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Files: 561-02-563 and 564

Citation: 2012 PSLRB 106



*Public Service
Labour Relations Act*

Before a panel of the Public
Service Labour Relations Board

BETWEEN

SAMEH BOSHRA

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as

Boshra 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: Margaret Shannon, a panel of the Public Service Labour Relations Board

For the Complainant: Himself

For the Respondent: Fiona Campbell, counsel

Decided on the basis of written submissions,
filed May 3 and 24, 2012.

REASONS FOR DECISION

Complaints before the Board

[1] On May 3, 2012, Sameh Boshra (“the complainant”) filed two complaints under paragraph 190(1)(g) of the *Public Service Labour Relations Act* (“the Act”). The complainant alleged that in November 2008, Jean Ouellette and Aleisha Stevens, both employees of the Canadian Association of Professional Employees (CAPE), intentionally misrepresented the deadline to transmit a grievance to the final level of the grievance process and created a false sense of urgency in order to coerce the complainant into signing the grievance transmittal form under duress, thereby foregoing his requested amendments.

[2] The complainant also alleged that Ms. Stevens had continued involvement with grievances that he had filed against Statistics Canada (“the employer”), despite his request to the CAPE in November 2008 that she refrain from any involvement. That breached the duty of fair representation owed him by the CAPE. Ms. Stevens at that time was employed by the CAPE as a labour relations officer and was assigned to represent the complainant in the pursuit of his grievances.

[3] The complainant alleged that those actions by Mr. Ouellette and Ms. Stevens constituted an unfair labour practice within the meaning of section 185 of the *Act*.

Summary of the evidence

[4] On May 19, 2009, the complainant filed a request with the Public Service Labour Relations Board (“the Board”) to amend a section 190 complaint under the *Act* that he had filed on February 5, 2009. He requested that the following be added to section 4 of his completed complaint form, (Form 16):

CAPE Director of Labour Relations Jean Ouellette and CAPE representation [sic] (Aleisha Stevens, Allan Stead, Lionel Saurette) proceeding to schedule and hold grievance hearings in bad faith, against the interest and at the exclusion of the complainant, against the interest of the employer, and against the interest of CAPE Local 503

[5] The appointed Board member denied the request to amend the Form 16. Dan Butler had been appointed to hear the original February 2009 complaint. In his decision, 2009 PSLRB 100, dated August 18, 2009, the Board member stated the following at paragraphs 71 through 73:

[71]. . . In my view, the amendment proposed by the complainant does not expand, clarify or correct the original complaint with respect to its essential subject matter - or, for that matter, regarding any of the original allegations listed in section 4 of Form 16. Instead it adds a new dimension to the complaint that is even more distinct given that it refers to clearly posterior events. As such, I rule that the allegation alters the nature of the original complaint rather than amends it.

[72]. . . the consequence of my ruling is that the requested amendment should properly be treated as a new complaint, not an amendment ... submitted on May 19, 2009. . . The Registry will need to open a new complaint file in the complainant's name containing the "amendment" as the allegation of a violation of section 187 and the submissions received to date concerning that allegation.

[73] I wish to emphasize that the new complaint file will be limited to the specific allegation that CAPE representatives proceeded to schedule and hold grievance hearings "... in bad faith, against the interest and at the exclusion of the complainant." Given my ruling in this decision, the allegations that formed the original complaint - including the complainant's disagreement with the respondent over the grounds for arguing his case regarding the incident of August 7, 2008 - are not included.

[6] On August 19, 2009, the complainant sought to further amend section 4 of the same Form 16 by adding the following:

CAPE Director of Labour Relations Jean Ouellette and CAPE Labour Relations Officer Aleisha Stevens indicating an incorrect grievance transmittal deadline of November 7, 2008, for a grievance reply received on October 28, 2008 for the purpose of creating a false sense of urgency to coerce me into signing the grievance transmittal form under duress and to justify foregoing consideration of the grievance form content by CAPE representation.

[7] The Board member dismissed the original complaints that the complainant sought to amend in the same August 18, 2009 decision before the complainant's second request for an amendment. The complainant sought judicial review of that decision on September 17, 2009. He did not pursue the May 19, 2009 amendment request or the further amendment request of the February 5, 2009 complaint he requested on August 19, 2009 before the Federal Court of Appeal.

[8] In October and November 2009, the Board requested that the complainant provide it with certain information so that a separate complaint could be filed with regard to the allegations raised on August 19, 2009. However, in a letter dated November 20, 2009, the complainant refused to do so on the basis that it might prejudice his judicial review application of the Board's decision dated August 18, 2009 and that he would, "...provide the required information to open a separate complaint if required after a decision on the appeal is provided by the Federal Court of Appeal."

[9] The Federal Court of Appeal dismissed the complainant's judicial review application and upheld the Board member's decision of August 18, 2009. The Court's decision was dated March 14, 2011.

[10] On March 16, 2012, the complainant sent a letter to the Board, stating the following:

On October 26, 2009, the complainant advised the Board that he would not be pursuing filing new complaints for the two requested amendments at that time. An application for judicial review of the Board's decision, including the Board's decision with respect to the amendment requests, had since been filed (September 17, 2009).

In recently reviewing files in relation to another matter presently before the Board, it came to the attention of the complainant that neither amendment request had been dealt with by either the Board or the Federal Court of Appeal.

As such, the complainant wishes to open two new complaint files related to the matters previously brought to the attention of the Board on May 19, 2009 and August 19, 2009, but which have to date not been dealt with. Please find attached separate complaint forms for the two previously submitted amendment requests.

[11] No copy of the letter was sent to the CAPE. The complainant did not attach the complaint form, as he mentioned. The Board advised the complainant via email on April 18, 2012 that he had until April 25, 2012 to attach the required forms. The Board received no response, so a copy of the email was faxed to the complainant on May 2, 2012. In response, the complainant filed the required forms on May 3, 2012 alleging in Board file 561-00-563:

CAPE Director of Labour Relations Jean Ouellette and CAPE Labour Relations Officer Aleisha Stevens indicating an incorrect grievance transmittal deadline of November 7,

2008, for a grievance reply received on October 28, 2008. Mr. Ouellette and Ms. Stevens intentionally misrepresented the deadline to create a false sense of urgency in order to coerce the complainant into signing the grievance transmittal form under duress.

This was done to forego amendments to the grievance form specifically addressing the employer's security practices during its investigation of a grievance filed by the complainant. The complainant had specifically requested the amendments to the grievance form, and CAPE Labour Relations Officers Ms. Stevens and Mr. Allan Stead agreed to make the requested amendments, if the employer did not address the security/privacy issues raised during the grievance hearings in its written reply.

and in Board file 561-00-564:

CAPE Director of Labour Relations Jean Ouellette, and CAPE Labour Relations Officers Aleisha Stevens, Allan Stead and Lionel Saurette, proceeded to schedule and hold grievance hearings in bad faith, against the interest and at the exclusion of the complainant.

In so doing, CAPE not only acted against the interest of the complainant but against the interest of his union local at the time. The CAPE Local 503 President had agreed to an alternate arrangement, in collaboration with the complainant's employer, to address the complainant's concerns regarding CAPE representation during the grievance process. The CAPE local President in an e-mail referred (sic) to CAPE's continued representation of the complainant's grievances as "senseless".

In so doing, CAPE also acted to intentionally undermine the grievance process and, ultimately, the employer-employee relationship. Counsel for CAPE sent a letter to the complainant's employer threatening legal action upon learning of the alternate grievance hearing arrangements. A Labour Relations Officer for the employer in an e-mail referred (sic) to CAPE conduct as "underhanded" and expressed frustration with the resulting grievance process.

[12] Counsel for the CAPE filed written submissions in reply to both complaints on May 25, 2012. The complainant was asked on May 29, 2012 to provide his response to the CAPE's submissions by June 19, 2012. Nothing further was received from the complainant. On July 19, 2012, the Board advised both parties that, in the absence of a response from the complainant, or a request for an extension of time to provide a

response, the matters would be decided on the basis of the documents already on the Board's files.

[13] On August 30, 2012, the complainant contacted the Board concerning a change of address and informed Registry Operations that he had sent a letter to the Board on June 19, 2012 which had not been acknowledged. He provided a copy of that letter the same day. Receipt was acknowledged by Registry Operations on September 14, 2012. As indicated in the Board's letter of September 14, 2012, the complainant's letter of June 19, 2012 was brought to the attention of the decision maker in this case. By letter dated September 25, 2012, the Board confirmed this had in fact happened. The complainant's letter makes reference to the fact that "a more complete reply will be forthcoming" despite the fact that the grievor had been advised on May 19, 2012 that the deadline for submissions was June 19, 2012. The Board's letter of September 25, 2012 therefore indicated that while the Board would accept his letter dated June 19, 2012, no further submissions would be accepted.

Summary of the arguments

[14] The complainant argued that, in mid-August 2008, in meetings with CAPE officers Allan Stead and Aleisha Stevens, he "related a workplace incident involving security policies and staff" at his workplace. According to the complainant, his privacy was violated, and his religious beliefs about modesty were offended. The grievance form prepared by Mr. Stead and Ms. Stevens did not mention privacy or address Statistics Canada's security policy. The complainant claimed that he was advised that no specific mention of privacy is contained in the collective agreement, only discrimination based on prohibited grounds. That information was not sufficient to address the complainant's privacy and security concerns. The complainant alleged that to allay his concerns, Mr. Stead and Ms. Stevens advised him that "they would bring up the security/privacy issues during the grievance hearings and that the grievance form could be amended later if the employer refused to address them during the grievance process."

[15] The employer's first-level grievance reply did not address either concern. The complainant contacted the CAPE to amend the grievance to reflect his concerns. He was advised via email from Ms. Stevens that they would be reflected in the grievance at the second level and beyond. When the complainant tried to discuss his concerns further with Ms. Stevens, she was not available until after the date on which to

transmit the grievance to the next level. She also was not available to deal with it before the deadline to transmit the grievance to the third level.

[16] The complainant wrote to Mr. Ouellette on November 6, 2008 requesting that the CAPE seek an extension of time from the employer to transmit the grievance to the third level. It was refused. He was encouraged to transmit the grievance to the next level as it was because of the tight time lines.

[17] In July 2009, the complainant discovered that the CAPE had misrepresented the deadline date.

[18] In November 2008, the complainant filed an internal complaint with Mr. Ouellette about Ms. Stevens' conduct and requested that she refrain from any involvement with his grievances until his concerns with her level of representation were addressed. Despite the complaint, Ms. Stevens, with Mr. Ouellette's approval, continued to schedule and attend the complainant's grievance hearings. Ms. Stevens attended grievance meetings with the employer about the complainant's grievances unknown to him. The complainant wrote to the employer, advising it that Ms. Stevens was not authorized by him to proceed with any further representation on his behalf and that it was inappropriate for the employer to accept representations from Ms. Stevens due to the outstanding complaint against her.

[19] To ensure that the grievance process continued, the complainant entered into an agreement with the local CAPE president and the employer that the complainant would present his own grievance while accompanied by the local CAPE president. Upon hearing of that agreement, CAPE's national office advised the employer that this arrangement was not acceptable and threatened retaliation if the employer proceeded to allow the complainant to present his own grievance.

[20] In his June 19, 2012 letter the complainant makes reference to files being previously held in abeyance pending the hearing of a complaint and he reminds the Board that the respondent had been successful in arguing in the Federal Court of Appeal that the two matters referenced in the 2008 files were materially different.

[21] Counsel for the CAPE submitted a lengthy rebuttal with supporting case law. She also submitted an "Affidavit of Service" sworn to by Amy Quinn on May 24, 2012,

confirming that she personally served the complainant with the CAPE's submission by regular mail and via email.

[22] In its submission, the CAPE raised a preliminary objection based on the timeliness of the complaint. Alternatively, the CAPE's position is that the complaints should be dismissed on the basis that the complainant failed to provide the Board with the information it needed to open the complaint files, as requested in November 2009. Consequently, the Board should deem the complaints abandoned.

[23] The CAPE argued that subsection 190(2) of the *Act* requires that a complaint be made no later than 90 days after the date on which the complainant knew or ought to have known of the circumstances giving rise to it. The date on which the complainant knew or ought to have known of the circumstances giving rise to his complaints is measured from the date on which the CAPE informed him of its position on the alleged violations. In 2009 PSLRB 100, in which the amendment issue was raised, the Board member fixed May 19, 2009 as the date on which the complaint should be considered to have been filed. Incidents that gave rise to that complaint ought therefore to have been known by February 18, 2009.

[24] The allegations on which to support the May 19, 2009 amendment could not predate February 18, 2009. By email dated February 4, 2009, Ms. Stevens advised the complainant that his grievance hearings were scheduled for February 19 and 29, 2009, and that they would proceed. That is beyond the mandatory 90-day limitation period for filing a section 190 complaint under the *Act*.

[25] As an alternative, the CAPE argued that the complainant abandoned his complaints by failing to provide the information required by the Board until May 3, 2012. The Board dealt with the initial amendment request in 2009 PSLRB 100. The second amendment request, which the complainant filed on August 19, 2009, was not part of that decision. The CAPE objected to any action being taken on that request as the Board was *functus officio*, having rendered its decision the day before the request was made. Nothing further was heard from the complainant, with the exception of his letter of October 26, 2009 advising that he did not want the complaint files opened and in November of 2009 to refuse to provide the information required by the Board, until the complaints were filed on May 3, 2012.

[26] Finally, the CAPE argued that allowing the complaints to proceed would amount to an abuse of process by skirting the Board's decision dismissing the complainant's initial complaints by raising the small aspect of his representation in fall 2008.

[27] The complainant alleged that the CAPE violated its duty of fair representation by providing incorrect information about a grievance transmittal deadline in November 2008. In essence, the allegation is that the CAPE inappropriately denied the complainant the opportunity to deal with security and privacy issues in how it handled his grievance. The Board member in 2009 PSLRB 100 found that the essence of the complaint before him was the complainant's belief that the CAPE was pursuing the grievance based on a sexual harassment argument as opposed to the security and privacy issues that the complainant wanted to pursue. Allowing these complaints to proceed would require rehearing the facts that formed that basis of the complaint dismissed by that Board member.

Reasons

[28] I find that I am without jurisdiction to deal with these complaints. Both are barred by statute as the triggering events for each occurred beyond the 90-day limit prescribed in the Act for filing complaints under section 190.

[29] With respect to the first complaint, which arose out of the complainant's first request for amendment made to Mr. Butler, CAPE argued that the date on which the complainant first became aware of the events that gave rise to the complaints cannot be earlier than February 18, 2009, or 90 days before the date on which Mr. Butler, in 2009 PSLRB 100, deemed the new complaint to have been filed. I agree with CAPE's position if it is assumed that the complainant actually pursued the May 19 amendment request, but he did not.

[30] Had he complied with the Board's requests for information to complete the file opening process, his complaint would have been timely had he referred to events that occurred on February 18, 2009 or later. However, he did not comply with the Board's requests for information and in fact specifically advised the Board that he did not want to pursue this option until after his judicial review application had been disposed of by the Federal Court of Appeal. I find that the complainant therefore only filed the first of his two complaints before me in May of 2012 and this complaint refers to events which occurred in October and November 2008. Clearly, his complaint is out of time.

[31] Even had I found that the complainant's first complaint was filed on May 19, 2009, it would still be untimely as it refers to events that occurred over three months outside the 90-day time limit for filing a complaint. Regardless of whether I deem the first complaint before me to have been filed in May of 2009 or May of 2012, it is untimely and must be dismissed.

[32] The second amendment request, which was made after the decision in 2009 PSLRB 100 was issued, was, like the first amendment request, never pursued by the complainant beyond an initial exchange of correspondence. Indeed, as with the first complaint, the complainant specifically advised the Board that he did not wish to pursue his avenue before the Board, as he was fearful that it would prejudice his case before the Federal Court of Appeal. Having made this decision, he must bear its consequences. Therefore, I find that the complainant's second complaint was, like the first one, filed in May of 2012 and is therefore out of time as it refers to events which occurred long before the 90-day time limit. As well, even if I were to hold that the complaint had been filed some time following the issuance of Mr. Butler's decision, it would still be out of time as it clearly refers to events that occurred long before the filing deadline.

[33] In my opinion, both complaints are out of time. No request for an extension of time to file them was received, nor is it possible under the *Act*. Only grievance deadlines may be extended. It is not permissible for the complainant to pursue a complaint beyond the mandatory statutory time limits on the basis that they were not been dealt with by the Federal Court of Appeal. That discovery does not change the onus on a complainant to pursue his or her complaint in a timely fashion. It is clear that that 90-day period is mandatory, following which a complaint under section 190 must fail.

[34] In addition, I believe that the complainant is guilty of unreasonable delays in the pursuit of his complaints against the CAPE. He did not pursue his complaints in a timely fashion, filing these complaints nearly 11 months after he was advised of the Federal Court of Appeal's decision and 8 months after the 90-day appeal period expired. He created undue delay in pursuing his complaints against the CAPE, especially for the second amendment, requested on August 19, 2009. According to Brown & Beatty, *Canadian Labour Arbitration*, Fourth Edition, a balance must be sought between expedition and finality on the one hand and the fair resolution of the

merits of the disputes on the other (at paragraph 2:3210). The decision in each case is a matter for the decision maker to make in his or her discretion after considering any explanation for a delay and its effect in terms of prejudice to the other party.

[35] The only explanation for the delay that the complainant submitted is found in his March 16, 2012 letter to the Board, in which he states the following:

In recently reviewing files in relation to another matter presently before the Board, it came to the attention of the complainant that neither amendment request had been dealt with by either the Board or the Federal Court of Appeal.

As such the complainant wishes to open two new complaint files related to matters previously brought to the attention of the Board on May 19, 2009 and August 19, 2009, but which have to date not been dealt with.

[36] The complainant then delayed an additional six weeks before he delivered the required complaint forms to the Board. He provided no response to the CAPE's submissions; nor did he request an extension of time to provide a response. In my opinion he has not provided a reasonable explanation for the delay; nor do his actions in failing to respond to Board correspondence, to file the mandatory complaint forms or to provide a response to the CAPE's submissions, even if it were merely to advise the Board that he would not be making any, demonstrate that he is diligently pursued his complaints. According to Brown & Beatty, at paragraph 2:3212, to avoid the application of the doctrine of laches, there must be a reasonable explanation for the delay by the responsible party. The complainant failed to provide any, and the CAPE is entitled to be protected against any prejudice it may suffer as a result of the delay.

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

(The Order appears on the next page)

Order

[38] Both complaints are dismissed.

October 4, 2012.

**Margaret Shannon,
a panel of the Public Service
Labour Relations Board**