Date: 20111114

File: 561-02-515

Citation: 2011 PSLRB 129

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

JEAN ENGLAND

Complainant

and

TERRY TAYLOR, BARRY STOLAR, LOUISE MARDELL AND FRED SADORI

Respondents

Indexed as
England v. Taylor et al.

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

REASONS FOR DECISION

Before: Renaud Paquet, Vice-Chairperson

For the Complainant: Robbie McLellan

For the Respondents: Helen Nowak, Public Service Alliance of Canada

Decided on the basis of written submissions filed June 8, August 4 and October 6, 2011.

Complaint before the Board

[1] On March 9, 2011, Jean England ("the complainant") filed a complaint against Terry Taylor, Barry Stolar, Louise Mardell and Fred Sadori ("the respondents"). At different times between 2006 and 2011, the respondents had been representatives of the Public Service Alliance of Canada ("the bargaining agent"). The complainant alleged that the respondents committed an unfair labour practice within the meaning of paragraph 190(1)(*g*) of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 ("the *Act*"). The complainant wrote in her complaint that the respondents failed to represent her interests by not advising her properly and by not pursuing the defense of her dispute with the Correctional Service of Canada ("the employer" or CSC).

[2] The complaint involves the following provisions of the *Act*:

. . .

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
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> . . .
>
> (g) *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> . . .
>
> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> . . .
>
> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

. . .

[3] On June 8, 2011, the respondents submitted that the complaint was untimely and that it should be dismissed on that basis. They also submitted that it failed to disclose a "*prima facie*" case. For the respondents, the issues specified in the

complaint fall outside the 90-day time limit prescribed by subsection 190(2) of the *Act*. That subsection 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.*

[4] On August 4, 2011, the complainant replied to the respondents' objections. After reviewing the submissions already received from the parties, at my request, the Public Service Labour Relations Board's ("the Board") registry wrote to the complainant on September 14, 2011, requesting her to ". . . provide additional written arguments concerning the respondents' objection to jurisdiction based on timeliness . . . and to be more specific on the dates that the incidents giving rise to the complaint happened." That letter also mentioned that the Board might decide the case based on those additional submissions and on the information already on file. In reply, the complainant sent additional submissions on October 6, 2011.

Summary of the alleged facts on timeliness

[5] The complainant retired from the public service in September 2007. While she was working for the CSC, she felt that her position was not properly classified. In December 2006, she filed a grievance requesting that her position be reclassified to a higher level. After long delays, she was informed, in April 2009, that her grievance was partially upheld at the second level of the grievance process and that her position would be reclassified to the AS-03 group and level retroactively to August 1996. When she filed her grievance, the complainant's position was classified at the AS-02 group and level.

[6] The complainant was not satisfied with the decision to reclassify her position to the AS-03 level since she believed that it should have been classified at the AS-05 level. The complainant complained to the CSC's Commissioner in April 2009 about that decision. Her complaint was referred back to the CSC's Prairies Regional Office, which replied in November 2009 that the employer's decision to reclassify the position as AS-03 would stand. In January 2010, the complainant submitted the material in her possession to the Canadian Human Rights Commission (CHRC). The CHRC answered her in May 2010, stating that she did not meet the criteria for discrimination and that she had only one year after retirement to file a complaint.

[7] In June 2010, the complainant contacted the bargaining agent to pursue the issue. She was told that nothing could be done because the grievance was not transmitted to the next level of the grievance process after it was upheld at the second level in April 2009.

[8] In July 2010, the complainant contacted her Member of Parliament, who replied that he could not do much because it would be seen as political interference. In September 2010, the complainant sent her material to the Public Service Commission and to the Treasury Board. Both organizations referred her back to the CSC. On November 26, 2010, the CSC's Commissioner reiterated the CSC's previous position. In January 2011, the complainant contacted the Canada Industrial Relations Board, which referred her to this Board.

[9] The complainant submitted that the respondents did not inform her of timeliness issues related to transmitting a grievance. They also did not transmit her grievance to the third level of the grievance process after the second-level response was received in April 2009. Furthermore, they did not suggest that she submit an acting-pay grievance. Lastly, they informed her in February 2011 of her right to file a complaint to the Board.

Summary of the arguments on timeliness

[10] The respondents argued that the complaint is untimely. The complainant blamed the respondents for omitting to transmit her grievance to the next level of the grievance process in April 2009 which is clearly outside the 90-day timeline specified in subsection 190(2) of the *Act*. Then, in June 2010, the complainant contacted the respondents again for their advice and support. If the complainant believed that the respondents violated the *Act* at that time, she had 90 days to file a complaint. She did not respect that timeline since she filed her complaint in March 2011.

[11] The respondents referred me to the following decisions: *Shutiak v. Union of Taxation Employees*, 2009 PSLRB 30; *Panula v. Canada Revenue Agency and Bannon*, 2008 PSLRB 4; *Walters v. Public Service Alliance of Canada*, 2008 PSLRB 106; *Martel et al. v. Public Service Alliance of Canada*, 2008 PSLRB 19; and *Cuming v. Butcher et al.*, 2008 PSLRB 76.

[12] The complainant argued that she was first informed by the bargaining agent in February 2011 of her right to file a complaint under section 190 of the *Act*. She filed

her complaint in March 2011, which was well within the 90-day deadline. Normally, being informed late would not provide an excuse for not adhering to time limits. However, in this case, the respondents' mishandling of the matter led to the delay to file a complaint. The substantial amount of information that the respondents did not provide to the complainant was the direct cause of the delay.

[13] The complainant also argued that, had she been properly informed by the respondents that she should transmit her grievance to the third level of the grievance process in April 2009, she would have done so because she was not satisfied with the employer's decision to reclassify her to the AS-03 level. However, the respondents did not provide her with that information. When they informed her of her right to complain to the Board in February 2011, she acted promptly.

Reasons

[14] This decision deals exclusively with the respondents' objection that the complaint is untimely. At my request, the Board's registry invited the complainant to make additional submissions on timeliness. The Board's registry informed the complainant that the Board could decide the case based on those submissions and on the information already on file. After reviewing the file and the parties' submissions, I have determined that I have enough information to decide the objection raised by the respondents.

[15] The Board has repeatedly found in its past decisions that the 90-day time limit must be respected at all times. In reference to the interpretation of subsection 190(2) of the *Act*, the Board, at paragraph 55 of *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78, wrote the following:

> *[55] That wording is clearly mandatory by its use of the words "must be made no later than 90 days after the events in issue". No other provision of the* PSLRA *gives jurisdiction to the Board to extend the time limit prescribed in subsection 190(2). Consequently, subsection 190(2) of the* PSLRA *sets a boundary, limiting the Board's power to examine and inquire into any complaint that an employee organization has committed an unfair labour practice within the meaning of section 185 (under paragraph 190(1)(*g*)) of the* PSLRA*) and that is related to actions or circumstances that the complainant knew, or in the Board's opinion ought to have known, in the 90 days previous to the date of the complaint.*

[16] The only possible discretion for the Board when interpreting subsection 190(2) of the *Act* is determining when the complainant knew, or ought to have known, of the action or circumstances that gave rise to the complaint.

[17] The complainant signed her complaint on March 9, 2011. That means that the complaint must be based on actions or circumstances that the complainant knew of or ought to have known of within the prior 90 days or, in this case, by early December 2010 or later. Actions or circumstances attributable to the respondents that occurred before that time, and that the complainant knew of, could not have given rise to this complaint because they would be untimely.

[18] In her complaint, the complainant referred to the non-transmittal by the respondents of her grievance to the third level of the grievance process in April 2009. That was a long time before December 2010. The complainant also referred to her exchanges with the respondents in June 2010 on how to pursue her classification issue. She was told then by the respondents that nothing could be done. Those exchanges with the respondents also happened before December 2010.

[19] In fact, the only event that occurred within the 90-day deadline was the information provided by the bargaining agent in February 2011 on the complainant's right to file a complaint under section 190 of the *Act*. Contrary to the complainant's argument, that event cannot trigger the deadline clock. Obviously, the bargaining agent cannot be accused of violating the *Act* for informing one of the employees that it formerly represented that the *Act* has a mechanism that can be used to file a complaint against the bargaining agent itself. The respondents had no such obligation. Furthermore, it is a well-established principle that someone cannot use his or her lack of knowledge of the law to excuse the non-respect of a mandatory timeline. The clock started when the complainant knew or ought to have known of what she blamed the respondents for. The clock cannot start the day that she learned that she could file a complaint, or the day when the respondents informed the complainant of the existence of section 190 of the *Act*.

[20] The respondents had a duty of fair representation toward the complainant while they were acting on her behalf or helping her with her classification issues. If the complainant felt that in 2009 the respondents failed in their duties of fair representation, she should have filed a complaint then with the Board. The *Act* is clear — a complaint must be filed within the 90-day deadline. The fact that the

complainant learned only in 2011 that she could file a complaint does not extend that deadline.

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

(The Order appears on the next page)

Order

[22] The complaint is dismissed.

November 14, 2011.

Renaud Paquet,
Vice-Chairperson