Date: 20111027

File: 561-02-467

Citation: 2011 PSLRB 121

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

JACQUES LANGLOIS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Langlois 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 J. Bertrand, Board Member

For the Complainant: Himself

For the Respondent: Dan Fisher, Public Service Alliance of Canada

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Heard at Ottawa, Ontario,
July 18 to 20, 2011.

I. Complaint before the Board

[1] On June 3, 2010, Jacques Langlois ("the complainant") made a complaint against the Public Service Alliance of Canada ("the respondent"). The complaint is based on paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). The complainant alleged that the respondent breached its duty of fair representation by failing to file a harassment grievance on his behalf and by refusing to grieve the non-renewal of his term employment.

[2] This complaint was filed under paragraph 190(1)(*g*) of the *Act*, which reads as follows:

> ***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.*
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> . . .

[3] Section 185 of the *Act* defines an unfair labour practice as anything prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).

[4] The provision of the *Act* referenced under section 185 that applies to this complaint is section 187, which provides 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.*

This provision was enacted to hold employee organizations to a duty of fair representation, a duty that, according to the complainant, the respondent did not fulfill.

II. Summary of the evidence

[5] The complainant testified on his own behalf and Leslie Sanderson was called as the sole witness for the respondent. Their testimonies are summarized as follows.

[6] The complainant was hired by Elections Canada ("the employer") on June 26, 2006 as a data entry and reporting officer, a position classified at the AS-02 group and level. His initial letter of employment dated June 23, 2006, specified that his appointment was for a specified period, commonly referred to as a term appointment, and was part of a sunset-funded program, which normally means that the program to which the term employee is assigned is funded by external sources and is for a limited duration.

[7] The complainant specified that his term appointment was extended on a number of occasions, namely, from April 1, 2007 to October 1, 2007, from October 2, 2007 to March 31, 2008, from March 31, 2008 to September 30, 2008, from September 30, 2008 to March 31, 2009, from April 1, 2009 to December 31, 2009, and, finally, from December 31, 2009 to March 31, 2010.

[8] On February 22, 2010, the complainant was notified that his employment would cease at the end of his term, on March 31, 2010. By then, he had been working for the employer as a term employee for a little over three and one-half years. Normally, term employees with three years of service are converted to indeterminate status.

[9] On February 23, 2010, the complainant emailed his local union representative, Rahima Kanani, and attached a letter in which he outlined a detailed account of his employment history with the employer and requested that the respondent investigate what he characterized as the "misuse of the sunset clause." Unlike other term employees, those hired as part of a sunset-funded program are not converted to indeterminate status after three years of service. His letter also referred to an investigation that had been launched by the Public Service Commission (PSC) at his request, in connection with a staffing process for an indeterminate AS-02 position with the employer that he had applied to, as well as a workplace conflict that had developed with his supervisor. Three incidents involving the complainant's supervisor were referred to, two of which had occurred in 2008. The PSC eventually resolved the staffing issue. It issued a "Record of Decision," dated March 22, 2011, which ordered the employer to implement a number of corrective actions.

[10] Within hours, Ms. Kanani forwarded the complainant's letter to Ms. Sanderson, a labour relations officer with the respondent's National Component. Ms. Sanderson replied to Ms. Kanani on March 8, 2010, who immediately forwarded her response to the complainant. It sparked an exchange of correspondence between the complainant

and Ms. Sanderson, mainly on the staffing issue and the alleged misuse of the sunset-funded term exception. Larry Rousseau, a regional vice-president of the respondent's National Component, also took part in the exchange by providing, on a few occasions, his input and comments about the complainant's concerns.

[11] Both Mr. Rousseau and Ms. Sanderson advised the complainant that the respondent would not challenge either the employer's decision to not renew or extend his term or the alleged misuse of the sunset clause. In an email dated April 26, 2010, Ms. Sanderson explained to the complainant that, although it had determined that there were no grounds or means to grieve his concerns, the National Component would continue to press the employer to hire term employees subject to the sunset-funded term exception through fair and transparent competitions. She also reminded the complainant that although the time limit for doing so had passed, he could attempt to grieve the alleged misuse since it was not a grievance "owned" by the respondent, because the non-renewal of term employees was not a violation of the applicable collective agreement.

[12] In her testimony, Ms. Sanderson reiterated that, according to the respondent, term employees whose terms were subject to a sunset-funded program were excluded from the conversion provision of the Treasury Board's Term Employment Policy (TEP), which provides that a term employee with a cumulative working period of three years within a department or agency without a break in service longer than 60 consecutive calendar days must be appointed to an indeterminate position, and that that exclusion, whether or not applied as intended, did not create a right or entitlement under the collective agreement, since the TEP was not incorporated into the applicable collective agreement.

[13] The respondent's refusal to represent the complainant's interests with respect to the sunset-funded term exception, among others, led to this complaint.

[14] The complainant made it clear in his testimony that the only issues of importance in his complaint were the employer's misuse of the sunset-funded term exception and the respondent's failure to file a harassment grievance. In cross-examination, he specified that the most important issue was the sunset-funded term exception. He stated that he was upset that the respondent did not at least try to challenge the misuse of that exception and that it did not file a harassment grievance against his supervisor. With respect to the latter issue, the complainant testified that

he raised the harassment issue in a telephone conversation with Ms. Kanani on February 22, 2010 and that he was told to put it in writing, which, according to him, he did in his email of February 23, 2010.

[15] In her testimony, Ms. Sanderson indicated that, after she received the complainant's letter from Ms. Kanani, she had a telephone conversation with her to improve her understanding of the relevant issues and that the term "harassment" never came up. According to Ms. Sanderson, the detailed summary of events provided by the complainant on February 23, 2010 did not refer to the term "harassment." Ms. Sanderson felt that the complainant's email described a workplace conflict that had been resolved, since the supervisor had allegedly admitted that he had been "riding" the complainant and that he would be "backing off." No other incidents were mentioned. Ms. Sanderson added that, in the numerous email exchanges that followed, the harassment issue was never mentioned, that no further particulars were provided about this issue, that the complainant never requested in writing that a harassment grievance be filed on his behalf and that he never once requested a status report of any harassment grievance. In cross-examination, the complainant admitted that he never filled or signed any grievance form and that he did not follow up on the status of any harassment grievance. He added that he was not familiar with the grievance process and that he was under the impression that his email of February 23, 2010 was all that was required of him.

[16] Ms. Sanderson indicated that, even had she been requested to file a harassment grievance, she was never provided with sufficient information or documentation to support one. She added that in any event, she became aware of the complainant's grievance expectations only when the complaint was filed.

[17] She added that, even if the sunset-funded term exception could be challenged through a grievance, no compelling evidence of misuse or misapplication of that exception had been provided by the complainant, other than his impression that the funding for the program was not completely from an external source.

[18] Ms. Sanderson stated that she reviewed all the facts provided to her, that she carefully analyzed the relevant issues, that she determined that the complainant's concerns were not adjudicable (as there had been no violation of the collective agreement, no discipline or disguised discipline, no failure to accommodate, and no discrimination), that she clearly communicated her conclusions to the complainant in

writing and that she provided him with some options. She also referred to a letter from the employer dated February 19, 2008, that notified the complainant that the sunset exception allowed it to extend his term beyond three years without converting him into an indeterminate employee.

[19] Ms. Sanderson stated that the TEP that referred to the sunset-funded term exception was not incorporated into the collective agreement. She stated that certain avenues were open to the respondent to challenge questionable applications of the TEP by the employer or to encourage the conversion of term positions into indeterminate positions but that a grievance was not one of them. Such a grievance, according to Ms. Sanderson, had no chance of success, unless disguised discipline or discrimination were alleged, which was a not the case. I note that in an email dated April 26, 2010, Ms. Sanderson had recognized that the right to grieve was available to the complainant. Notwithstanding, no right to refer to adjudication arises from this.

[20] She added that the respondent does not advocate every concern of employees represented by the respondent and that when determining whether it should represent employees, it considers many factors, including the costs associated with grievances and the merits of each employee's case. According to Ms. Sanderson, the complainant was treated no differently than any other employee, and she bore no animosity or hostility towards him.

[21] The complainant stated that, although he was aware that his appointment was subject to the sunset-funded term exception, he did not know that the employer misused the sunset provision until after he was notified of the non-renewal of his term employment.

[22] He admitted that, had the sunset-funded term exception been applied correctly, Ms. Sanderson's determination that nothing could be done to assist him was reasonable. His issue, according to the complaint, was that it had not been correctly applied. The complainant also admitted that he had failed to make a direct connection between the misuse of the sunset-funded term exception and the collective agreement.

III. <u>Summary of the arguments</u>

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

[23] The complainant's arguments were succinct. He contended that the respondent's wrongful and arbitrary conduct amounted to a violation of section 187 of the *Act*.

[24] First, the complainant argued that the respondent did not adequately investigate his concerns and that it failed to take action into his allegation of workplace harassment. According to the complainant, that amounted to no less than serious negligence on the part of the respondent. The complainant added that the respondent's negligence was further demonstrated by its failure to request clarification and documents from him.

[25] Second, the complainant contended that, as a term employee, he should have been appointed to an indeterminate position after three years of service, in accordance with the conversion provision of the TEP, that the employer misapplied the sunset-funded term exception and that it should not have stood in the way of his conversion. He added that the respondent's refusal to advance this issue was both wrong and arbitrary.

[26] The complainant believes that the respondent should be compelled to represent him in connection with the misuse of the sunset exception and the workplace harassment. According to him, the sunset exception found in the TEP should, by implication, be considered part of the collective agreement because it defines his terms and conditions of employment. He is convinced that Ms. Sanderson's analysis of his chance of success was flawed because she mistakenly focussed on the non-renewal of his term employment rather than on the wrongful application of the sunset-funded term exception.

[27] In a nutshell, the complainant's argument can be summarized as follows. Since the non-renewal of a term employee who has worked more than three years of uninterrupted service is, according to him, a violation of the collective agreement, and since the sunset exception was misapplied in his case, the exception should not apply to him, and his years of service should count toward an indeterminate appointment.

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

[28] The respondent argued that the onus of establishing a violation of section 187 of the *Act* rested on the complainant and that he failed to establish that violation.

According to the respondent, the complainant did not demonstrate that it conducted itself in a manner that displayed bad faith or arbitrariness.

[29] Representatives of the respondent acted within hours of receiving the complainant's first correspondence by looking into the complainant's concerns and by seeking advice from the National Component.

[30] As for the complainant's allegation that his harassment issue was not examined or acted on, the respondent contended that it was never sufficiently "flagged" or brought to its attention. The complainant never requested that a harassment grievance be filed; nor did he provide sufficient information that could have reasonably led the respondent to file such a grievance. Moreover, the reference to the alleged conflict involving the complainant's supervisor appeared to suggest that the issue was resolved.

[31] As for the complainant's allegation that his concerns over the employer's application of the sunset exception were not duly investigated and acted on, the respondent contended that the issue was carefully reviewed, that an analysis was conducted and that it is not to be held to a standard of perfection but must rather be afforded a wide latitude in its decisions of whether to represent members.

[32] The respondent argued that, in the complainant's initial letter of employment dated June 23, 2006, he was notified that his appointment was for a specified period and that nothing in the letter was to be construed as offering an indeterminate appointment. Moreover, the letter went on to state that the complainant's employment was part of a sunset-funded program and that his specified period of employment would not count in the calculation of the cumulative working period for indeterminate appointment under the TEP. That condition of employment continued to apply for every subsequent term extension.

[33] The employer also notified the complainant on February 19, 2008 that the sunset exception allowed it to extend term employee's employment beyond three years without converting them to indeterminate employees. The TEP clearly states that term employees' days of service, when subject to a sunset-funded program, do not count in the calculation of the cumulative working period of three years for appointments to indeterminate positions. The respondent added that, in any event, such a conversion can be made only in accordance with the merit principle, meaning that term employees

appointed to indeterminate positions must have the required competencies and qualifications, which normally involves a staffing process.

[34] According to the respondent, because the complainant's employment was subject to a specified term of employment and, specifically, to a sunset-funded program, he could not have reasonably expected that his term position would be converted into an indeterminate position. The harsh reality, according to the respondent, is that term employees subject to a sunset-funded program are more vulnerable than term employees not subject to such a program.

[35] The respondent's view is that, although it has and will continue to work with employers to advance the causes of employees subject to sunset-funded programs, filing a grievance, which the complainant has a right to do, cannot be expected to further such a cause.

[36] The respondent made an informed decision that was well thought through and cannot be considered perfunctorily or hostile. According to the respondent, receiving bad news does not meet the threshold that applies in this case.

[37] The PSC investigated and resolved the complainant's staffing concern.

[38] The respondent argued that the complainant's concern with the employer's application of the sunset exception was not adjudicable. That provision was not part of the collective agreement. No disciplinary action was taken by the employer. There was no demotion, termination or suspension. The employer simply opted to not renew or extend the complainant's term of employment, something that it was entitled to do. Although the respondent has and will continue to consider representation in cases of non-renewal of terms in which disguised discipline or discrimination might have occurred, no such indicators are in the complainant's case.

[39] The respondent added that the complainant failed to provide any compelling evidence about the source or duration of the funding for the projects or programs to which he was assigned.

[40] According to the respondent, Ms. Sanderson's actions were diligent. She properly and timely conveyed her analysis to the complainant. She considered all his concerns but simply had a different view than he did. Her view was that the application of the sunset exception, as it appeared in the TEP, was not an issue that could be grieved

successfully. She made her determination based on the facts and information that she had obtained from him, and she provided him with options.

[41] The complainant was not treated any differently than any other employee represented by the respondent with respect to this issue. The complainant did not point to any other case in which the respondent represented an employee in a similar set of circumstances involving the sunset-funded term exception.

[42] The respondent contended that a bargaining agent is not obligated to represent every employee and that it can refuse to as long as the discretion it exercises is made in good faith, results from a thorough analysis of the case, is fair and is made without hostility toward the employee. It added that the employee is not entitled to the best possible examination of the case but rather to one that is not superficial or made carelessly. In support of those propositions, the respondent referred me to *Tsai v. Canada Employment and Immigration Union and Sand*, 2011 PSLRB 78, and to *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28.

[43] The fact that the complainant was disappointed and frustrated with the respondent's decision to not provide representation did not establish a violation of section 187 of the *Act*. The respondent investigated the complainant's concerns, gave them due consideration and made an objective determination in good faith.

IV. <u>Reasons</u>

[44] As stated by the Board in *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, the burden of proof in a complaint under section 187 of the *Act* rests with the complainant. That burden required the complainant to present evidence sufficient to establish that the respondent failed to meet its duty of fair representation.

[45] With respect to the harassment issue, the complainant referred to three incidents involving his supervisor, two of which occurred in 2008. Even if the incidents warranted some type of representation by the respondent, the evidence revealed that the complainant never referred to the term "harassment" in any of his correspondence with the respondent, he never instructed the respondent, in writing, to file a grievance on his behalf, he never filled out or signed a grievance form, and he never inquired as to the status of any such grievance. His allegation that he made such a request verbally

to Ms. Kanani during a telephone conversation on February 22, 2010, is not credible in light of the remainder of the evidence introduced by the parties, particularly their email exchanges, which never even referred to this verbal request or to the term "harassment." Ms. Kanani was not called to testify by either party.

[46] The complainant's statement that he was unaware that the employer misused the sunset exception provision until after he was notified of the non-renewal of his term employment is also not credible. He never provided the respondent with any explanation as to how and when he came to believe that the program to which he was assigned was not being funded through external sources. The complainant raised this issue for the first time after he was notified that his term employment would not be further renewed. He provided neither further particulars nor the source of his information but nevertheless expected the respondent to investigate the issue. The respondent cannot be blamed for not grieving such an issue in light of such circumstances; nor can it be viewed as the respondent acting arbitrarily.

[47] In any event, the sunset-funded term exception is referred to in the TEP. According to both parties, that policy is not part of the collective agreement. I agree with the respondent's contention that, whether or not the employer applied the policy as it was intended is not a matter that could be referred to adjudication, as such a matter, barring evidence of discrimination or disguised discipline, would not fall under section 209 of the *Act*. Moreover, even if the complainant's concern could be referred to adjudication, it would not mean that the respondent would be obligated to represent him. The same principle applies to his harassment issue, in that, even if he had made a request to file a harassment grievance, no obligation to file one would have automatically arisen for the respondent.

[48] The Board has often commented on unionized employees' right to representation. In *Halfacree,* at para 17, it rejected the idea that it was an absolute right as follows:

> *[17] The respondent, as a bargaining agent, has the right to refuse to represent a member, and a complaint to the Board is not an appeal mechanism against such a refusal. The Board will not second-guess the bargaining agent's decision. The Board's role is to rule on the bargaining agent's decision-making process and not on the merits of its decision. . . .*

The Board's role is not to determine whether the respondent's decision to not represent the complainant was correct; instead, it is to determine whether the respondent acted in bad faith or in a manner that was arbitrary or discriminatory in its decision-making process.

[49] However, as broad as that discretion may appear, it is not absolute. Its scope was set out by the Supreme Court of Canada (SCC) in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, at page 527. In that decision, the SCC describes the principles underlying the duty of fair representation as follows:

. . .

> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

. . .

[50] The Board also canvassed the meaning of arbitrary conduct as follows in *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, at para 22 and 23:

> *[22] With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of* Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:*
>
> > The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible …

. . .

> *[23] In* International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.*, [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, "… a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."*

[51] In *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, the Board commented as follows:

. . .

> *[44] . . . It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (*Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in* Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.):*

. . .

>> [42] When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of [the duty of fair representation].

. . .

[52] Undoubtedly, bargaining agents and their representatives should be afforded substantial latitude in their representational decisions. As the Board stated recently in *Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*,

2010 PSLRB 128, at para 38, ". . . [t]he bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high. . . ."

[53] The complainant was required to establish a violation of section 187 of the *Act,* which in turn required him to present evidence demonstrating that the respondent's decision to not represent him was made arbitrarily, discriminatorily or in bad faith. My examination of the facts and of the evidence submitted by the parties in this case does not reveal any signs of discriminatory, arbitrary or bad faith behaviour on the part of the respondent. Nothing that the complainant presented in the course of the hearing established, on a balance of probabilities, a violation of section 187 of the *Act*.

[54] In addition, nothing in the evidence led me to conclude that the respondent displayed an uncaring or cavalier attitude toward the complainant's interests or that it acted fraudulently, with improper motives or out of personal hostility. I have no reason to believe that the respondent acted negligently or that it treated the complainant differently than other employees and that such distinction was based on illegal, arbitrary or unreasonable grounds.

[55] On the other hand, I am satisfied that the respondent legitimately examined the complainant's case, that it considered relevant and genuine factors and that a reasoned decision was made as to whether to pursue his concerns.

[56] For those reasons, I find that the complainant has failed to establish that the respondent committed an unfair labour practice or that it violated section 187 of the *Act*.

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

(*The Order appears on the next page*)

V. Order

[58] The complaint is dismissed.

October 27, 2011.

Stephan J. Bertrand,
Board Member