Date: 20111013

File: 561-34-424

Citation: 2011 PSLRB 115

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

GORDON EDWARD SIGMUND

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Sigmund v. Public Service Alliance of Canada

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

REASONS FOR DECISION

Before: Stephan Bertrand, Board Member

For the Complainant: Himself

For the Respondent: Debra Seaboyer, Public Service Alliance of Canada

Heard at Vancouver, British Columbia,
June 13 to 15, 2011.

I. Complaint before the Board

[1] On November 24, 2009, Gordon Edward Sigmund ("the complainant") filed a complaint in which he alleged that his bargaining agent, the Public Service Alliance of Canada ("the respondent"), committed an unfair labour practice. The complaint refers specifically to paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). That paragraph reads 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.*

It is apparent from the documentation on file that the only possible applicable provision under section 185 of the *Act* is section 187, which reads as follows:

> ***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.*

[2] The complainant listed nine separate grounds in support of his complaint, which refer to nine separate alleged failures on the part of the respondent. He listed the nine grounds as follows:

> *DEC 07, REP., ED PAINTER, FAILURE TO FILE GRIEVANCE FOR ABUSE OF AUTHORITY/HARASSEMENT.*
> *JAN.08, REP., ED PAINTER, FAILURE TO FILE GRIEVANCE FOR FAILURE TO ACCOMMODATE.*
> *OCT.,08, REP., HILDE SELLMYRE, FAILURE TO FILE GREIVANCES FOR NON ACCEPTANCE OF FUNCTIONAL ABILITIES FORM, FAILURE TOFILE FOR ACCOMMODATION*
> *JAN., 09, HILDE SELLMYRE, FALURE TO FILE , NEW FAILURE TO ACCOMMODATE.*
> *MAY 09, HILDE SELLMYRE, FAILURE TO FILE TO CORRECT AN EMPLOYEES AND PEER'S UNTRUTHFULL CLAIMS USED TO DAMAGE MY REPUTAION AND ENHANCE THEIRS.*
> *JUNE 09, HILDE SELLMYRE, FAILURE TO FILE FOR HARASSEMENT. (NEW)*
> *JUNE 09 JEAN STERLING, FAILURE TO FAMILIARIZE HERSELF WITH MY FILE(S, MISSUNDERSTOOD BASIES OF FILES, SECTIONS OF THE COLLECTIVE AGREEMENT, AND CONFUSED TWO SIMILAR FILING ISSUES AND TOOK*

> *INSTRUCTIONS FROM MANAGEMENT AS TO HOW TO DISPOSE OF FILES. rEFUSED TO ADVANCE MY 3 FILED GRIEVANCES TO A HIGHER LEVEL, WOULD NOT SUBMIT FOR TRANSMITTAL AS MY REQUESTS. THIS WAS NOT DONE ON THE MERITS OF THE GRIEVANCE BUT ON HER MISSUNDERSTANDING OF THE RULES AND HER DESCRIMINATORY BEHAVIOUR.*
> *JULY 09 PAMELA ABBOTT, REGIONAL VP, FAILED TO APPLY DUE DILLIGENCE TO A REVIEW OF MY FILES AND COMPLAINTS.*
> *OCT 09, JEAN STERLING, TERRY RUTER (LOCAL PRES.) GARY FRASER (REGIONAL) WOULD NOT REPLY TO MY ENQUIRIES OF ACTIONS DISPOSITION RETURN OF FILES,*
>
> [*Sic* throughout]

[3] The complainant identified October 9, 2009 as the date on which he knew of the acts, omissions or other matters giving rise to the complaint.

[4] In its written reply dated December 9, 2009, the respondent raised a preliminary objection on the basis that the complaint was inadmissible and that it should be summarily dismissed, first because the first eight grounds were untimely, as the complaint was not filed within the time limit set out in subsection 190(2) of the *Act,* and second because the remaining ninth ground dealt with an issue over which the Public Service Labour Relations Board ("the Board") has no jurisdiction. Subsection 190(2) reads as follows:

> ***190.*** *(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

II. Hearing

[5] The sole purpose of the hearing was to determine whether the complaint was untimely or dealt with an issue over which the Board had no jurisdiction, or both.

[6] The case was scheduled to be heard in Vancouver, British Columbia, beginning on June 13, 2011, at 09:30, and lasting a duration of three days. On June 13, 2011, at approximately 08:33, the complainant emailed a Board registry officer, indicating that he was under the impression that the hearing had been postponed and that he was, in any event, unable to attend because he was ill. No particulars were provided.

[7] Shortly after receiving the email, the registry officer attempted to reach the complainant by phone to obtain particulars, including whether he was seeking a postponement of the hearing, but was unsuccessful, as the telephone number on file was out of service. The registry officer then emailed the complainant, seeking that same information.

[8] As of 09:40, the complainant had not responded to the registry officer's email. I proceeded to open the hearing and sought comments from the respondent's representative, who objected to any postponement and indicated that the respondent was ready to proceed and that it had a witness who had flown from another province to testify. She added that the complainant was known for not showing up at meetings and for failing to disclose the nature of his health condition.

[9] I adjourned the hearing until the next morning and instructed the registry officer to write to the complainant and to advise him that, if he did not intend to attend on the next day, he was required to attend a teleconference on June 14, 2011, at 09:30 to formally request an adjournment and to provide some particulars, failing which the matter could proceed in his absence.

[10] The complainant replied to the registry officer's email on June 14, 2011, at 06:49. He indicated that he was requesting an adjournment because he was on long-term disability and was experiencing "great difficulties." He added that he anticipated being asleep at 09:30, which I took to mean that he would not be participating in the requested teleconference. Further, the complainant did not provided a telephone number at which he could be reached.

[11] When the hearing reconvened on June 14, 2011, the respondent opposed the complainant's request for an adjournment. According to the respondent, the complainant had known for some time that this case was scheduled for a hearing, had not raised his health issue in advance, was not providing any compelling reason for a delay and was refusing to even take part in a short teleconference. The respondent's witnesses were ready to testify and one witness in particular had travelled from far to do so.

[12] I denied the complainant's request for a postponement, and the hearing proceeded in his absence. In my opinion, the complainant failed to provide a compelling reason for a postponement. He was duly notified of the time and place of

the hearing and never raised any issue regarding his health until a few hours before it started. He failed to make himself available for a teleconference to discuss the postponement issue and ignored the Board's request for a valid telephone number at which he could be reached, despite being warned that there were no guarantees that the hearing would not proceed and that the postponement issue would be determined during the teleconference. Moreover, the complainant failed to suggest other times where he would be available to take part in a teleconference.

[13] There is no indication that the complainant does not possess a home phone or a cell phone or that something is preventing him from participating in a teleconference.

[14] The complainant's lack of cooperation and disregard for process could simply not be overlooked. Moreover, the respondent had first given notice of its intention to challenge the timeliness of the complaint in December 2009, it was ready to proceed, and one of its witnesses had travelled to testify and had been standing by since the previous day. The complainant had been advised on December 17, 2010 that the hearing was scheduled to proceed on these dates and was reminded on January 17, 2011 that those dates were considered to be "final."

[15] To this day, the complainant has failed to particularize his state of health and has not provided the Board with a telephone number at which he could be reached. In fact, the complainant has not communicated with the Board since his email of June 14, 2011 at 06:49.

[16] The respondent argued that the complaint should be dismissed because it is, for the most part, untimely, and because the remaining part of the complaint does not pertain to an issue over which the Board has jurisdiction. It also seeks a declaration from the Board that the complaint is frivolous.

A. Timeliness

[17] The respondent raised its timeliness objection when it responded to the complaint on December 9, 2009. According to the respondent, all but one ground relied on by the complainant are untimely.

[18] The respondent contended that the first eight grounds in the complaint clearly depict events that allegedly occurred well beyond the 90-day time limit set out in subsection 190(2) of the *Act*, which means that they are all untimely. Moreover, I am

without authority to extend the time limit for filing a complaint founded on those grounds. The respondent referred me to the following authorities: *Forward-Arias v. Union of Solicitor General Employees and Public Service Alliance of Canada*, 2010 PSLRB 81; *Psyllias v. Meunier-McKay and Canada Employment and Immigration Union*, 2009 PSLRB 67; *Cunningham v. Correctional Service of Canada and Union of Canadian Correctional Services — Syndicat des agents correctionnels du Canada — CSN,* 2009 PSLRB 96; *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100; *Babb v. Gordon,* 2009 PSLRB 114; *Hérold v. Public Service Alliance of Canada and Gritti*, 2009 PSLRB 132; *Renaud v. Canadian Association of Professional Employees*, 2009 PSLRB 177; *Panula v. Canada Revenue Agency and Bannon*, 2008 PSLRB 4; and *Walters v. Public Service Alliance of Canada*, 2008 PSLRB 106.

[19] The respondent argued that the complaint filed on November 24, 2009 would be outside the statutory 90-day time limit if the complainant knew or ought to have known of the circumstances giving rise to his complaint before August 26, 2009.

[20] The first eight grounds of the complaint refer specifically to events that allegedly occurred well before August 26, 2009, the first in December 2007 and the last in July 2009. According to the respondent, the complainant has never alleged that, although the events in question allegedly occurred before August 26, 2009, he became aware of the circumstances giving rise to his complaint only sometime after August 26, 2009; nor are there any compelling reasons to make that allegation. On August 26, 2010, the complainant replied to the respondent's response dated December 9, 2009 and made no effort to address the timeliness issue or to clarify the timing of his knowledge.

[21] Even if the last day of the month referred to by the complainant is used for each listed failure, since the complainant refers only to the month and year for each, the first eight grounds are still well beyond the 90-day time limit. In addition, the applicable collective agreement requires that a grievance be presented within 25 days of the alleged breach or violation. The standard grievance form requires the grievor's signature.

B. Remaining ground (ninth ground)

[22] With respect to the ninth ground of the complaint, although it appears to refer to an event that allegedly occurred within the time limit — October 2009 — the respondent contended that it does not refer to a matter over which the Board has jurisdiction. Section 187 of the *Act* refers to conduct by the bargaining agent ". . . in the representation of any employee in the bargaining unit [emphasis added]." According to the respondent, the alleged failure must therefore be about the representation of the complainant. In this case, the complaint refers to an alleged failure to reply to the complainant's inquiries into certain actions, certain dispositions and the return of files. In other words, this ground is about internal union procedures and has nothing to do with representing the complainant before his employer. Therefore, the Board lacks jurisdiction to consider the ninth ground of the complaint.

C. Frivolous nature of the complaint

[23] The respondent is seeking a declaration from the Board that the complaint is frivolous given that most of the alleged failures were so completely out of time and without merit. In support, the respondent called three witnesses: Terry Ruyter, Jean Sterling and Hilde Sellemeyer. For the reasons that follow, I have not reproduced their testimonies.

III. Reasons

[24] I agree with the respondent's objections that the complaint is inadmissible because its first eight grounds are untimely and because the ninth ground deals with an issue over which the Board has no jurisdiction.

A. Timeliness

[25] Subsection 190(2) of the *Act* explicitly states that the complaint must be made no 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. If some of or all the failures complained of occurred outside that 90-day period, then the complaint is untimely.

[26] With respect to the first eight grounds, the latest incident on which the complaint is based occurred in July 2009, at least 126 days before the filing of the complaint, if July 31, 2009 is used as a reference point.

[27] I agree with the respondent's argument that the 90-day time limit is strict and that the Board has no authority to extend it (see *Castonguay v. Public Service Alliance of Canada,* 2007 PSLRB 78, and *Cunningham*). The Board has repeatedly affirmed the mandatory nature of subsection 190(2) of the *Act.* In fact, in *Boshra,* at paragraph 45, the Board stated the following:

> *[45] . . . Once a bargaining agent has clearly communicated a position in representing a member that the latter considers to be evidence of representation that violates section 187, subsection 190(2) does not allow for a delay in starting the 90-day filing period, however good the reason for a delay. Once again, the language of the statute is mandatory. It is different from what applies to certain other types of actions under the* Act.

The extent of the Board's jurisdiction is to determine, based on the evidence before me, the date on which the 90-day period started.

[28] The complaint was filed on November 24, 2009, almost three years after the first alleged failure took place (first ground) and 126 days after the last possible date on which the second-last alleged failure took place (eight ground). I accept the respondent's argument that the complaint, as it relates to the first eight grounds being relied on by the complainant, is clearly, on its face, untimely. Each event referred to in the first eight grounds falls well outside the applicable 90-day period.

[29] Despite the fact that the respondent raised its timeliness objection in its response dated December 9, 2009, the complainant failed to address the timeliness issue, other than to seek an extension of time, something that the Board has no legislative authority to grant, as no provision of the *Act* gives the Board the power to extend this particular time limit.

[30] The complainant provided no explanation that would lead me to conclude that he was not aware of the alleged first eight failures, as depicted in the first eight grounds of his complaint, when they are alleged to have occurred. In fact, the first six grounds refer to failures to file grievances on his behalf. The complainant had only 25 days to grieve, according to the applicable collective agreement, and would normally

have had to have been aware that nothing had been done shortly thereafter, baring a scenario wherein the respondent filed a grievance with signatures to follow or sought and obtained an extension of time from the employer, which does not appear to be the case here.

[31] Although the complainant entered October 9, 2009 on his complaint form as the date on which he knew of the acts, omissions or other matters giving rise to the complaint, nothing in his complaint, his reply or in the documents attached to them reveals the significance of that date. Therefore, I am unable to give it any meaningful consideration.

[32] As a whole, when it comes to the first eight grounds of the complaint, there are no reasons before me to conclude that the complaint was filed within the time limit set out in subsection 190(2) of the *Act*. I therefore find the complaint untimely with regard to the first eight grounds.

B. Jurisdiction

[33] The ninth and last ground states as follows:

> *OCT 09, JEAN STERLING, TERRY RUTER (LOCAL PRES.)*
> *GARY FRASER (REGIONAL) WOULD NOT REPLY TO MY*
> *ENQUIRIES OF ACTIONS DISPOSITION RETURN OF FILES,*
>
> [*Sic* throughout]

[34] I agree with the respondent's contention that, although this ground appears to refer to an event that allegedly occurred within the time limit set out in subsection 190(2) of the *Act*, it is not a matter over which the Board has jurisdiction. This ground refers to an alleged failure by the respondent's representatives to reply to inquiries by the complainant with respect to some actions and dispositions and to the return of some files. Nothing in the ninth ground refers to an alleged failure of the respondent's duty to represent the complainant. Rather, the ninth ground appears to refer to internal union procedures, which is not something contemplated by section 187 of the *Act*. As the only unfair labour practice that could apply to the ninth and last ground of the complaint is a failure of the duty of fair representation set out in section 187 of the *Act*, I find that that last ground alleges no unfair labour practice within the meaning of the *Act* and that the Board has no jurisdiction to address that part of the complaint.

C. Frivolous nature of the complaint

[35] Although I found the candid testimonies of Mses. Ruyter, Sterling and Sellemeyer helpful to my understanding of the context of this complaint, I saw no value in summarizing their evidence since it did not address the timeliness or the jurisdictional issue but was instead presented in support of the respondent's quest to have this complaint declared frivolous, something that I am not willing to do simply because no notice was given to the complainant prior to the hearing that such a declaration would be sought. Unlike the other objections, which the respondent clearly raised at the outset in its reply, this issue was raised for the first time during the hearing, which was held in the absence of the complainant. Therefore, I do not believe it appropriate, in the circumstances, to make such a declaration.

(The Order appears on the next page)

IV. Order

[36] I declare the complaint untimely with regard to its first eight grounds.

[37] I further declare that the Board has no jurisdiction to address the ninth and last ground of the complaint.

[38] The complaint is denied.

October 13, 2011

Stephan Bertrand,
Board Member