Date: 20111021

Files: 561-02-444 and 449

Citation: 2011 PSLRB 118

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CLAYTON EDWIN JOSEPH THERRIEN

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
Therrien v. Canadian Association of Professional Employees

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

REASONS FOR DECISION

Before: Stephan J. Bertrand, Board Member

For the Complainant: Himself

For the Respondent: Peter Engelmann, counsel

Decided on the basis of written submissions filed on May 19, 2011.

Background

[1] The Canadian Association of Professional Employees ("the respondent" or CAPE) is the bargaining agent for all employees classified EC, the Economics and Social Sciences Services Group, employed by the Treasury Board. Clayton Edwin Joseph Therrien ("the complainant") is a member of that bargaining unit. At all material times, he was (and still is) employed at Statistics Canada ("the employer").

[2] The complainant is the former president of CAPE Local 503, which represents employees of the employer. He occupied this position from November 2003 until the Local was suspended and placed in trusteeship by the respondent on December 9, 2009.

[3] The complainant filed two complaints with the Public Service Labour Relations Board ("the Board"). Both were filed against the CAPE, and both allege that it committed an unfair labour practice. The first complaint (PSLRB File No. 561-02-444) was filed on March 3, 2010, the second (PSLRB File No. 561-02-449) on March 22, 2010.

[4] The complainant's explanation of the complaints appears to allege that the respondent breached sections 185 to 190 of the *Public Service Labour Relations Act* ("the *Act*") in its dealings with Local 503, with the members of the Local's Executive Committee (LEC) and with him personally. In a preliminary objection, the respondent submitted that the complaints ought to be dismissed by the Board on the basis that no *prima facie* case of a breach of those sections was established.

Preliminary issues

[5] Although the two complaints contain a lot of information, it is difficult, to say the least, to decipher the acts, omissions or other matters complained of by the complainant and, particularly, the linkage of his allegations to specific provisions of the *Act*. For example, at Box 4 of his complaint (PSLRB File No. 561-02-444), which requires complainants to describe such acts, omissions or other matters, the complainant states as follows:

> *PURSUANT TO SECTIONS 185, 187, 188, 189 & 190, PER THE LETTER DATED DECEMBER 23, 2009 FROM CAPE, SIGNED BY A. PICOTTE; THE CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES HAS BREACHED ITS OWN*

> *BY-LAWS & CONSTITUTION, NATURAL LAW, ADMINISTRATIVE JUSTICE AND THE LETTER OF INTERPRETATION FROM THE PRESIDENT DATED JUNE 16, 2009, AND HAS COMMITTED CIVIL OFFENSES INCLUDING HARASSMENT AND DEFAMATION IN ITS PERSECUTION OF LOCAL 503 AND ITS REPRESENTATIVES REGARDING THE ALLEGATION OF "interfering with the work of an lro;" THAT SUCH AN ORDER OF SUSPENSION MUST BE STRUCK DOWN AND RECTIFIED BECAUSE: * OF CONFLICT OF INTEREST. * OF BIASED POLITICAL OBJECTIVES. * THE JUDGEMENT AND EXECUTION TO THE FULLEST EXTENT HAS BEEN ASSERTED IN A MANNER THAT IS OUT OF ORDER PROCEDURALLY AND CHRONOLOGICALLY. * THE ALLEGATIONS THEREIN DO NOT CONFORM TO ANY STANDARD OF COMPLAINT, GRIEVANCE OR AN ALLEGATION OF A BREACH OF A CAPE BY-LAW NOR CRIMINAL NOR CIVIL OFFENCE. * THE COMPOSITION OF THE 'INVESTIGATIVE COMMITTEE' IS BIASED & PREJUDICED AGAINST CLAYTON THERRIEN & THE LOCAL EXECUTIVE COMMITTEE 503 AND ITS MEMBERSHIP. * THE NATIONAL PRESIDENT HAS ABUSED HIS/HER POWER UNDER ARTICLE 9.3 OF THE CONSTITUTION. * THE NATIONAL EXECUTIVE COMMITTEE HAS ABUSED ITS POWER UNDER ARTICLE 6 OF THE CONSTITUTION. * THE MANAGEMENT AND STAFF HAS ABUSED ITS POWER INSOFAR AS THEY HAVE DISCRETION PER THE ABOVE. NAMED: THE CAPE NATIONAL EXECUTIVE COMMITTEE & CAPE MANAGEMENT & STAFF.*
>
> [*Sic* throughout]

[6] Not surprisingly, before responding to the complaints, the respondent's counsel requested that the complainant be required to particularize them, as it alleged that none of his allegations referred to any contravention of the *Act*.

[7] On April 1, 2010, the Board requested that the complainant provide by April 14, 2010 his position regarding the respondent's request for the particulars. The complainant requested additional time to provide a response — until April 19, 2010 — and was granted that time by the Board. No position or particulars were provided by the extended deadline.

[8] On May 11, 2010, the Board wrote to the complainant to remind him that the deadline had passed and that no particulars had been received. The complainant was advised that he was required to provide the particulars immediately, which he again failed to do.

[9] On October 26, 2010, the complainant was again reminded of his failure to abide by the Board's request and was given until November 9, 2010 to file his particulars, on which date he requested an additional two-week extension indicating that "medical certification will be available", a request that the Board again granted.

[10] On November 15, 2010, the complainant submitted an 11-page document that provided very little, if any, insight and that fell short of particularizing his complaints. It contained assertions 1) that the "catch-all" by-law cited by CAPE was not in effect at the time of the events and 2) that if it was, it was "an affront to the principles of the Charter" 3) that he broke no by-laws 4) that CAPE's actions were "procedurally unjust and also unfounded in fact" and 5) that CAPE had harassed and defamed him. To a little over three pages of text composed by the complainant was attached the first page of a letter from CAPE advising the complainant that it had struck an Investigation Committee, as well as five "Notes" in which the complainant provides citations from the *Charter of Rights and Freedoms*, excerpts from two decisions of the SCC, an excerpt from a paper on anti-trust regulation, as well as an excerpt from CAPE's by-laws.

[11] That document prompted the respondent to contend that the complainant had still failed to particularize or even to clarify his complaints and to request that he be given one last opportunity to provide the particulars of his complaints, failing which they should be dismissed on the basis that they do not demonstrate a *prima facie* breach of the *Act*. In the alternative, the respondent suggested that a pre-hearing conference be held to allow the complainant to verbally particularize his complaints.

[12] On December 16, 2010, the complainant requested a pre-hearing conference, which was later scheduled for February 11, 2011, by teleconference. During the teleconference, the complainant, although obviously unprepared, agreed to provide the Board with the particulars of his two complaints. In a letter sent that same day, the Board specifically directed him to particularize his complaints by expanding on the following topics:

i) the specific provisions of the *PSLRA* that were allegedly violated;

ii) how he was personally affected by those alleged violations (the resulting effects on him);

iii) who allegedly violated the provision;

iv) when the alleged violations took place;

v) what action or conduct amounted to those violations; and

vi) what documents, if any, support the allegations.

[13] The complainant was required to provide the particulars by March 11, 2011. He provided documents before the deadline and requested more time, until April 14, 2010, to submit more documents; his request was granted.

[14] On April 14, 2010, the complainant provided additional documents in eight separate emails sent to the Board's registry. Those documents, which totaled approximately 1000 pages, were submitted in no particular order and without any chronology and, importantly, without any indication from the complainant as to their purpose. He made no attempt to link any of the documents to the Board's itemized directions.

[15] As a result, a second pre-hearing conference was scheduled, this time in person. The complainant was present, although once again unprepared, and was unable to assist the Board or the respondent by providing some kind of link between the particulars being sought and the voluminous documentary record that he had submitted.

[16] In light of that fact, I directed the parties to provide written submissions on the respondent's preliminary objection that the complaints failed to make out a *prima facie* case under section 190 of the *Act*. The respondent was directed to submit its submission by May 24, 2011, which it did. The complainant was directed to file his responding submissions by June 17, 2011, which he failed to do.

[17] On June 21, 2011, the Board's registry communicated with the complainant by email, his preferred method of communication, to remind him once again that the June 17 deadline had passed and that no submissions had been received. The complainant was given until the end of that day to file his submissions, which he again failed to do.

[18] On June 23, 2011, the Board's registry communicated with the complainant to inquire as to whether he intended to file submissions. According to the Registry Officer's note to file, the complainant unambiguously indicated that he did not intend to make further submissions and that he wished to withdraw his complaints. The next day, the Board wrote to the complainant to request a written notice of withdrawal, which he failed to provide.

[19] On June 29, 2010, the Board again wrote to the complainant and gave him until July 8, 2011 to file his notice of withdrawal, failing which a determination of the complaints would be made based on the submissions filed to date.

[20] Since the complainant filed no submission or notice of withdrawal by July 8, 2011, the parties were advised on July 11, 2011 that the complaints would be determined based on the materials filed to date.

[21] My authority to determine these matters without holding an oral hearing is found in section 41 of the *Act*.

The facts

[22] In the absence of any contradictory submissions on the complainant's part, I accept the respondent's statement of facts, which is reproduced as follows.

[23] On September 30, 2009, several allegations of wrongdoing by members of the LEC of Local 503 were brought to the attention of the CAPE's National Executive Committee (NEC). The allegations included interfering with the work of labour relations officers tasked with representing individual members of Local 503, suspending, without due process, a member of the LEC, spending membership funds in proceedings against the CAPE, inappropriately using CAPE funds entrusted to the LEC, and deliberately acting in disregard of the authority of the president of the CAPE and of the NEC. Seven allegations were made against the complainant, who was the president of Local 503 at that time, and six other members of the LEC, as evidenced by an investigation report of the NEC's Investigation Committee, filed by the respondent.

[24] The CAPE's constitution, which was also filed by the respondent, sets out the powers of the NEC in article 6. All the powers of the respondent as an employee

organization are vested in the NEC and are subject to the restrictions and conditions specified in the CAPE's constitution and its bylaws. Clause 6.6, which provides the NEC with the power to discipline or expel members, is but one example of those powers.

[25] As a result of the number of serious allegations against members of the LEC, on December 9, 2009, the NEC temporarily suspended Local 503 and placed it in trusteeship. Under clause 20.10 of the CAPE's constitution, all records, property and funds in Local 503's possession were ordered returned to CAPE's National Office. That decision was communicated to LEC members by a letter dated December 11, 2009 and to Local 503's membership by a memo dated December 14, 2009. The December 11, 2009 letter to LEC members highlighted the seriousness of the allegations against them. The NEC also struck a committee to investigate ("the Investigation Committee") the allegations and, if it substantiated any allegations of wrongdoing, to recommend disciplinary action against the wrongdoers.

[26] On December 23, 2009, the Investigation Committee wrote to each individual that it would investigate, including the complainant, to advise them of the allegations against them and of the investigative process that would be followed. Each individual, including the complainant, was invited to provide documentary evidence and the names of witnesses to the Investigation Committee. Each individual was also invited to meet with the Investigation Committee to assist with the investigation.

[27] The complainant and some other LEC members did not respond to the Investigation Committee's letter of December 23, 2009. The complainant and the others who did not respond were sent further invitations to participate in the investigation on January 20, 2010 and on February 5, 2010. The letter dated February 5, 2010 advised the complainant that failing to participate in the investigation would not prevent the Investigation Committee from making its findings and recommendations to the NEC about the matters it was investigating and that its findings and recommendations would be based on the evidence before it. The Investigation Committee met with and heard from those who agreed to participate in the investigation. The complainant did not participate.

[28] On March 3, 2010, the complainant filed the first of his two complaints with the Board, PSLRB File No. 561-02-444. The Investigation Committee's report of its

investigation was not finalized at that time. That complaint largely deals with the suspension and trusteeship of Local 503.

[29] On March 19, 2010, the Investigation Committee provided a copy of its report on its findings to the complainant and to all other individuals subject to its investigation. The Investigation Committee concluded that the allegations against four members of the LEC were unfounded, and that some or all allegations against three LEC members were founded, including the complainant. The Investigation Committee concluded that all seven allegations against him were substantiated. The complainant, and the two other individuals against whom allegations were found substantiated, were advised that the NEC would meet on March 31, 2010 to determine the appropriate disciplinary action. They were invited to appear before the NEC at that meeting to make representations in response to the findings and recommendations specific to them.

[30] On March 22, 2010, the complainant filed the second of his complaints, PSLRB File No. 561-02-449, with the Board. It largely reiterates his disapproval of the process used by the NEC to suspend Local 503 and to place it in trusteeship.

[31] The Investigation Committee presented the report on its findings to the NEC during its March 31, 2010 meeting. For the complainant, the Investigation Committee recommended a suspension from CAPE membership of 12 years and 6 months. The complainant declined to appear in front of the NEC to comment on his case. The NEC nonetheless decided to reduce the complainant's suspension to six years, starting on April 1, 2010. The other two members of the LEC against whom allegations were found substantiated agreed to appear before the NEC. One had his recommended suspension reduced. The complainant was advised of the NEC's decision by letter dated April 6, 2010.

The respondent's arguments

[32] According to the respondent, both complaints should be dismissed for failing to establish a *prima facie* case of a violation of the *Act*.

[33] The respondent argues that the Board can dismiss a section 190 complaint for which it finds no *prima facie* foundation. In support of that proposition, the

respondent quoted paragraphs 13 and 14 of *Exeter v. Canadian Association of Professional Employees*, 2009 PSLRB 14, which state the following:

> *[13] . . . Any complainant bears a responsibility to outline the details of his or her complaint to the extent necessary to establish how the alleged act or omission breaches a specific prohibition under the* Act *on a* prima facie *basis. Should the complainant fail to do so, the Board may dismiss the complaint or may strike from it references to cited provisions of the* Act *for which it finds no* prima facie *foundation.*
>
> *[14] In this instance, the complainant has the onus to establish on a* prima facie *basis how the allegations she makes relate to each of paragraphs 190(1)*(a) *through* (g) *of the* Act *as cited on Form 16. The threshold requirement is not high. A* prima facie *basis exists for the allegation where the purported facts — assumed for this preliminary purpose to be true — reveal an arguable case that there has been a breach of the statute. . . .*

[34] The respondent submits that, in this case, the complainant failed to adduce any facts that reveal how the respondent breached section 185 to 190 of the *Act*. It contends that the facts adduced by the complainant either refer to matters not properly within the Board's jurisdiction or do not disclose a breach of the *Act*, even if considered true.

[35] The respondent further argues that none of the complainant's allegations pertains to anything that is properly the subject matter of a complaint made under section 187 of the *Act*.

[36] According to the respondent, section 187 of the *Act* provides that employee organizations must not act in a manner that is arbitrary, discriminatory or in bad faith ". . . in the representation of any employee in the bargaining unit" and that, traditionally, the duty of fair representation applies only to a bargaining agent's representation of employees with respect to their employers. In support of that proposition, the respondent referred me to *Shutiak et al. v. Union of Taxation Employees - Bannon,* 2008 PSLRB 103 and to *Kraniauskas v. Public Service Alliance of Canada et al.*, 2008 PSLRB 27. In *Shutiak* at paragraph 19, the Board commented as follows:

> [19] . . . *The Board has jurisdiction under section 187 of the* Act *to deal with allegations that a bargaining agent acted in a manner which is arbitrary, discriminatory or in bad faith "in the representation of any employee in the bargaining unit". It is well established in the Board's jurisprudence that section 187 does not address matters relating to the internal affairs of a bargaining agent but, rather, relates to the representation of employees by the bargaining agent in its dealings with the employer:* Kraniauskas v. PSAC et al., *2008 PSLRB 27. As the complainants have made no allegation concerning the union's actions vis-à-vis the employer, the complainants have failed to make out a* prima facie *case under section 187.*

[37] Since the complainant made no allegation in either complaint about the CAPE's representation of him in any dealings with the employer, and since he made no allegation that such representation was sought or that it was provided in a manner that was arbitrary, discriminatory or in bad faith, there is, according to the respondent, nothing in the complaints disclosing a *prima facie* case of a breach of section 187 of the *Act*.

[38] With respect to the complainant's allegation that the CAPE breached section 188 of the *Act,* the respondent argues that he did not clearly indicate which paragraph of section 188 the CAPE breached. However, the respondent submits that nothing in the general factual context of the complaints or in the documents filed by the complainant support that it breached paragraph 188(*a*) (attempt to persuade an employee to become or refrain from becoming a member of an employee organization), *(d*) (discipline against an employee for exercising a right under Part 1 or 2 of the *Act*), or (*e*) (reprisal against an employee for participating in a proceeding under Part 1 or 2 of the *Act*). According to the respondent, the only reasonable interpretation of the complainant's allegations with respect to section 188 is as an alleged breach of paragraph 188(*b*) or (*c*) of the *Act*.

[39] Those provisions read as follows:

> ***188.*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> . . .

> *(*b*) expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;*
>
> *(*c*) take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner. . . .*

[40] The respondent submits that the Board lacks jurisdiction to consider the complainant's allegation of a breach of paragraphs 188(*b*) or (*c*) of the *Act* and that, in any event, the complaints do not disclose a *prima facie* case of a breach of either provision.

[41] According to the respondent, the allegations of a breach of paragraph 188(*b*) or (*c*) of the *Act* are not within the Board's jurisdiction because (i) they refer largely to matters which the Board has no authority to adjudicate, and (ii) they were made prematurely.

[42] The respondent further submits that, even if all the facts alleged by the complainant are considered true, and despite the jurisdictional issues, the complaints fail to disclose a violation of paragraph 188(*b*) or (*c*) of the *Act*.

[43] The respondent contends that, to prove a breach of paragraph 188(*b*) or (*c*) of the *Act*, a complainant must show that an employee organization's membership rules or standards of discipline were applied in a discriminatory manner. The Board's jurisprudence is clear that it has no authority under those provisions to review the substance of the organization's decision to discipline or deny membership to an employee. In support of that contention, the respondent referred me to paragraph 32 of *Strike v. Public Service Alliance of Canada*, 2010 PSLRB 22.

[44] According to the respondent, *Shutiak,* at paragraph 16, and *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 58, at paragraph 28, state respectively that the word "discriminatory" in paragraphs 188(*c*) of the *Act* refers to discrimination based on a prohibited ground under the *Canadian Human Rights Act* R.S.C. 1985, C.H-6, or to a decision-making process that breached the rules of administrative justice. The respondent adds that although both cases define the word "discriminatory" as it appears in paragraph 188(*c*) of the *Act*, the same

definition should be attributed to paragraph 188(*b*) since the same word is used in an identical context.

[45] The respondent submits that, in *Strike,* a similar factual scenario occurred, in that Mr. Strike, like the complainant in this case, had refused to participate in an internal union process that would have allowed him to express his views on allegations made against him. In those circumstances, the Board found that there was little merit to a complaint that the process was applied in a discriminatory matter.

Reasons

[46] The matter to be determined is whether the complainant established the foundations for an arguable complaint under paragraph 190(1)(*g*) of the *Act*, assuming that his alleged facts are true. For the reasons that follow, I have determined that the complainant was not successful.

[47] Although the complainant indicated that his complaints were based on sections 185, 186, 187, 188, 189 and 190 of the *Act*, I agree with the respondent's contention that he did so without providing the particulars of the links of his allegations to specific provisions of the *Act*. Furthermore, he failed to clarify how his allegations supported a violation of the *Act*.

[48] The Board reviewed the requirements of a complainant in such circumstances as follows at paragraph 48 of *Russell v. Canada Employment and Immigration Union*, 2011 PSLRB 7:

> ***[48]*** *A complaint under section 190 of the* Act *need not include the full details of the complainant's case when it is filed with the Board, as is made apparent by section 4 of Form 16 (*Complaint under Section 190 of the Act*), which asks for a "[c]oncise statement of each act, omission or other matter complained of … " Nonetheless, a complainant is expected to provide sufficient information in Form 16 or, when subsequently asked for clarification, to reveal the essential subject matter of the complaint so that the Board can be satisfied (1) that it has been properly filed under the identified paragraph of subsection 190(1), and (2) that there is, or could be, an arguable case for a violation of the provision of the* Act *to which that paragraph refers. As a matter of procedural fairness, the requirement to provide sufficient information is also vital to permit the named respondent to understand the*

> *basic dimensions of the case against which it must defend.*
> [Emphasis added]

[49] An initial review of the complaints did not reveal whether the complainant was complaining about something that affected him personally or something that affected Local 503 or its LEC. Nor did it reveal any facts that could support an allegation of discriminatory conduct by the respondent.

[50] On several occasions, the Board sought to obtain the particulars of the complainant's allegations against the respondent. In response, the complainant forwarded roughly a thousand pages of documents without any indication of what they were for or which allegations they supported. It is certainly not apparent, from a review of those documents, why or for what purpose they were submitted. These documents, on their face and presented as they were, indubitably did not and could not help the complainant establish a *prima facie* case.

[51] The term "*prima facie"* is commonly used to describe the apparent nature of something on initial observation. In law, the term is generally used to describe the presentation of sufficient evidence by a claimant to support his or her claim (a "*prima facie"* case).

[52] To ensure that that initial onus is met, a complainant must produce enough evidence on all elements of his or her complaint to support his or her claim. This consists of an "at-first look" of the requirement to adduce sufficient material facts to establish a violation of the *Act*. That evidentiary foundation must be legally sufficient to make out a case that the *Act* was in fact violated. In other words, I must consider whether, if all the complainant's allegations are true, the Board could find that the *Act* was in fact violated. That is simply not the case here.

[53] The complainant's failure to particularize his complaints as requested, either by addressing the Board's specific directions or by filing written submissions as requested, left me with nothing more than vague and incoherent statements and references that could not form the basis of an arguable case for a violation of the *Act*.

[54] Based on the documents I reviewed, it is not even conceivable that the respondent acted arbitrarily, in bad faith or in a discriminatory manner and that any of sections 185 to 190 of the *Act* were violated as a result.

[55] For example, in a written statement filed with the Board on November 16, 2010, the complainant expressed at length his disapproval of the internal process used by the NEC to suspend Local 503 and to put in trusteeship, but he did so without referring specifically to a single discriminatory act or conduct by the respondent. As was the case for all his allegations, no link to a violation of a specific provision of the *Act* was made or could be presumed.

[56] Furthermore, I also agree with the respondent's contention that, although *Shutiak* and *Veillette* refer to the use of the word "discriminatory" in paragraph 188(*c*) of the *Act*, the same word is used in an identical context in paragraph 188(*b*), such that it must have the same meaning in both provisions. No evidentiary foundation of any discriminatory act was made out in this case.

[57] The complainant had four opportunities to meet his initial onus. First, when he filed his complaint; second, when he took part in the first pre-hearing conference; third, when he appeared at the second pre-hearing conference; and fourth, when he was provided with an opportunity to present written submissions. He failed in each of the first three opportunities and wilfully declined to file submissions on his fourth and final opportunity.

[58] The complainant was clearly reminded of his failure to establish a *prima facie* case during the second pre-hearing conference and was, at that time, given one last opportunity to address the issue, but he declined.

[59] In my opinion, the complainant has not presented me with any arguable basis for finding that the respondent violated the *Act*, despite being provided with numerous opportunities and adequate time to particularize his allegations and to provide sufficient information that could reveal the essential subject matter of his complaints. For that reason, I find that the complainant did not establish any foundation for a violation of the *Act*.

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

(The Order appears on the next page)

Order

[61] The complaints are dismissed.

October 21, 2011.

Stephan J. Bertrand,
Board Member