Date: 20120201

File: 561-02-516

Citation: 2012 PSLRB 13

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CECILIA BASIC

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
Basic v. Canadian Association of Professional Employees

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

REASONS FOR DECISION

Before: Kate Rogers, Board Member

For the Complainant: Herself

For the Respondent: Fiona Campbell, counsel

Decided on the basis of written submissions filed May 20, June 26, and July 29, 2011.

I. Complaint before the Board

[1] On April 27, 2011, Cecilia Basic ("the complainant") filed this complaint, which alleges that her union representatives did the following:

. . .

> *1. Arbitrarily choose from July 2009 until Dec. 2010 to NOT represent me on the whistle-blowing issues of my case despite being provided with: my personal accounts; access to information (ATI) documents; knowledge that Public Safety Minister Vic Toews' office had advised me to report to the police; and that the Integrity Commissioner's Office had advised me to submit a disclosure. CAPE claimed "whistle-blowers never win" and then represented me on the discrimination issues of my hybrid case only.*
>
> *2. Acted in bad faith during the Aug. to Dec. 2010 settlement negotiations following their announcement Aug. 7, 2010 that they planned to withdraw support. I did not ratify the offer and CAPE withdrew on Dec. 21/10.*
>
> *3. Discriminated against me based on my family status by justifying their withdrawal based on labour laws that claim that leave granted is an acceptable alternative to an accommodation agreement afforded under human rights and that the breakdown in my relationship with my supervisor due to her harassment of me was justifiable grounds for termination of a probationary employee with a family status issue.*

. . .

For remedy, the complainant asked that the respondent, the Canadian Association of Professional Employees (CAPE or "the union") be required to resume its representation of her grievance before the Public Service Labour Relations Board (PSLRB) and her complaint before the Canadian Human Rights Commission (CHRC).

[2] Initially, the complainant was represented by the union, but in August 2010, the complainant's union representative told her that the union had decided that, following a review of her case, it would no longer represent her at adjudication. The complainant was advised that she could appeal this decision through the union's internal complaint process, which she did. That appeal was dismissed by the President of CAPE on

October 27, 2010. Despite the decision to withdraw support for the grievance at adjudication, the union representative continued to represent the complainant in settlement discussions with the complainant's employer, the Public Health Agency of Canada, until December 2010, when talks broke down. On December 21, 2010, the union formally withdrew its support for the grievance.

[3] Responding to the complaint on May 20, 2011, the union objected to the jurisdiction of the PSLRB because it was filed outside the 90-day time limit prescribed in subsection 190(2) of the *Public Service Labour Relations Act (PSLRA)*. The union asked that the issue of timeliness be dealt with through written submissions. The complainant provided a very detailed response to the respondent's submissions. Although she objected to proceeding on the basis of written submissions, she agreed that the PSLRB should determine the process for resolving her complaint. The union provided a brief rebuttal in which it maintained its objection on the basis of the timeliness and its position that the matter should be dealt with by way of written submissions.

[4] Following a review of the file, I determined that the objection to jurisdiction based on timeliness could be dealt with through written submissions. At my request, the PSLRB Registry advised the parties that the objection on timeliness would be decided on the basis of written submissions and asked them to provide any further submissions on points not already on file, according to an agreed-upon timetable. Neither party felt it necessary to provide any further submissions. They asked the PSLRB to determine the matter based on the submissions already made.

II. Summary of the facts relevant to timeliness

[5] The complainant was rejected on probation on June 12, 2009. She was a member of the Economics and Social Sciences Services Group (EC), which was represented by CAPE. It is common ground between the parties that, with the assistance of the union, the complainant filed a grievance on June 25, 2009 against the termination of her employment on the grounds that it was in violation of the collective agreement between the Treasury Board and CAPE for the Economics and Social Sciences Services Group, expiry date June 21, 2011, and was also disciplinary in nature. The union stated without contradiction that the complainant was aware when the grievance was filed that the union would not represent her on the whistle-blowing aspects that she had raised.

[6] It is common ground between the parties that, between June 2009 and August 2010, the union represented the complainant through the grievance process and during an attempted mediation her grievance. However, it appears that, in August 2010, the complainant's union representative advised her that the grievance was not likely to succeed at adjudication and that, therefore, the union would withdraw its representation and support. The representative advised the complainant that she could appeal the decision to withdraw support for her grievance through the union's internal appeal process.

[7] The complainant appealed the union's decision to withdraw support and representation for her grievance on August 20, 2010. That appeal was dismissed by CAPE's president on October 27, 2010, confirming the union's decision to withdraw representation for her grievance.

[8] Despite the decision to withdraw its representation for the grievance, the complainant's union representative agreed to continue to represent her in ongoing settlement discussions with the employer and agreed not to advise the employer that the union had decided to withdraw its support of the grievance. Settlement discussions continued through autumn 2010. A final settlement offer was presented to the complainant on December 10, 2010. When forwarding the offer to her, the representative reminded her that the union would withdraw its representation if she decided not to accept it. She turned down the settlement on December 17, 2010. On December 21, 2010, the union formally withdrew its representation for the grievance.

[9] The complainant filed a number of requests under the *Access to Information Act,* R.S.C., 1985, c. A-1, and the *Privacy Act,* R.S.C., 1985, c. P-21, seeking information about her dispute with her former employer. In particular, on January 4, February 21 and March 11, 2011, she received copies of email exchanges between the senior labour relations officer assigned to her case on the employer's side and her union representative on the subject of her grievance and the settlement discussions that had taken place between August and December 2010. Those emails were not originally copied to the complainant, and she did not see them until she received them through her access to information (ATIP) requests.

III. Summary of the arguments on timeliness

A. For the respondent

[10] The union argued that the 90-day time limit prescribed by subsection 190(2) of the *PSLRA* is mandatory and that the time began to run when the complainant knew or ought to have known of the circumstances giving rise to the complaint. The union noted that no other provision of the *PSLRA* gives the Board jurisdiction to extend the time limit.

[11] In the circumstances of this case, the union argued that the complainant knew or ought to have known of the circumstances giving rise to the complaint when she was advised of its position. Citing *Ethier v. Correctional Service of Canada and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN,* 2010 PSLRB 7, and *Renaud v. Canadian Association of Professional Employees,* 2009 PSLRB 177, the union argued that the complainant could not extend the time limit by attempting to change the union's position or through her ignorance of her rights.

[12] The union submitted that, since the complainant filed her complaint on April 27, 2011, the only allegations that could be considered were those that occurred after January 27, 2011. However, it is clear that all the events that are the subject matter of the complaint took place before December 21, 2010. Further, she should have known of the circumstances giving rise to the complaint by October 27, 2010 at the latest, which is when CAPE's president confirmed the union's decision to withdraw its representation.

B. For the complainant

[13] In essence, the complainant argued that she could not have known about the events giving rise to her complaint until she received the documents from her ATIP requests. She received the last of those documents on March 11, 2011, which is therefore the date from which the time limits should be calculated.

[14] The complainant stated that she could not have known about the conversations between her union representative and the employer during the settlement discussions because she was not told about them when they occurred. In particular, she stated that she was not aware until she saw the documents received through her ATIP request that

the settlement under discussion in September 2010 had not yet been approved by the employer; nor was she aware that her representative had agreed to a proposal to restrict her rights to file ATIP requests or to disclose her whistle-blowing experiences. She was also not aware that the union representative had provided a copy of a letter between her and the CHRC to the employer until she saw the email exchange in the documents copied to her through her ATIP request.

[15] The complainant also argued that the union's October 27, 2010 response to her appeal of the decision to not provide representation should not be considered in relation to the time limits because she appealed only on the ground of discriminatory representation based on her probationary status, not on grounds of discrimination based on family status and she did not argue bad faith or arbitrary representation.

C. Respondent's Rebuttal

[16] The union argued that to determine when the time limit starts to run, for the purpose of subsection 190(2) of the *PSLRA*, it is necessary to identify the essence of the complaint. The circumstances or events that support a complaint are evidence, and the acquisition of new evidence after the event that gives rise to the complaint does not change the point at which the time limit begins to run.

[17] The union contended that, in this case, the essence of the complainant's allegations concerned its decision to not represent her on the whistle-blowing aspects of her grievance, its withdrawal of representation for her grievance against her rejection on probation and its withdrawal of support for the aspects of her grievance relating to alleged violations of the collective agreement.

[18] The union argued that although the complainant referred to a number of facts in support of her allegations that she claimed to have learned about only after receiving documents through her ATIP requests, she clearly knew of at least some of the events giving rise to her complaint before December 21, 2010. The union argued that the complainant knew that it would not represent her on the whistle-blowing aspects of her grievance as early as June 2009 and that she knew as early as October 27, 2010 that it would not continue to represent her if the settlement discussions in autumn 2010 were not successful.

[19] The union argued that the date on which the complainant received the documents from her ATIP requests is not relevant to the date on which she became aware of the circumstances of her complaint, because those documents simply constitute additional evidence about to the withdrawal of the union's representation of her grievance. For those reasons, the union argued that the complaint is untimely.

IV. Reasons

[20] This decision concerns an objection to the PSLRB's jurisdiction based on timeliness raised by the respondent with respect to an unfair labour practice complaint filed by the complainant.

[21] The complainant alleged that her union acted in bad faith when it refused to represent her on whistle-blowing issues in her grievance against her rejection on probation, that it acted in bad faith during settlement negotiations with the employer after telling her that it would withdraw support and that it discriminated against her on grounds of family status by justifying its refusal to continue to represent her based on labour laws rather than pursuing her human rights issues.

[22] The union objected to the PSLRB's jurisdiction to examine and inquire into this complaint on the ground that it is untimely as it was not filed within the mandatory 90-day time limit prescribed in subsection 190(2) if the *PSLRA*. The union contended that the essence of the complaint is the union's decision to withdraw its support and representation of the complainant for her grievance against her rejection on probation. The union argued that the complainant was aware of its decision as early as August 2010 and certainly by December 21, 2010, when it formally advised the PSLRB that it no longer supported the collective agreement aspects of the grievance and was no longer representing the complainant.

[23] The complainant argued that she could not have known of the circumstances giving rise to her complaint until she received documents in response to her ATIP requests, which she received in January, February and March 2011. From those documents, she learned that her union representative was aware but did not inform her that the settlement being discussed had not yet been approved by the employer, and that the representative was prepared to limit her rights to file ATIP requests and to pursue whistle-blowing issues, even though the union representative had not discussed it with her. The complainant argued that this information delayed the

application of the time limits and that, therefore, her complaint was filed in compliance with the time limit.

[24] I agree with the union that it is important to identify the essential nature of the allegations being made in the complaint. The union argued that those allegations can be reduced to two issues, that is, its refusal to proceed with the whistle-blowing aspects of the grievance and its decision to withdraw its support and representation of the grievance. However, in fact, the complaint sets out three allegations. First, it describes what the complainant described as an "arbitrary" decision by the union to not represent her on whistle-blowing issues in her grievance against her rejection on probation. Second, it concerns actions by the union representative during the settlement discussions that took place in autumn 2010, which the complainant characterized as acting in bad faith. Third, it concerns the union's subsequent decision to end its representation and support for the grievance if the grievance was not settled following discussions with the employer in autumn 2010, which the complainant argued was bad faith and discrimination based on family status. Each issue can stand separately as a ground for the complaint. Therefore, to determine the timeliness of the three issues, it is necessary to determine when the complainant knew or ought to have known of the circumstances giving rise to each of them.

[25] There was no dispute between that parties that the union advised the complainant, in the discussions leading to the filing of her grievance against her rejection on probation, that it would not pursue whistle-blowing issues. The grievance, filed on June 25, 2009, alleged that the rejection on probation was both a violation of the collective agreement and a disguised disciplinary discharge. It did not refer to whistle-blowing. Therefore, it is clear that the complainant knew by June 25, 2009 that the union would not represent her in any whistle-blowing allegations related to her rejection on probation. Accordingly, I find that the allegation relating to the union's decision to not represent her on whistle-blowing issues is untimely and must be dismissed.

[26] It is also clear on the facts presented by both parties that the complainant was told in August 2010 that the union had determined that her grievance was not likely to succeed at adjudication and that it would not continue to represent her for the grievance. The complainant filed an appeal using the union's internal process. The CAPE president denied her appeal in a letter dated October 27, 2010. On December 21,

2010, the union formally advised the PSLRB that it was no longer representing the complainant and that it was withdrawing its support for the collective agreement aspects of her rejection on probation grievance. Given those facts, it is clear that the complainant knew that the union was not representing her in August 2010 and that she demonstrated that knowledge by filing an appeal against that decision. In my view, the time limit for this allegation was triggered by the advice given to her by her representative that the union would no longer support the grievance. I agree with the adjudicator in *Ethier*, who held, in similar circumstances, as follows:

. . .

> 22. *The essence of the complaint was the union's refusal to exercise the representational rights and recourses to which the complainant claims he was entitled. Accordingly, the complainant's knowledge of the union's refusal to support his dispute is the triggering event of a violation of section 190 of the* PSLRA *and the 90-day period for filing the complaint. Therefore, the period began when the complainant realized that the union would not help him settle his disagreement. The* PSLRA *does not contain any provision that a complainant must exhaust all alternate recourse before filing a complaint.*

. . .

[27] The complainant argued that her appeal of the union's decision to withdraw representation alleged discrimination based on her probationary status and that this complaint alleges discrimination based on family status. She suggested that they are different matters. In fact, both allegations have at their core the withdrawal of representation. That is the essence of the complaint. The complainant knew in August 2010 that the union would no longer represent her. Even if I accepted that a final decision on representation was not made until sometime after her appeal was decided, there is absolutely no doubt that she knew the union's decision by December 21, 2010, when it took the formal step of advising the PSLRB that it was no longer representing her. Therefore, this allegation is, on even the most generous of calculations, untimely and must also be dismissed.

[28] The complainant also alleged that her union representative acted in bad faith during the settlement discussions that took place between August and December 2010. She based her allegation on information received as a result of her several ATIP requests. In particular, she referred to copies of email exchanges between her union

representative and the employer's representative that were not copied to her when they were sent. According to the complainant, the exchanges show that the union representative withheld information from her, such as that the settlement under discussion had not yet been approved by the employer. Further, the complainant argued that the exchanges showed that the union representative indicated to the employer that the representative was willing to sign an agreement limiting the complainant's right to pursue further ATIP requests without discussing it with her. The complainant alleged that other documents received through her ATIP request showed that the union representative forwarded copies of documents to the employer without discussing it with her.

[29] It is evident that the documents that gave rise to this allegation of bad faith during the settlement discussions came into the complainant's possession only as a result of her ATIP requests. She received the documents in question in packages on January 4, February 21 and March 11, 2011. The documents received on January 4 and March 11, 2011, bear the same file number, and it is clear that the March package provided additional information on her original request. Therefore, although it could be argued that the complainant had at least some knowledge of the facts that support her allegation by January 4, 2011, it is also clear that she did not have a complete picture until March 11, 2011, when she received the last of the documents.

[30] In my view, the complainant's third allegation describes a pattern of behaviour rather than a singular event that she became aware of only as she reviewed the information provided to her as a result of her ATIP requests. That information was cumulative. There was no way that she would have seen the email exchanges that gave rise to her belief that her representative was acting in bad faith without the documents sent to her through her ATIP requests. Without ascribing any judgment as to whether the information actually supports the allegation in the complaint, I cannot find for the reasons given that the allegation itself is untimely. Accordingly, the objection to jurisdiction based on timeliness, as it applies solely to the complaint that the union acted in bad faith during the settlement discussions between August and December 2010, is dismissed.

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

(The Order appears on the next page)

V. Order

[32] The objection to jurisdiction is allowed in part. The allegations in the complaint that relate to CAPE's decision to not represent the complainant on the whistle-blowing aspects of her grievance and to CAPE's decision to withdraw its representation for her grievance are dismissed.

[33] The objection to jurisdiction on the allegation that CAPE acted in bad faith during the settlement discussions between August and December 2010 is dismissed.

[34] The Board's Registry will be asked to set dates for a hearing on the merits of the sole remaining allegation of the complaint.

February 1, 2012.

Kate Rogers,
Board Member