Date: 20100706

File: 561-02-387

Citation: 2010 PSLRB 81

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

NANCY FORWARD-ARIAS

Complainant

and

UNION OF SOLICITOR GENERAL EMPLOYEES AND PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Indexed as
Forward-Arias v. Union of Solicitor General Employees and 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: Karin Galldin, counsel

For the Respondents: John Haunholter, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
June 14 and 15, 2010.

I. Complaint before the Board

[1] On March 24, 2009, Nancy Forward-Arias ("the complainant") filed a complaint with the Public Service Labour Relations Board ("the Board") against the Union of Solicitor General Employees (USGE) and the Public Service Alliance of Canada (PSAC) ("the respondents"). The USGE is a component of the PSAC, the bargaining agent. In her complaint, the complainant alleged that the respondents committed an unfair labour practice within the meaning of section 185 of the *Public Service Labour Relations Act* ("the *Act*").

[2] The complainant occupied an administrative position at the Royal Canadian Mounted Police (RCMP), and she was a member of the PSAC and of the USGE. She retired in June 2006. In her complaint, the complainant alleged that the respondents acted arbitrarily in representing her following allegations of workplace harassment in 1998 and that they discriminated against her by their failure to represent her from 1999 to 2007 throughout her period of disability. The complainant also alleged that the respondents failed to file grievances on her behalf, which grievances may have offered meaningful remedies for the discipline and the harassment that she experienced in her workplace.

[3] On April 15, 2009, the respondents submitted that the complaint was untimely and that it should be dismissed on that basis. The issues specified in the complaint date from 1998 to 2004. That period is clearly outside the 90-day time limit prescribed by subsection 190(2) of the *Act*. That subsection 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.*

[4] The parties were advised by the Board's registry that this hearing would be limited to hearing evidence and arguments on the objection raised by the respondents. At the start of the hearing, the complainant submitted that she should also be allowed to present evidence on the events that led to her complaint because those events were closely related to the reasons she filed her complaint only in 2009. The respondents did not oppose that request, which I accepted.

[5] At the hearing, the respondents also raised an objection on the complainant's standing because she retired in 2006, thus losing her employee status. I refused to deal with that objection because the parties had been advised that the hearing would be limited to the timeliness objection. I suggested to the respondents that they raise the objection again were the timeliness objection rejected.

II. Summary of the evidence

[6] The complainant called Dr. Robert Groves as a witness. Dr. Groves is a registered clinical and consulting psychologist. The complainant has been his patient since 2002. The complainant also testified. She adduced 28 documents in evidence, and the respondents, 3 documents.

A. The grievor's testimony

[7] The complainant started working for the RCMP in 1989. In July 1998, one of her co-workers, Ms. X, filed a harassment complaint against the complainant alleging that the complainant assaulted her at work. Ms. X also filed a complaint with the Ottawa Police with the aim of having assault charges laid against the complainant. Before those complaints, the complainant's professional and personal life was fine, but those complaints had a devastating effect on her.

[8] Following Ms. X's complaint, the grievor felt that she was all alone, with nobody to help her. The respondents told her that they could not assist her because she was the alleged harasser. After the complaint was filed, the RCMP did not separate Ms. X and the complainant in the workplace. The complainant felt harassed on a daily basis. In August 1998, the RCMP sent the complainant home for six weeks. When she returned, the complainant's movements were monitored, and she was required to advise her supervisor whenever she left her workstation. She was always escorted during her movements in the building where she worked, including to the bathroom. The complainant became isolated, and she felt punished for something that she had not done. Later, in fall 1998, she filed a harassment complaint against her supervisor at the RCMP. After an investigation, the RCMP concluded that the complaint was founded.

[9] Ms. X's harassment complaint and assault charges were both rejected. However, that did not repair the psychological damage experienced by the complainant. By February 1999, the complainant was no longer capable of working. In September 1999,

Dr. Peter Ely wrote a psychological assessment report on the complainant for Health Canada. He concluded that she was far too vulnerable and fragile to be reintegrated into her potentially hostile work environment.

[10] On April 4, 2000, Dr. John Given from Health Canada asked Dr. Richard Spees to re-evaluate the complainant's fitness to work. On April 8, 2000, Dr. Spees concluded that the complainant suffered from major depression and that she was not fit to work. He recommended that she be reassessed in two or three months. In September 2000, Dr. Spees examined the complainant again. He suggested that she could return to work on a very limited basis, perhaps two afternoons per week to start. In October 2000, the complainant went back to work part-time, as per Dr. Spees' suggestion.

[11] In April 2001, the complainant saw Ms. X in a store at a shopping centre. The complainant left the store right away. She was very troubled and upset. She called the local police, but they could not do anything for her. She learned shortly after that Ms. X went to the courthouse to obtain a restraining order against the complainant. Ms. X alleged that the complainant followed her at the shopping centre, that the complainant had a gun and that she had threatened her. The complainant was interviewed by the local police. At the end of the investigation, the police concluded that the complainant had done nothing wrong. As a result of Ms. X's new complaint, the complainant became afraid of leaving her house. As of June 2001, she could no longer work because her health had deteriorated. In March 2002, she met with Dr. M.J. Hamilton for an independent medical assessment. Dr. Hamilton concluded that the complainant suffered from severe anxiety and depression in reaction to circumstances in her life and that she was disabled for any type of employment at that time.

[12] In the following years, the complainant's health did not substantially improve, as supported by several medical certificates and assessments adduced in evidence at the hearing. For a while, she received disability insurance from Sun Life. She experienced problems with that company but finally got them resolved with the assistance of a lawyer that she hired.

[13] In May 2001, the complainant went to the union local for help. The union local helped her file a grievance, which stated that the RCMP had failed to provide her with a harassment-free environment. In December 2001, the RCMP made an offer to the complainant to resolve her grievance. The complainant indicated that she was not healthy enough to be capable of accepting or rejecting that offer. Despite the

complainant's request, the RCMP replied to the grievance in March 2002, allowing it only in part. On April 10, 2002, the respondents wrote to the complainant, informing her that her grievance was not adjudicable but that they would refer it to adjudication for mediation purposes. On April 22, 2002, Cynthia Sams, a lawyer retained by the complainant, wrote to the respondents, informing them that the complainant was agreeing that her grievance be referred to adjudication for mediation purposes but that the mediation should not take place before the complainant's health had improved. The PSAC referred the grievance to adjudication on May 21, 2002.

[14] The first mediation session took place in September 2003. After hearing the parties, the mediator suggested that the session be adjourned in order to have more people present, which could have facilitated the resolution of the outstanding issues. In December 2003, the complainant met with her lawyer, Ms. Sams, and together they wrote a five-page document in preparation for the upcoming mediation session. That session took place in January 2004, and the complainant was represented by the PSAC. Nothing positive came out of it, and no settlement was achieved. The complainant was devastated. On January 16, 2004, the PSAC advised the Board that it was withdrawing the complainant's grievance from adjudication. The complainant admitted that she received a copy of that letter.

[15] The complainant believed that the respondents were not upfront and honest with her and that they had abandoned her. After February 2004, the complainant did not have any other contact with the respondents.

[16] Later in 2004, Ms. Sams informed the complainant that she was leaving the country on sabbatical. She suggested that the complainant consult a lawyer that she knew, Emilio Binavince. In June 2004, the complainant met with Mr. Binavince, who suggested that she take legal action against the RCMP. For that purpose, the complainant met with someone from Mr. Binavince's office and related her story. From that meeting, Mr. Binavince prepared a Statement of Claim, including the details of the problems that the complainant experienced with the RCMP over the years. In its decision dated November 25, 2005, the Ontario Superior Court of Justice dismissed the action on the ground that the Court was without jurisdiction over the subject matter of the Statement of Claim. Mr. Binavince, on behalf of the complainant, appealed that decision. The appeal was dismissed.

[17] Following a medical assessment, which indicated that the complainant was considered unfit for work on medical grounds, the RCMP wrote to the complainant in April 2006 to advise her that she should apply for a medical pension or that she voluntarily resign; otherwise, her employment would be terminated. The complainant decided to apply for a medical pension, which she started receiving in May 2006.

[18] In 2007, the complainant met with a woman whom she had helped once before and who held a management position in a federal department. That woman believed that the complainant would benefit from being employed again. She suggested that the complainant register with an agency and that she could hire the complainant as an administrative assistant through the agency. The complainant worked for that woman until March 2010. It greatly helped her regain some self-confidence, and she began to feel better in 2009.

[19] In early 2009, the complainant met with a lawyer, Karin Galldin, for advice on what could be done about the way she had been treated over the years by the RCMP and by her union representatives. She then learned that she could file an unfair labour practice against the respondents. Shortly after meeting Ms. Galldin, this complaint was filed.

B. Dr. Robert Groves' testimony

[20] Dr. Groves began seeing the complainant as a patient in 2002. She suffered from chronic post-traumatic stress disorder (PTSD) caused by the incidents with Ms. X. PTSD can be silent for a long period but can be triggered by new incidents. From 2002 to 2006, the complainant showed strong symptoms of PTSD. She had a hard time coping with life at that time, and she was very passive. Since 2002, Dr. Groves has met with the complainant every second week. He was able to observe her behaviour and her capacity to cope with her problems. It took the complainant four to five years to talk coherently about her past work problems. Talking about those problems would trigger the pain that she suffered from.

[21] Dr. Groves had recommended that the original date of the complainant's grievance mediation be postponed. He thought that she could go through it in early 2004 because she strongly trusted Dan Fisher, a PSAC representative, who was to be present at mediation. However, when the mediation took place, the complainant was represented by a PSAC mediation officer, and Mr. Fisher was not there. The

complainant strongly felt abandoned. That feeling increased when she realized that the RCMP had nothing to offer her and that the PSAC was withdrawing her grievance.

[22] The complainant could function in life even though she had had a very difficult childhood. She was adopted when she was a young child and experienced abuse from her dysfunctional adoptive family. She had a terrible life but rose above it. This made the complainant more vulnerable as an adult. The feeling of abandonment was triggered by the failure of the January 2004 mediation and by the withdrawal of her grievance at adjudication.

[23] In 2004, the complainant was back to the same state she had been in 2002. She worried, ruminated and could not put her thoughts in order. Her interior flux of emotions invaded her cognitive process. Dr. Groves remembered that, in 2004, Ms. Sams referred the complainant to Mr. Binavince. Initially, the complainant trusted him. He wanted Dr. Groves to send him her medical records. Dr. Groves refused. He also remembered that, in 2005, the complainant was devastated when she learned that she lost her court case and that she had to pay costs. She did not have any money.

[24] In 2005 and 2006, the complainant had ups and downs, was very stressed and was desperate. She also experienced some physical health issues. In early 2007, she returned to work for a friend in a very secure environment with little pressure and stress. It helped her build some self-confidence. Had she not had that woman to help her, she would not have been able to work.

[25] Before early 2009, the complainant did not have sufficient clarity to process facts in a logical order. When she talked about her work experience at the RCMP, she collapsed. Her critical judgment was impaired by anxiety and feelings of guilt. It was not until 2009 that the complainant was able to recognize and act on her need for legal advice. However, the complainant was never legally incompetent, even at her lowest point.

III. Summary of the arguments

A. For the complainant

[26] The complainant argued that her medical situation prevented her from acting before 2009 on a violation of the *Act* that had occurred several years earlier. The complainant admitted that she knew the actions of the respondents in 2004, but she

was unable to file a complaint before early 2009. As soon as she received a legal opinion in early 2009, informing her of her rights under the *Act*, she filed this complaint.

[27] Her own testimony, the medical reports adduced in evidence and Dr. Groves' testimony prove that the complainant could not have filed this complaint before 2009. Even though she took legal action against the RCMP in 2004, she was not involved with the court action and had simply brought her file to Mr. Binavince.

[28] Before late 2008 or early 2009, the complainant could not talk about past work issues without collapsing. She could not be coherent about it, which prevented her from filing this complaint. It was not until 2009 that she was able to recognize and act on her need for legal advice. She then approached her current lawyer with relatively new confidence in the possibility that a review of her situation may have been deserved.

[29] The complainant referred me to the following decisions: *Machnee v. Klaponski et al.*, 2001 PSSRB 28; *McConnell v. Professional Institute of the Public Service of Canada*, 2005 PSLRB 140; *Cuming v. Butcher et al.*, 2008 PSLRB 76; and *Exeter v. Canadian Association of Professional Employees*, 2009 PSLRB 14.

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

[30] The complainant knew of the facts on which the complaint was based in January 2004. She chose to wait five years before acting on those facts. The *Act* is clear: a person has 90 days to file a complaint. There is abundant jurisprudence from the Board that clearly states that the 90-day limit is firm and that it must be respected.

[31] The respondents argued that the complainant could have filed her complaint earlier. She was not legally incompetent and could have acted in 2004. Obtaining a fresh legal opinion in 2009 did not give her an extension of time to file a complaint under the *Act*.

[32] The complainant retained Mr. Binavince's services in 2004 to take legal action against the RCMP. This proves that she was capable of acting at that time and that she could have filed this complaint.

[33] The respondents referred me to the following decisions: *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100; *Dubuc v. Professional Institute of the Public Service of Canada and Sioui*, 2009 PSLRB 140; *Renaud v. Canadian Association of Professional Employees*, 2009 PSLRB 177; *Shutiak v. Union of Taxation Employees*, 2009 PSLRB 30; *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2010 PSLRB 7; *Hérold v. Public Service Alliance of Canada and Gritti*, 2009 PSLRB 132; *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78; *Harrison v. Public Service Alliance of Canada*, PSSRB File No. 161-02-725 (19951023); and *Giroux v. Health Canada et al.*, PSSRB File Nos. 161-02-825 and 826 (19990129).

IV. Reasons

[34] In the complaint, the complainant stated that the respondents acted arbitrarily in representing her allegations of workplace harassment in 1998 and that they discriminated against her by their failure to represent her from 1999 to 2007, throughout her period of disability. However, the complainant testified that she had no contact with the respondents after the withdrawal of her grievance from adjudication on January 16, 2004. If the respondents did not know that the complainant needed representation after that date, they could obviously not have helped her or have acted on her behalf. The respondents cannot be accused of having committed an unfair labour practice towards the complainant after January 16, 2004. Consequently, to establish whether the complaint is timely, I will use January 16, 2004 as a starting point.

[35] The parties' arguments on timeliness explicitly referred to subsection 190(2) of the *Act*, which states that a complaint must be made 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. The latest incidents on which the complaint is based occurred in January 2004.

[36] The fact that the events which form basis of the complaint all occurred prior to the enactment of the *Act* raises the issue of whether the *Act* or its predecessor, the *Public Service Staff Relations Act* ("the former *Act*") applies to this complaint. This is particularly the case given the fact that the *Act* contains a 90-day time limit for the filing of complaints whereas no set time limit was contained in the former *Act*. The question of acquired rights might therefore have been raised. However, neither party

raised the issue and instead both argued the case based on the provisions of the *Act*. Regardless of which statue applies, I have determined that my decision would be the same.

[37] As stated above, the former *Act* did not specify a time limit for filing a complaint. In its interpretation of the former *Act*, the Public Service Staff Relations Board ("the former Board") established that complaints had to be filed within a reasonable period of time following the actions or decisions on which the complaint was based. Even if the concept "reasonable time period" does not refer to a precise number of days or months, a review of the jurisprudence of the former Board clearly shows that a complainant who waited more than a few months before doing so had to convince the Board that he or she had a serious explanation for not filing a complaint within a few months after the occurrence of the contested facts or circumstances.

[38] The evidence shows that the complainant clearly knew and understood that the PSAC had withdrawn her grievance from adjudication on January 16, 2004. In accordance with the jurisprudence under the former *Act*, the complainant should therefore have filed her complaint some time in the first half of 2004, at the latest, in order to have the delay in filing her complaint characterized as "reasonable". A six year delay can, in no way, be characterized as being "reasonable". Therefore, under the former *Act*, the complainant would have had to adduce evidence to explain why she had waited so long. The complainant did so in this case through her testimony and the evidence of her psychologist, Dr. Groves.

[39] Considering that the complainant was capable of seeking legal advice for Ms. Sams and Mr. Binavince in 2004, I find that she could have also filed this complaint at that time. While I am convinced that the complainant was very sick from 2002 to 2009, the evidence disclosed that: she knew of the facts which formed the basis of her complaint; she had the capacity to retain and instruct Ms. Sams regarding her workplace issues and had the capacity to work with her on the drafting of a five-page mediation document; she had the capacity to retain and instruct a second lawyer, Mr. Binavince, when Ms. Sams left the country and that she had the capacity to instruct him in the pursuit of an action in Superior Court.

[40] Dr. Groves testified that while the complainant was not well, she was not incapacitated. I believe that the real reason that she did not act at that time is that she was not aware of her right to file an unfair labour practice complaint until early 2009,

when she met with Ms. Galldin. Under the former *Act*, and with the facts of this case, five years cannot be considered to be a reasonable period after which to file a complaint. Therefore even if the former *Act* were to apply, I would dismiss the complaint for timeliness.

[41] I will now turn to the issue if timeliness under the *Act*. Pursuant to subsection 190(2) of the *Act*, the prescribed period to file a complaint is 90 days, and it cannot be extended. Subsection 190(2) 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.*

[42] The complainant admitted having received the respondent's unambiguous position on January 16, 2004. It was that position which forms the basis of her complaint. She was therefore aware of the acts and circumstances giving rise to her complaint in January 2004. Clearly, the complaint was filed outside the mandatory 90-day limit. Also, while the *Act* gives the Chairperson of the Board the authority to extend the time limits for filing a grievance, no such authority is given to the Board in the case of complaints. The Board has repeatedly found that it is without the authority to extend the time limits for filing a complaint, and I agree with that position.

[43] I have reviewed the decisions submitted by the parties, and I see no need to comment on them further since the facts of this case are unique.

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

(The Order appears on the next page)

V. Order

[45] The complaint is dismissed.

July 6, 2010.

Renaud Paquet,
Board Member