Date: 20100610

File: 561-02-442

Citation: 2010 PSLRB 77

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

YANNICK LAROCQUE

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

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: Himself

For the Respondent: Johanne Bray, Professional Institute of the Public Service of Canada

For the Respondent: Stéphane Ferland, Treasury Board Secretariat

Decided on the basis of written submissions filed between February 10 and April 22, 2010.
(PSLRB Translation)

Complaint before the Board

[1] Yannick Larocque ("the complainant") was a junior project officer classified CS-01 with the Correctional Service of Canada ("the employer"). The complainant was hired on September 5, 2008 and was subject to a one-year probationary period from the time of his initial appointment. The purpose of the probationary period is to enable the employer to assess the performance and conduct of individuals recruited from outside the public service to determine whether they are suited to the positions to which they have been appointed. On September 4, 2009, the complainant was rejected on probation.

[2] On October 13, 2009, the complainant disputed his rejection in a grievance, alleging that it was unjustified.

[3] On October 30, 2009, the employer dismissed the grievance on the grounds that it was untimely and that the rejection was employment related in that the complainant's conduct and attitude at work demonstrated that he did not have the personal qualities required for a junior project officer position.

[4] On October 8, 2009, Isabelle Pétrin, on behalf of the complainant's bargaining agent, the Professional Institute of the Public Service of Canada ("the Institute"), advised the grievor before he filed his grievance that it would be pointless to file it. She provided the following reasons in her email:

> [Translation]
>
> *Good day Yannick:*
>
> *My assessment of your file remains the same, specifically that a grievance would be pointless and not adjudicable, and the review of your file showed that the termination was for legitimate employment-related reasons. Solely to preserve your right to file a grievance, you will find attached a completed grievance form ready for signing and forwarding to management.*
>
> *Your grievance must to be submitted to Bruno Paradis, either by electronic mail (*[address omitted] *make sure to indicate that you want an automatic reply when he receives the document) or by fax through Wendy Neil, Director, Human Resources* [telephone number omitted] *– to ensure the document's confidentiality.*
>
> *My recommendation remains the same, i.e., that your*

> *grievance should not be represented for the reasons already explained. However, you called the president, which was your right under the Institute's policies (Policy Manual, Section 11). Your request will likely be referred to Danielle Auclair, Manager, Representational Services, for a reply.*
>
> *The attached grievance is solely to protect your right in terms of the applicable time limits. You have until Tuesday, October 13, to sign it and send it to the CSC.*
>
> . . .

[5] The complainant filed a complaint under paragraph 190(1)(*f*) of the *Public Service Labour Relations Act* (*PSLRA*) on February 10, 2010. That provision refers to an unfair labour practice within the meaning of section 185. As corrective action, the complainant asked the Board to grant him reinstatement in his junior project officer position, lost salary retroactive to September 4, 2009, and "[translation] damages caused, injury to [his] person and [his] reputation."

[6] On March 15, 2010, the Institute submitted a preliminary response to the complaint and argued that it was untimely, that the grievor was not an employee who was a member of the bargaining unit when the complaint was made, and that the Institute did not act in a discriminatory or arbitrary manner or in bad faith toward the complainant.

[7] The employer submitted a response to the complaint on March 15, 2010 in which it argued that the complaint was not specific enough in terms of the actions alleged against the employer and that it was untimely. The employer argued that the complainant indicated on the form provided in the *Public Service Labour Relations Board Regulations* (Form 16) that he knew of the act, omission or other matter giving rise to the complaint on November 16, 2009. The complaint was made on February 16, 2010, 92 days after November 16, 2009. The *PSLRA* provides that the time limit in which to make a complaint is 90 days.

[8] On April 6, 2010, the complainant replied to the objections of the Institute and the employer by clarifying his allegations. The complainant did not respond to the objection raised by both the Institute and the employer that his complaint was untimely.

[9] On April 16, 2010, the Institute responded to the clarifications provided by the complainant by adding its own clarifications, and the employer did the same on

April 22, 2010.

[10] The file was submitted to me for a decision on May 11, 2010.

Respondents' objection about the time limit in which to make the complaint

[11] It is necessary to address the objection raised by both respondents that the complaint is untimely before examining the complaint on its merits.

[12] Subsection 190(2) of the *PSLRA* reads as follows:

> ***190****.(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[13] Parliament chose to impose a 90-day time limit on any party that wishes to make a complaint under section 190 of the *PSLRA*. The Board does not have jurisdiction to change that provision, but it may review the circumstances that serve to establish the date on which the 90-day time limit began. Subsection 190(2) of the *PSLRA* stipulates that the time limit begins on the date on which the complainant knew or ought to have known of the actions or circumstances giving rise to the complaint. This is a question of fact.

Untimeliness invoked by the Institute

[14] In paragraph 5 of his complaint, the complainant alleges that he knew of the act, omission or other matter giving rise to his complaint on November 16, 2009. However, the evidence on file shows that the complainant last communicated with the Institute on October 8, 2009. That is the date on which Ms. Pétrin informed him that, after reviewing his file, the Institute would not support his grievance.

[15] The fact that the grievor continued with his grievance despite the Institute's recommendation to the contrary does not change the fact that the Institute refused to support the grievance giving rise to this complaint and that the complainant was so advised on October 8, 2009. After that, the complainant communicated with the employer and not with the Institute.

[16] In general, the circumstances giving rise to a complaint may not be extended by invoking circumstances outside the context of the initial refusal to proceed with the

grievance. In this case, the 90-day time limit to make a complaint with the Board began on the date of that refusal, specifically October 8, 2009, and not November 16, 2009, the date invoked by the complainant.

[17] The essence of the complaint is the Institute's refusal to support the complainant's grievance. Accordingly, the complainant's knowledge of the Institute's refusal to support his grievance was the trigger for a violation of section 190 of the *PSLRA* and the 90-day time limit for making the complaint. Therefore, the period began on the date on which the complainant became aware that the Institute would not support him.

[18] Accordingly, I find that the complaint is untimely with respect to the Institute.

Untimeliness invoked by the employer

[19] The employer argued that the complainant made his complaint on the 91st day after he had knowledge of the act, omission or other matter giving rise to his complaint against the employer. The complainant did not respond to this objection.

[20] In the absence of a response from the complainant explaining the reasons for the delay in making his complaint, I have no facts allowing me to exercise my discretion to determine the date on which the 90-day time limit began.

[21] Accordingly, I find that the complaint is untimely with respect to the employer.

Merits of the complaint under section 185 of the *PSLRA*

[22] Even though the complaint against the employer is untimely, I decided to examine its merits.

[23] The complaint against the employer refers to two unfair labour practices, the first the refusal to negotiate in good faith and the second a violation of section 185 of the *PSLRA*, which reads as follows:

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

[24] Subsection 186(1) of the *PSLRA* deals with unfair labour practices by the employer with respect to the formation or administration of an employee organization

or discrimination against an employee organization. Subsection 186(2) deals with the employer's refusal to employ or to continue to employ a person because of his or her union activities. Sections 187 and 188 and subsection 189(1) deal with unfair labour practices by a union or by any person and are not relevant to a complaint against an employer.

[25] It is clear that the complaint against the employer and the complainant's written response to the employer's objection refer to its decision to reject the complainant on probation. Section 211 of the *PSLRA* specifically excludes the referral of an individual grievance to adjudication when the grievance relates to a termination of employment under the *Public Service Employment Act* (*PSEA*). The reference in the complaint to a "[translation] refusal to negotiate" is clearly linked to how the complainant was dismissed and not to the employer's obligation to negotiate in good faith during collective bargaining.

[26] Neither the complainant's complaint nor his written response to the employer's objection states that the rejection was allegedly related directly or indirectly to his union activities or to the fact that he allegedly otherwise exercised his rights under the *PSLRA* or a collective agreement within the meaning of subsections 186(1) and (2) of the *PSLRA*.

[27] Even had the complainant been able to prove all he alleges, his complaint does not demonstrate that the employer's actions constituted an unfair labour practice within the meaning of the *PSLRA*. By filing a complaint to the same effect as his grievance, it is my view that the complainant is trying to circumvent the provisions of section 211 of the *PSLRA*, which prevent referring a grievance to adjudication that disputes a rejection on probation within the meaning of the *PSEA*.

[28] In light of these circumstances, I find the complaint unfounded.

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

(The Order appears on the next page)

Order

[30] I do not have jurisdiction to hear the complaint.

[31] I order the file closed.

June 10, 2010.

PSLRB Translation

Michele A. Pineau,
Vice-Chairperson