Date: 20100831

File: 561-02-165

Citation: 2010 PSLRB 96

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

KENNY ROBERTS

Complainant

and

UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN (UCCO-SACC-CSN)

Respondent

Indexed as
Roberts v. Union of Canadian Correctional Officers – Syndicat des Agents Correctionnels du Canada – CSN (UCCO-SACC-CSN)

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Michele A. Pineau, Board Member

For the Complainant: John M. Farant, counsel

For the Respondent: John Mancini, counsel

Heard at Kingston, Ontario,
February 2 and 3 and August 19, 2010.

I. Complaint before the Board

[1] The complainant, Kenny Roberts, was a correctional officer at Kingston Penitentiary. On January 25, 2006, the complainant's employment was terminated for disciplinary reasons. The complainant filed a grievance that was referred to the Public Service Labour Relations Board ("the Board") for adjudication. On March 5, 2007, the grievance was dismissed (see *Roberts v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 28).

[2] On May 31, 2007, the complainant filed a complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* (*PSLRA*) alleging that the respondent, the Union of Canadian Correctional Officers – Syndicat des Agents Correctionnels du Canada – CSN ("the union") had breached its duty of fair representation as provided in section 187 of the *PSLRA*.

[3] The complainant makes the following allegations:

. . .

> *#4 The following are the reasons I believe I was misrepresented by my union.*
>
> *(A). I have requested since the onset of my termination to be represented by a lawyer. They indicated that such was not necessary since they felt Mr. Bouchard (union advisor-CSN) could adequately represent me. I made my opinion clear that I was not satisfied with this decision and that I felt it would be best to approach the adjudication with the same fighting force as the employer. The National President, Sylvain Martel was also contacted regarding my concerns. Other staff members in the past were provided with adequate lawyers to represent them. I was not aware that walking away from the union was an option. I was also advised, by other resources that the internal avenues had to be exhausted first before outside resources could be applied. My union is obligated to represent me fairly and equitably. Numerous letters are enclosed.*
>
> *(B) To state the obvious, Mr. Bouchard did not want cross-examine any of the other union witness on the stand. He refused to call anyone associated with the case. One character witness was called on my behalf only because the employer was slandering my character and he choose a Officer that was at the hearing. Mr. Bouchard never challenged or disputed any of the employer's arguments. He was unwilling to bring forth facts that related directly with the case. I provided video and audio recordings, witnesses*

who were willing to testify to the racist attitudes and actions of the Warden of Kingston Penitentiary and the countless other supporters to her ordeal. There was never any mediation or negotiation offered before my hearing. I strongly believe Mr. Bouchard's efforts to defend me was clearly to sabotage my case. Every documents he requested was available to him, was never admitted. There was definitely conspiracy.

(C) March 5, 2007, notified decision from adjudication was not favourable. March 15, 2007, met with Mr. Bouchard to discuss Judicial Appeal. He adamantly stated "the union is no longer going forward with my case". There is nothing to review, nothing more they will do. I was shocked that the UCCO representatives would so easily give up on an opportunity to represent a union member to the fullest and demonstrate to the union body that there is always strong support from the union. I requested they provide a written document stating their non-interest in pursuing this matter.

(D) UCCO refused to meet to prepare for my hearing because it was 8-monghts away and they wanted to wait 3-weeks before the hearing. His reason was that he didn't have time and that he didn't want to overload and forget anything. We met twice and nothing really was put to purpose. I provided all that was requested and suggested having an outside lawyer assist. This was rejected because this was not how the union operated. My case was never prepared for the Adjudication Hearing in September 2006. At closing arguments Case Studies were not prepare to show relevance on other cases. Adjudicator gave extra day to have evidence admitted. These cases, were never shared with me and they were cases of Officers who were suspended. Totally irrelevant to my case. Mr. Bouchard's attitude and support was never positive in respect to my case, even though he claims he did his best.

#8 The step taken was requesting the union to represent me at the Judicial Review.

#9 (a) Total Re-instatement

(b) Loss of Wages

(c) Pain and Suffering

(d) Monetary Compensation

(e) Proper Representation

(f) Mediation and Negotiation

(g) Written Apology

> *#10 UCCO is a BIAS Organization. Visible minorities are treated unfairly!!*
>
> [*Sic* throughout]

[4] On June 22, 2007, the respondent wrote to the Board, raising two objections to the complaint. The first was that the allegations in paragraph 4 (A), (B) and (D) were untimely, that is, that they were filed outside the 90 days specified in subsection 190(2) of the *PLSRA*. The second was that the respondent's decision not to refer the adjudicator's decision to judicial review was not a complaint that related to arbitrary, discriminatory or bad-faith representation at the adjudication hearing. The complainant could have filed an application for judicial review without the assistance of the respondent. Consequently, the Board has no jurisdiction to decide this allegation.

[5] At the outset of the hearing of the complaint, the respondent raised its twofold objection once more. The respondent argued that the Board, as a statutory tribunal, does not have the power to extend time limits that are clearly expressed in its enabling legislation, as recently decided in *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2010 PSLRB 7. Furthermore, neither the *PSLRA* nor the relevant collective agreement contain a provision that requires a union to refer cases to the Federal Court in which it is not successful.

[6] The complainant, through his counsel, objected to the adjudicator considering these objections at this time since the complainant responded to the objections in writing before the hearing. The complainant further argued that entertaining such objections at this time caused him severe prejudice. The complainant argued that I should exercise my "equitable" jurisdiction and extend the time for filing his complaint so that the merits of his complaint may be heard. The complainant argued that I should be lenient because he was unrepresented when he filed his complaint and that it would be a terrible miscarriage of justice if I did not proceed to hear its merits.

[7] The respondent replied that the Board is not a superior court but a specialized labour relations tribunal with limited statutory powers; it cannot create its own jurisdiction. Nor can it, in this instance, award the remedies that the complainant seeks. The respondent requested that the complaint be dismissed without a hearing on the merits.

[8] The complainant replied that section 182 of the *PSLRA* gives me very broad jurisdiction to correct any inequity that may arise in a matter referred to the Board and that I have powers under common law and contract law to determine all issues that come before the Board.

[9] In response to the respondent's objections, the complainant provided oral evidence of his position that I should exercise a broad remedial authority to relieve him of his untimely application. His evidence follows.

II. Summary of the complainant's evidence

[10] The complainant was terminated on January 26, 2006 following an incident that occurred on September 28 and 29, 2005. He was suspended, and an administrative investigation was launched into the incident, which was followed by a disciplinary hearing. The complainant's employment was terminated as a result. The complainant met with his union representative, Michel Bouchard, either on the day of the termination or a few days later. Mr. Bouchard told him to return to Toronto and look for a job.

[11] The complainant testified that he requested representation by legal counsel at the time of his termination because he already had concerns about the quality of the union's representation. Mr. Bouchard's told the complainant that he would not prepare his case for adjudication until three weeks before the adjudication hearing because it was too early and because he would likely forget much of what the complainant had to say. Mr. Bouchard told the complainant that legal counsel would not be retained. Mr. Bouchard confirmed this position to the complainant in writing on March 26, 2006. In preparation for the adjudication hearing, the complainant provided Mr. Bouchard with relevant documents and any other information he requested. Mr. Bouchard met with the complainant twice in the three weeks before the adjudication hearing of the grievance to prepare his case. The grievance was heard in September and December 2006, with written submissions filed in late December. The adjudicator's decision was issued on March 5, 2007. The complainant acknowledged that he was aware that he was not going to be represented by legal counsel at the adjudication hearing.

[12] The complainant filed a complaint with the Board about the quality of the union's representation after receiving the adjudicator's decision dismissing his grievance.

[13] In cross-examination, the complainant acknowledged that he had written to Mr. Bouchard concerning his anxiety about the results of the adjudication and his dissatisfaction with the entire process. The complainant's email to Mr. Bouchard reads as follows:

. . .

> *March 20, 2007*
>
> *Michel,*
>
> *I have taken some time since meeting you last week at your office to attempt to understand the information you presented me, as well as your refusal to assist with a Judicial Review request.*
>
> *At this time I feel it is necessary to outline some of the responses I have received throughout this grievance process and ultimately adjudication.*
>
> *I have requested since the onset of my termination to be represented by a lawyer, you indicated that such was not necessary since you felt you could adequately represent me. I made my opinion clear that I was not satisfied with this decision and that I felt it would be best to approach the adjudication with the same fighting force as the employer. Upon contacting the National President with my concerns I was assured that if adjudication was unsuccessful that a lawyer would be retained on my behalf. Yet you clearly stated in your office (March 15, 2007) that UCCO was through with this case and that you felt there were no grounds for review.*
>
> *Once again, I disagree with you. I have sought the assistance and guidance of a lawyer who adamantly agrees that there are grounds for a Judicial Review and was shocked that the UCCO representatives would so easily give up on an opportunity to represent a Union Member to the fullest and demonstrate to the union body that there is always strong support from the union.*
>
> *Although you have indicated that you are not interested in pursuing this matter, and would not provide a written document stating such you have left me with no option but to request again that you provide your rationale in a written format.*
>
> *As this e-mail indicates, I have now advised contacts at the National level with my concerns in an effort to allow others to gain awareness of the situation, and I am confident that if*

> *they puruse* [*sic*] *the decision they too will see the need to apply for Judicial Review.*
>
> *I would request that you respond promptly as this is a time sensitive matter, and perhaps you could refer me to an individual who may be interested in assisting me. Now is the time to set aside your personal feelings and judgement and assist someone simply because they have been unfairly treated.*
>
> *Regards,*
>
> *Kenny Roberts*
>
> . . .
>
> [Emphasis added]

[14] The complainant admitted that, before filing this complaint, he consulted Angus McLeod, counsel in private practice, for an opinion as to whether there were grounds for judicial review of the adjudicator's decision. Mr. McLeod apparently stated that there were. The complainant did not specify what those grounds may have been. However, the complainant did not retain Mr. McLeod's services because of his financial circumstances. He also admitted that he would not have filed this complaint had he been successful at adjudication.

[15] The complainant conceded that Mr. Bouchard responded to his email on March 23, 2007 with the following advice:

> . . .
>
> *Dear Kenny Roberts,*
>
> *This message is to confirm that the union examined the adjudication decision in your file carefully and objectively, as discussed when you came to my office. The union's evaluation of this adjudication decision remains unchanged. I understand that you disagree. As discussed when we met, you still have the option of requesting a Judicial Review of the Federal Court. Please be advised that, should you choose to request a Judicial Review on you own, you must do so before April 5th, 2007.*
>
> *Sincerely,*
>
> *Michel Bouchard*
>
> *CSN Ontario Union Advisor*

. . .

[Emphasis added]

[16] When asked in cross-examination why he did not file an application for judicial review before the Federal Court, the complainant testified that he did not know. He felt that it was the union's responsibility. Because he had been a union member for 19 years, it was the union's duty to fight on his behalf. In the complainant's view, the union was uninterested in his case from the very beginning and continued to be uninterested throughout the adjudication proceedings.

[17] At the end of his testimony, the complainant observed that he fully collaborated with the union in presenting his case and that he could not comprehend why he should be unable to pursue a complaint before the Board simply because of an issue of timeliness. The complainant stated that it was most unjust that he had not been represented by legal counsel when his case proceeded to adjudication, yet Mr. Bouchard was represented by legal counsel for the purposes of this complaint. In the complainant's view, the union had a duty to pursue every available recourse to fully represent him, especially since his employment has been terminated. That is why he became a union member.

[18] The respondent did not provide any oral testimony in support of its position.

III. Summary of the arguments

A. For the union

[19] The union argues that the complainant's recourse with respect to the adjudication is untimely, in particular with respect to the complaints that he was not represented by counsel during the adjudication hearing (paragraph 4(A) of his complaint; that the quality of the representation by the union's representative during the adjudication hearing was poor (paragraph 4(B)); and that the preparation for the adjudication hearing was inadequate (paragraph 4(D)).

[20] The complainant was advised well before the adjudication hearing that the union would not assign a lawyer to handle his termination. The adjudication hearing was held in September and December 2006. The adjudicator's decision was rendered on March 5, 2007. Thus, the complaint, filed on May 31, 2007, was filed well beyond the 90 days provided in the legislation.

[21] The union further argues that, with respect to paragraph 4(C) of the complaint, that is, that the union did not apply to the Federal Court to have the adjudication decision judicially reviewed, the complaint is without merit. In reply to an email that he sent on March 20, 2007, the complainant was provided with a legal opinion, dated March 21, 2007, as to why the union considered that judicial review of the adjudicator's decision would be futile. On March 23, 2007, the complainant was advised in an email that he had the option of applying for judicial review in the Federal Court and that he had to do so before April 5, 2007. The complainant did not apply for judicial review but instead filed a complaint with the Board on May 31, 2007.

[22] The union argues that, in assessing whether to pursue judicial review of the adjudication decision, it considered whether the adjudicator had fully exercised his jurisdiction and whether the decision was patently unreasonable. Since the adjudicator's findings were based mainly on issues of credibility, there was little chance of the decision being reversed.

[23] The union explained that there was an alternative course of action available to defend the complainant at the adjudication hearing that could have yielded far different results, that is, that he admit his wrongdoing and express regret. However, the complainant adamantly insisted that his defence be that the incident that led to his termination did not happen. He was contradicted by several witnesses, and thus, his testimony was found not credible.

[24] In light of these circumstances, the union submits that its decision not to pursue the judicial review of the adjudicator's decision was justified. The union informed the complainant of the opportunity of pursuing judicial review on his own, but he did not follow up on it.

[25] The union asks that the complaint be dismissed.

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

[26] The complainant argues that he was confused and concerned that there was no recourse against the adjudicator's decision. The complainant asked that I consider his degree of sophistication and appreciate that he exercised due diligence under the circumstances. The complainant submits that an Alberta arbitrator extended the time

limits based on the lack of sophistication of a complainant but is unable to provide the exact citation for that precedent.

[27] The complainant argues that he was owed a duty of fairness and that the damage to him in not extending the time limit to file a complaint greatly outweighs the prejudice to the union.

[28] The complainant further argues that all he wanted was for the union to represent him. He adds that he will seek judicial review if the decision in this case is unfavourable since it involves his right to employment.

[29] The complainant takes the view that the Board has the discretion to extend the time limit if the alternative is a grave injustice.

[30] In support of its position, the complainant cites *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59.

[31] The complainant requests that the time limit for filing his complaint be extended.

IV. Reasons

A. Timeliness of the complaint

[32] By way of a preliminary objection to the Board's jurisdiction to decide the complaint, the union alleges that three of the complainant's allegations are untimely.

[33] As for time limits, subsection 190(2) of the *PSLRA* states as follows that a complaint under subsection 190(1) must be filed within 90 days:

> ***190.****(2) … 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.*
>
> [Emphasis added]

[34] The 90-day period during which a party may file a complaint under section 187 of the *PSLRA* is imposed by law. As stated in *Éthier*, the Board has no power to modify that time limit. The Board's only discretion lies in deciding the circumstances to use to determine the date on which the 90-day period began, namely, the point at which the

complainant knew or ought to have known of the action or circumstances giving rise to the complaint, which is purely a factual issue.

[35] In paragraph 4(A) of his complaint, the complainant stated that he requested representation by legal counsel ". . . at the onset of [his] termination. . ." (January 26, 2006) and that the union refused his request. The complainant repeated this statement in an email to Mr. Bouchard on March 20, 2007 and again in his oral testimony. Furthermore, the complainant admitted that he was not represented by legal counsel at the adjudication hearing that took place September 25 to 28 and December 12 and 13, 2006. Thus, throughout the grievance process, up to and including the adjudication hearing, the complainant was well aware that he was not represented by legal counsel. The complainant also admitted that, had his grievance been upheld, he would not have filed this complaint.

[36] The fact that the complainant pursued his recourse before the Board with the assistance of the union does not in any way change the fact that the union stated very clearly to him in a letter dated March 26, 2006 that no legal counsel would be assigned to his file. The union maintained that position up to and including the adjudication hearing before the Board. A union representative defended the complainant in the adjudication hearing in September and December 2006. Those facts are undisputed. Accordingly, the complainant knew or ought to have known that he would not be represented by legal counsel as early as March 2006.

[37] In *Éthier*, I stated the following:

. . .

> *In general, the circumstances that give rise to a complaint cannot be extended by invoking other circumstances that go beyond the first refusal to proceed with the grievance or dispute at issue. In this case, the 90-day period to make a complaint with the Board began on the date of that refusal, at the end of June 2006, and not on the date on which the complainant deemed that he had sufficient evidence to make the complaint, which was December 13, 2006. The period for filing a complaint cannot be extended by a complainant's attempts to convince a union to change its decision. To the extent that there is a violation of the* PSLRA, *there is no minimum or maximum standard for the degree of knowledge that a complainant must have before filing his or her complaint.*

. . .

[38] Thus, the complainant's knowledge of the circumstances giving rise to a complaint under section 190 of the *PSLRA* and the 90-day period for filing the complaint was triggered by each of those events and the dates on which they took place. These circumstances were not extended by the complainant's persistence about being represented by legal counsel or until the outcome of the adjudication of his grievance. Moreover, if the complainant had concerns over the quality of his representation at the adjudication hearing, it was incumbent upon him to raise those concerns in the proceedings before the adjudicator and not after the fact (see *Dwyer v. Shime*, [1994] O.J. No. 2577 (QL)).

[39] I am not persuaded by the complainant's argument that he was an unsophisticated litigant. The following examples contradict that position: the complaint's very articulate views in his exchange of correspondence with the union filed with his complaint; the union's clearly stated position in writing as to its role in the adjudication hearings; and the complainant's admission that he consulted independent counsel before filing his complaint.

[40] I have also not been persuaded that the decision in *Thompson* is relevant to these proceedings. In that case, Ms. Thompson was, through no fault of her own, late in filing a grievance. In the event that the grievance was found untimely, she applied for an extension of time to file it. The Board's decision in *Thompson* must be distinguished from the circumstances of this case. Section 61 of the *Public Service Labour Relations Board Regulations*, SOR/2005-79 ("the *Regulations*"), authorizes the Chairperson to extend the time limits for presenting a grievance ". . . in the interest of fairness . . . ." The exercise of that authority is discretionary and is subject to the principle of natural justice requiring that it satisfy the test of reasonableness. The time for filing a complaint is provided in subsection 190(2) of the *PSLRA,* and there is no parallel provision in the *Regulations* for the discretion to extend the time limit. The only latitude under the *PSLRA* is to decide at what point the complainant had sufficient knowledge of the circumstances of his complaint.

[41] Therefore, I find that the complainant had sufficient knowledge of the circumstances of his complaint on March 26, 2006 concerning the union's refusal to provide him with counsel and that he had knowledge of the alleged poor quality of representation by the union's representative during the adjudication hearing and the

alleged inadequate preparation for the adjudication hearing in September 2006. Therefore, his complaint, filed on May 31, 2007, is untimely.

[42] With respect to that part of the complaint concerning the union failing to seek judicial review of the adjudicator's decision, I find that the complainant had sufficient knowledge of the circumstances of this allegation on March 23, 2007 and that, since he filed his complaint on May 31, 2007, this allegation is timely.

[43] However, I find that this issue was not sufficiently addressed by the complainant's testimony or his arguments at the hearing. I have decided that it can be adequately addressed by written submissions, without need for a further oral hearing.

[44] Consequently, the complainant shall file his written submissions in response to the union's arguments no later than September 15, 2010. The union has until September 30, 2010 to provide a response, should it consider a response necessary.

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

(The Order appears on the next page)

V. Order

[46] The allegations in the complaint concerning the union's refusal to provide counsel, the alleged poor quality of representation by the union's representative during the adjudication hearing and the alleged inadequate preparation for the adjudication hearing are dismissed.

[47] The allegation in the complaint that the union failed to seek judicial review of the adjudicator's decision is taken under reserve until further written submissions are filed.

August 31, 2010.

Michele A. Pineau,
Board Member