Date: 20100827

File: 561-02-452

Citation: 2010 PSLRB 95

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 under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Renaud Paquet, Board Member

For the Complainant: Herself

For the Respondent: Amarkai Laryea and Leslie Robertson, Public Service Alliance of Canada

Decided on the basis of written submissions filed May 20, July 29, and August 11, 17, 18 and 23, 2010.
(PSLRB Translation)

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 engaged in an unfair labour practice within the meaning of section 185 of the *Public Service Labour Relations Act* ("the *Act*").

[2] On November 3, 2009, the complainant met with Raymond Brossard, a representative of the National Component of the PSAC, to discuss her problems at work. In her complaint, she claims that Mr. Brossard prepared a grievance for her at that time but that he never submitted it to her employer. The complainant requests that the respondent file her grievance and follow up on it as it should have in November 2009.

[3] I met with the complainant and the respondent's representatives on July 6, 2010 to discuss the complaint. They exchanged a series of documents about the complaint and gave me a copy for the file. It was agreed that I would hear the complaint on the basis of those documents, which are not contested by the parties, and the parties' written arguments.

Facts relating to the complaint

[4] Contrary to what the complainant alleges in her complaint, the respondent filed a grievance on her behalf on November 4, 2009. The grievance statement and the 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.*

[5] Before meeting with Mr. Brossard on November 3, 2009, the complainant had met with the president of the National Component local and had contacted Jim McDonald, a co-worker of Mr. Brossard. On September 18, 2009, the complainant

forwarded to Mr. McDonald the contents of a medical certificate attesting that she would not be able to return to her position at the Translation Bureau. She also asked what she should do about a harassment complaint and a grievance about how her employer was treating her.

[6] On November 16, 2009, a representative of the employer asked Mr. Brossard for information about the complainant's intentions with respect to her grievance given that she had found another job in the federal public service. The following day, Mr. Brossard asked the complainant for an explanation. On November 25, he again contacted her and informed her that her grievance had been filed with the employer but that it had been agreed to place it on hold until the complainant returned from sick leave. Mr. Brossard also asked the complainant to confirm before November 27, 2009 whether she had accepted a job elsewhere. Had she found another job, he would not have been able to follow up on her grievance "[translation] . . . because it would no longer be applicable."

[7] On November 26, 2009, the complainant replied to Mr. Brossard and asked him to explain why her grievance was on hold and to elaborate on the issue of its "applicability." However, she did not answer Mr. Brossard's question as to whether she had accepted a new job. On November 27, 2009, Mr. Brossard replied to the complainant that her grievance would no longer be "applicable" had she accepted a position elsewhere. He again asked her whether that was the case. On December 7, 2009, the complainant wrote to Mr. Brossard to ask him what was happening with her case. Mr. Brossard replied that he would look into the matter. He also again asked her if she had a new job. On December 13, 2009, the complainant replied that she had another job with the federal public service and that she was still paying union dues to the PSAC.

[8] On January 26, 2010, Mr. Brossard wrote to the complainant to inform her that he was closing her file because she did not provide the information about her new job before November 27, 2009. He added that, since she held another job, her former employer could no longer grant her the corrective action requested in her grievance. Mr. Brossard also informed the complainant that he would notify her former employer that the National Component considered her file closed.

[9] On January 28, 2010, the complainant contacted Maria Fitzpatrick, Executive Vice-President, PSAC, to express her disagreement with Mr. Brossard's

decision. Ms. Fitzpatrick referred the matter to Daniel Kinsella, National President, National Component, for a reply to the complainant. In his March 7, 2010 reply, Mr. Kinsella reiterated Mr. Brossard's position of January 26, 2010. He reminded the complainant that her desired corrective action was no longer "open to discussion."

[10] The parties exchanged no verbal or written communications between December 14, 2009 and January 25, 2010 on the issue that is the subject of this complaint, i.e., the withdrawal of the complainant's grievance and the appropriateness of continuing to process it.

Summary of the arguments

[11] The complainant alleges that the respondent acted arbitrarily by not carrying out a thorough study of her case and by failing to follow up on the handling of her grievance. Thus, it violated section 187 of the *Act*.

[12] According to the complainant, the respondent could not have decided to no longer continue handling her grievance just because she did not inform it before November 27, 2009 that she had a new job. The respondent also could not have decided not to follow up on the grievance just because she had a new job. It was incorrect to maintain that the grievance then became inapplicable.

[13] The respondent alleges that, during the November 3, 2009 meeting with Mr. Brossard, the complainant did not accept his explanations about the procedure to follow in her situation. After considering the facts, Mr. Brossard drafted a grievance, which he filed with the employer on the understanding that the grievance would remain on hold until the complainant returned from sick leave. The complainant subsequently failed to notify Mr. Brossard that she had accepted a job at another department, despite his repeated inquiries. The complainant finally replied to Mr. Brossard on December 13 but did not provide any details about her new job. Then, on January 26, 2010, Mr. Brossard informed the complainant that he was closing her file.

[14] The respondent argues that it did not fail in its duty of representation. Mr. Brossard's letter of January 26, 2010 clearly explains why the complainant's file was closed. The respondent considered the circumstances of the grievance, assessed its merits and decided not to follow up. Therefore, the respondent finds that the complaint should be dismissed because it is unfounded, since the complainant failed to establish that section 187 of the *Act* was violated.

[15] The complainant referred me to the following decisions: *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79; *Charron v. Lafrance et al.*, PSSRB File No. 448-H-4 (19900208); *Jacques v. Public Service Alliance of Canada*, PSSRB File No. 161-02-731 (19950420); and *Seafarer's International Union of Canada v. Mikedis*, [1996] F.C.J. No. 69 (QL). The respondent referred me to the following decisions: *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28; and *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509.

Reasons

[16] On the complaint form, the complainant indicated that the respondent had also violated sections 56, 107 and 132 of the *Act*. However, the complaint does not refer to those sections of the *Act* in any way. In fact, the complainant based her complaint on paragraph 190(1)(*g*), which refers to section 185. That section sets out several unfair labour practices, including a breach of the duty of representation set out in section 187. The relevant provisions of the *Act* read as follows:

> ***190.****(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> *(*g*) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> . . .
>
> ***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).*
>
> . . .
>
> ***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.*

[17] The facts of this complaint are simple. The complainant contacted Mr. Brossard to inform him about problems that she was experiencing at work. It was agreed at that time to file a grievance. The grievance was in fact filed, but Mr. Brossard later decided to abandon it. He notified the employer of that fact. Mr. Brossard decided to abandon the grievance for the following two reasons: 1) the complainant did not inform him

before November 27, 2009 that she had found a job at another department; and (2) the Translation Bureau could no longer grant the corrective action requested in the grievance because the complainant had changed jobs.

[18] Considering those facts and section 187 of the *Act,* the issue that I must determine is whether the respondent failed in its duty of representation by deciding not to follow up on the grievance and by deciding to withdraw it.

[19] Section 187 of the *Act* does not impose on a union an obligation to provide representation in every case; rather, it prohibits a union from acting in a manner that is arbitrary or discriminatory or in bad faith. Therefore, a union must exercise its discretionary power within those guidelines. At page 510 of *Gagnon*, the Supreme Court of Canada wrote as follows:

. . .

> *. . . This discretion however must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other. In short, the union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

. . .

[20] Nothing submitted to me leads me to believe that the respondent acted in bad faith or in a discriminatory manner by deciding not to follow up on the complainant's grievance. In addition, I have not received any observations that the respondent did not continue handling the grievance because it was against its legitimate interests. It remains to be seen based on what has been submitted to me whether the respondent's decision was made arbitrarily.

[21] *Le Petit Robert, dictionnaire de la langue française* defines the adjective "arbitrary" as follows: "[translation] based only on a person's will (free will); . . . proceeding from a wilful choice of principles or conventions; . . . dependent on a person's whims or wishes." The noun "arbitrary" is defined as follows: "[translation] authority exercised at the whim of a person or group."

[22] With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:

> *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. . . .*
>
> . . .

[23] In *International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.,* [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, ". . . a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."

[24] Based on the facts submitted to me, it appears that, after meeting with the complainant on November 3, 2009, Mr. Brossard drafted a grievance on the complainant's behalf and that he filed it with the employer on the following day. On January 26, 2010, Mr. Brossard notified the complainant and then the employer that the complainant's grievance file was closed and that he considered the matter closed. Mr. Brossard decided to close the grievance file because the complainant did not inform him before November 27, 2009 that she had a new job and because her former employer could no longer grant her requested corrective action.

[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 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.

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

(*The Order appears on the next page*)

Order

[29] The respondent violated section 187 of the *Act* by failing to discharge its duty of fair representation to the complainant.

[30] A hearing will be scheduled to determine the corrective action.

August 27, 2010.

PSLRB Translation

Renaud Paquet,
Board Member