsay's complaint). That document indicates that the complaint received a copy of Ms. Ramsay's complaint on October 1, 2007. The complainant had the opportunity to present her case with the benefit of having the complaint, and the bargaining agent had the opportunity to consider the issue afresh in a process that was a rehearing of the matter. If there were any procedural errors early on in the process, I conclude that they were cured by the subsequent rehearing process.*
>
> *80. Finally, I might add that I do not agree with the complainant that all levels of every process are required to provide a full panoply of procedural rights. It is widely accepted that there are different and generally fewer protections at the first level of a process; this is so precisely to encourage settlements without rigid rules. For example, the first level of a grievance procedure under a collective agreement is very informal, the procedural requirements increase as a grievance proceeds to the Board, and then they*

> *are further increased if the grievance proceeds to other levels of adjudication such as the courts. As stated in* Veillette *1:*
>
> . . .
>
> 30 . . . Procedural fairness is not a rigid concept. It depends on the kind of power exercised and the implications of the measure contemplated as well as the practical conditions that result from a longer proceeding. The greater the consequences, the more the proceeding should be akin to a judicial procedure.
>
> . . .
>
> *It follows that an informal process such as was applied to the complainant's and Ms. Ramsay's situations do* [*sic*] *not need to include the extensive and rigour procedures of a full adversarial process, as urged by the complainant.*

[26] The Board Member set out in detail, at paragraphs 83 to 89, the findings concerning the argument that the PIPSC had disciplined or had imposed a penalty on the applicant by requesting that she apologize and by making an apology on her behalf when she refused. The Board Member concluded as follows at paragraphs 88 and 89:

> *88. Applying this analysis to the facts at hand, I conclude that the bargaining agent did not discriminate against the complainant. She wrote an ill-advised and intemperate email and Ms. Ramsay filed a complaint about the email. The Executive Committee considered the complaint and decided it should be allowed. They recommended that the complainant apologize to Ms. Ramsay, but the complainant maintained the righteousness of her position and refused to apologize. Indeed, she escalated the situation further by appealing the Executive Committee's decision and filing a complaint against the president. In the end, the Executive Committee apologized on the complainant's behalf, and the apology was sent to those who had received the complainant's first email.*
>
> *89. In my view, the bargaining agent was measured and fair in its conduct of the* [*sic*] *Ms. Ramsay's complaint as well as the complainant's complaint against Ms. Demers. There was a valid reason for the decision to recommend an apology and then to make the apology itself; therefore, it was not arbitrary. It was certainly not illegal. The complainant's email about Ms. Ramsay was objectionable, and the bargaining agent was entitled to enforce a minimum level of decorum among its members. Whether that enforcement creates political backlash is not something that concerns the Board. The bargaining agent's response was a remedial one based on a reasonable and valid distinction, the distinction*

> *being that the complaint's email about another member was worthy of some non-disciplinary response. Therefore, there was no disciplinary action or imposition of any form of penalty by applying the bargaining agent's standards of discipline in a discriminatory manner.*

[27] I have carefully reviewed the applicant's application as well as her 36-paragraph reply. In the 2009 decision, the Board Member canvassed the factual and legal issues in a full and detailed manner. The hearing was lengthy. The issue that gave rise to the applicant's first complaint was factually simple. It was about the applicant's conduct, which triggered a complaint by another member to the respondent. That caused the respondent to respond, ultimately with an apology for the applicant's intemperate language. An attempt was made to deal with the matter in a non-disciplinary way, and no sanctions were imposed on the applicant for her intemperate language. One might have thought that common sense would have prevailed. However, the Board Member noted that the applicant escalated the matter.

[28] The applicant's material for the reconsideration application alleged no change of circumstances. It raised no new evidence, facts or law that could not have been presented earlier. The complainant's application is simply an attempt to re-litigate the issues, which were fully canvassed before the Board at the original hearing.

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

(*The Order appears on the next page*)

VI. Order

[30] The review application is dismissed.

November 30, 2010.

Paul Love,
Board Member