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Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

SUSAN BIALY, KENNETH MAYHEW, LAURIE JARVIS, NAUSHEEN KHAN AND KAMALARANJINI MYLVAGANAM

Complainants

and

DREW HEAVENS AND TREASURY BOARD

Respondents

Indexed as
Bialy et al. v. Heavens and Treasury Board

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

REASONS FOR DECISION

Before: Linda Gobeil, Vice-Chairperson

For the Complainants: Themselves

For the Respondents: Jeff Laviolette, Treasury Board

Decided on the basis of written submissions filed April 26 and 27, May 13, and June 15 and 24, 2011.

I. Complaints before the Board

[1] On April 4, 5 and 6, 2011, Susan Bialy, Kenneth Mayhew, Laurie Jarvis, Kamalaranjini Mylvaganam and Nausheen Khan ("the complainants") filed unfair labour practice complaints with the Public Service Labour Relations Board ("the Board") against Drew Heavens and the Treasury Board ("the respondents") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the new *Act*").

[2] Although each complainant filed a separate complaint, the contents of each complaint are essentially the same. Furthermore, in correspondence to the Board dated April 4, 2011 and May 25, 2011, one of the complainants, Ms. Bialy, indicated that her reply was on behalf of all the complainants. Therefore, this decision will apply to all the complainants.

[3] The following is a summary of Ms. Bialy's complaint:

> *My complaint is under section 190 (1) (g), specifically that the employer, Treasury Board has performed an unfair labour practice within the meaning of section 185, specifically under 186(1) (a) which states:*
>
> *186 (1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> *(a) participate in or interfere with the formation or administration of an employee organization or the representation of employees of an employee organizatioon; or*
>
> *WITHDRAWAL OF GRIEVANCES*
>
> *My complaint is that the employer interfered with the representation of employees by an employee organization by putting conditions on the proposed settlement (exibit a) and Memorandum of Agreement that required the union to withdraw the salary protection grievances (exibit b) and allow the Memorandum of Agreement to falsely state I was ACTING. The employer compelled my union to fofeit salary protection in order to grant a settlement to the SDAII 15 year grievance. Forfeiting salary protection violates my collective agreement rights.*
>
> [*Sic* throughout]

II. Summary of the arguments

A. Preliminary objection

[4] In a letter to the Board dated April 26, 2011, the respondents denied any contravention of paragraph 186(1)(*a*) of the new *Act* and added the following:

. . .

> *The Employer submits that officials from the Department of Human Resources and Skills Development Canada (HRSDC) and the Public Service Alliance of Canada (PSAC) have been in negotiations for over a year in an attempt to settle over 1200 grievances and various complaints… In order to arrive at a mutually acceptable resolution, both parties have made concessions.*
>
> *The Employer respectfully submits that if the Complainant takes issue with any of the compromises that the parties have tentatively agreed to, she should be addressing her issues with her bargaining agent, who is acting on her behalf in these settlement discussions.*

. . .

[5] The respondents also requested that Mr. Heavens' name be removed as a respondent to the complaints and concluded by asking that the complaints be dismissed without a hearing.

[6] In subsequent correspondence to the Board dated April 27, 2011, the respondents objected to the Board's jurisdiction to hear the complaints on the following basis:

. . .

> *The Employer respectfully submits that the complainants cannot file complaints in their own name when the prohibitions concerning the rights of the bargaining agent are not respected by the employer. Only the PSAC or someone it has appointed as its representative may file a complaint under section 190 of the* Act *alleging contravention of the prohibitions set out in subsection 186(1)*(a)*. Employees may file a complaint only in cases where their rights have been violated with respect to the prohibitions set out in subsection 186(2) of the Act. . . .*

[7] Accordingly, the respondents submitted that the complainants did not have standing to file their complaints under paragraph 186(1)(*a*) of the new *Act*. Therefore, the Board does not have jurisdiction to hear these complaints.

[8] In support of their arguments, the respondents referred me to the following Board decisions: *Cloutier v. Leclair*, 2006 PSLRB 5; *Dodier v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-14640 (19851016); *Reekie v. Thomson*, PSSRB File No. 161-02-855 (19981222); and *Feldsted et al. v. Treasury Board of Canada and Correctional Service of Canada*, PSSRB File Nos. 161-02-944, 947 and 954 (19990429).

[9] In their rebuttal, submitted on May 13, 2011, the complainants disagreed with the respondents' objection to the Board's jurisdiction. They argued in essence that nothing in the new *Act* restricts the right to complain under paragraph 186(1)(*a*) to an employee organization. They also stated that, under section 190, the Board has an obligation to examine and inquire into any complaint, including a complaint filed by an employee. Moreover, they argued that the jurisprudence cited by the respondents was decided under the *Public Service Staff Relations Act,* R.S.C. 1985, c. P-35 *(*"the former *Act*") and that nothing under the new *Act* forbids employees from filing a complaint under its paragraph 186(1)(*a*). Moreover, they argued that the previous Board's interpretation of the provisions of the former *Act* was incorrect and that this incorrect interpretation should not be adopted by this Board.

[10] On June 10, 2011, the Board informed the parties that it was prepared to deal with the objection to its jurisdiction. The parties were invited to submit additional comments through written submissions.

[11] The parties were also informed that a decision would be rendered once all written submissions were received.

[12] On June 15, 2011, the respondents wrote to the Board, essentially reiterating their position and adding that in 2007 the Board rendered a decision under the new *Act* in *Laplante v. Treasury Board (Department of Industry and the Communications Research Centre),* 2007 PSLRB 95, which dealt with the same matter at issue in this case. (Note: an application for judicial review of that decision before the Federal Court has been withdrawn — Court File No. T-1809-7.)

[13] The complainants, in their written submission of June 24, 2011, disagreed as follows with the jurisprudence cited by the respondents and referred the Board to the article of their collective agreement that deals with leave with or without pay for union business:

> *The employer referred to various cases and we submit that all the board member decisions were based on the incorrect interpretation of the legislation.*
>
> *We submit that our collective agreement's Article 14 clearly shows that an employee can make a complaint under section 186(1)(a) on his or her own behalf ….*
>
> *Article 14*
> *Leave With or Without Pay*
> *For Alliance Business*
>
> ***Complaints Made to the Public Service Labour Relations Board Pursuant to Section 190(1) of the* Public Service Labour Relations Act**
>
> ***14.01** When operational requirements permit, in cases of complaints made to the Public Service Labour Relations Board pursuant to section 190(1) of the PSLRA alleging a breach of sections 157, 186(1)*(a)*, 186(1)*(b)*, 186(2)*(a)*(i), 186(2)*(b)*, 187, 188*(a) *or 189(1) of the PSLRA, the Employer will grant leave with pay:*
>
> *(a) to an employee who makes a complaint on his or her own behalf before the Public Service Labour Relations Board;*
>
> *and*
>
> *(b) to an employee who acts on behalf of an employee making a complaint, or who acts on behalf of the Alliance making a complaint.*

[14] Finally, I note that, from all the documentation submitted to the Board, it is not in dispute that the complainants are not represented by their bargaining agent in these proceedings; nor do they have a mandate from that bargaining agent to file the present complaint.

III. Reasons

[15] After a careful review of all the written material and jurisprudence submitted by the parties, I have decided to deny the complaints for want of jurisdiction.

[16] In my view, only an employee organization or a duly mandated representative may complain of a violation of the prohibitions set out in paragraph 186(1)(*a*) of the new *Act*.

[17] The complaints are based on paragraph 190(1)(*g*) of the new *Act*, specifically on section 185 and paragraph 186(1)(*a*). Those provisions 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).*
>
> *Unfair labour practices — employer*
>
> ***186.*** *(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> *(a) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*
>
> *(b) discriminate against an employee organization.*
>
> *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *a) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization,*

> *or participates in the promotion, formation or administration of an employee organization,*
>
> *(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,*
>
> *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iv) has exercised any right under this Part or Part 2;*
>
> *(b) impose, or propose the imposition of, any condition on an appointment, or in an employee's terms and conditions of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Part or Part 2; or*
>
> *(c) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from*
>
> *(i) testifying or otherwise participating in a proceeding under this Part or Part 2,*
>
> *(ii) making a disclosure that the person may be required to make in a proceeding under this Part or Part 2, or*
>
> *(iii) making an application or filing a complaint under this Part or presenting a grievance under Part 2.*
>
> . . .

[18] In my opinion, when Parliament enacted subsections 186(1) and (2) of the new *Act*, it had in mind two different and distinct statutory protections against potential unfair labour practices by employers. One was to protect the interests of employee organizations, and the other was to protect the interests of individual employees.

[19] The prohibition set out in paragraph 186(1)(*a*) of the new *Act* is directed at protecting an "employee organization" from interference by the employer. This interpretation is reinforced by the wording of paragraph 186(1)(*b*) that, like

paragraph 186(1)(*a*), refers to an "employee organization" as opposed to a "person," referred to in subsection 186(2).

[20] In enacting subsection 186(2), Parliament was equally concerned about protecting the interests of individual employees by listing the actions that employers may not take against employees and that constitute unfair labour practices. That list is clearly directed at protecting individuals as opposed to employee organizations.

[21] A review of subsection 191(3) of the new *Act* supports, in my view, this distinction between subsections 186(1) and (2). I subscribe to the view expressed by the Board in *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37, at para 25, that, in 2005, with the enactment of the new *Act* and particularly subsection 191(3), Parliament tried to create a level playing field between employers and employees facing situations contemplated under subsection 186(2). In recognition of the particular vulnerability of individual employees faced with situations listed in subsection 186(2), Parliament decided that the burden of proof that would normally fall on the complainant would shift to the employer under subsection 191(3). Subsection 191(3) reads as follows:

> ***191****(3) If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or by any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

[22] Thus, under subsection 186(2), employees enjoy the benefit of a favourable presumption. Not so for a situation contemplated in paragraphs 186(1)(*a*) and (*b*), in which Parliament probably felt that employee organizations are normally better organized and informed to challenge employer actions. In paragraphs 186(1)(*a*) and (*b*) the burden of proof to demonstrate that an unfair labour practice occurred is placed on the complainant, i.e., the employee organization or its duly authorized representative.

[23] In support of their argument that employees can file complaints under paragraph 186(1)(*a*) of the new *Act,* the complainants argued that the change in the legislation in 2005 also brought a change to their ability to file unfair labour practice complaints against the employer. The complaints compare sections 8, 9 and 23 of the

former *Act* to paragraph 186(1)(*a*) of the new *Act* and conclude that, under the new *Act*, individual employees can also file complaints under paragraph 186(1)(*a*). Finally, the complainants pointed out that nowhere under the new *Act* are employees expressly forbidden from making complaints under paragraph 186(1)(*a*). Section 8 of the former *Act* reads as follows:

> ***8.*** *(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*
>
> *(2) Subject to subsection (3), no person shall*
>
> (a) *refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> (b) *impose any condition on an appointment or in a contract of employment, or propose the imposition of any condition on an appointment or in a contract of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or*
>
> (c) *seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee*
>
> *(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or*
>
> *(ii) to refrain from exercising any other right under this Act.*
>
> *(3) No person shall be deemed to have contravened subsection (2) by reason of any act or thing done or omitted in relation to a person who occupies, or is proposed to occupy, a managerial or confidential position.*

[24] Section 9 of the former *Act* reads as follows:

> ***9.*** *(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.*
>
> *(2) Nothing in subsection (1) shall be construed to prevent a person who occupies a managerial or confidential position from receiving representations from, or holding discussions with, the representatives of any employee organization.*

[25] Paragraph 23(1)(*a*) of the former *Act* reads as follows:

> ***23.*** *(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(*a*) to observe any prohibition contained in section 8, 9 or 10. . . .*

[26] After reviewing sections 8, 9 and 23 of the former *Act*, I conclude that I must disagree with the complainants' arguments. I believe that, for the matter at issue, the prohibitions prescribed in sections 8 and 9 of the former *Act* are the same as those in subsections 186(1) and (2) of the new *Act*. I am not convinced that section 190 and subsections 186(1) and (2) of the new *Act* lead to a different result when deciding who has standing under paragraph 186(1)(*a*). Just as under the former regime, I am of the view that the statutory rights under paragraph 186(1)(*a*) were established by Parliament to protect employee organizations and not individual employees against interference by the employer.

[27] The issue of whether an individual employee can file a complaint under paragraph 186(1)(*a*) of the new *Act* was similarly decided in *Laplante.* In that decision, the Board upheld the respondents' objection that individual employees cannot file complaints under paragraph 186(1)(*a*) and decided the following at paragraph 72:

> ***72.*** *Furthermore, the complainant cannot file a complaint of interference in union business; only an employee organization or a person that it authorized may do so. . . .*

[28] As for whether, on that same issue, paragraph 186(1)(*a*) of the new *Act* should be read differently from sections 8 and 9 of the former *Act,* the Board concluded as follows at paragraph 72 of *Laplante*:

> *. . . I agree with the conclusions in* Reekie, Feldsted *and* Buchanan *cited by the employer with respect to sections 8 and 9 of the former* Act*. Since the prohibitions against the employer's interference in union business in the new* Act *are the same as those under sections 8 and 9 of the former* Act*, the reasoning established in those decisions applies to this case.*

[29] I agree with the conclusions reached by the Board member in *Laplante.*

[30] Finally, I do not agree with the complainants' argument that article 14 of their collective agreement, which concerns leave for union business, supports their position that an employee can file a complaint under paragraph 186(1)(*a*) of the new *Act*.

[31] In my view, the purpose of clause 14.01 of the complainant's collective agreement is solely the granting of leave, subject to operational requirements, by the employer, to an employee in a situation in which the employee has to appear before the Board following the filing of a complaint under subsection 190(1) of the new *Act.* Clause 14.01 is part of article 14 of the collective agreement, which deals with the granting of leave by the employer under different circumstances related to union business. It does not contemplate the issue of whether an individual employee has standing under paragraph 186(1)(*a*) of the new *Act* and instead addresses only relatively technical issues surrounding the granting of leave in a variety of circumstances.

[32] Since I have concluded that only an employee organization can file a complaint under paragraph 186(1)(*a*) of the new *Act,* there is no need to address whether Mr. Heavens' name should be removed as a respondent.

[33] I do not have jurisdiction to hear the complaints because the complainants do not have standing to file complaints under paragraph 186(1)(*a*) of the new *Act.*

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

(The Order appears on the next page)

IV. Order

[35] The complaints are dismissed.

August 8, 2011.

Linda Gobeil,
Vice-Chairperson