Date: 20121123

Files: 561-02-519, 537, 541 & 561

Citation: 2012 PSLRB 125

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

SUSAN BIALY ET AL.

Complainants

and

PUBLIC SERVICE ALLIANCE OF CANADA ET AL.

Respondents

Indexed as
Bialy et al. v. Public Service Alliance of Canada et al.

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

REASONS FOR DECISION

Before: Stephan J. Bertrand, a panel of the Public Service Labour Relations Board

For the Complainants: Themselves

For the Respondents: Patricia Harewood, counsel

Decided on the basis of written submissions,
filed May 15, July 6 and 13, 2012.

I. Request for recusal

[1] In accordance with section 44 of the *Public Service Labour Relations Act* ("the *Act*"), I was designated as the panel of the Public Service Labour Relations Board ("the Board") tasked to hear and determine four complaints, bearing PSLRB File Nos. 561-02-519, 537, 541 and 561.

[2] The complaints were filed under section 190 of the *Act* and alleged that the Public Service Alliance of Canada, John Gordon, Tony Tilley, Jeannette Meunier-Mckay and Steve McCuaig ("the respondents") breached their duty of fair representation toward Susan Bialy, Nausheen Khan and Kamalaranjini Mylvaganam ("the complainants") by reaching a settlement agreement with Human Resources and Skills Development Canada (HRSDC or "the employer") that affected over 1000 employees working in its Income Security Programs.

[3] The hearing for these four complaints has not yet been scheduled. However, the parties were convened to a first pre-hearing conference in Toronto, Ontario, on December 2, 2011 and to a second, also held in Toronto, on May 8, 2012. The complainants attended both conferences and were not represented by counsel or in any other way, other than through the submissions of Ms. Bialy. Patricia Harewood, counsel with the Public Service Alliance of Canada ("the bargaining agent"), represented the respondents.

[4] The purpose of the pre-hearing conferences was to deal with a number of preliminary matters, including procedural issues and an objection by the respondents about the Board's jurisdiction to hear one of the complaints. As a result of the pre-hearing conferences, the parties were able to reach agreement on a number of procedural matters, including the consolidation of the complaints for hearing purposes, the withdrawal of the respondent's preliminary objection on jurisdiction, the number of days required for the hearing and the requirement to exchange documents in advance of the hearing.

[5] However, following the second pre-hearing conference, the complainants requested that I recuse myself from hearing their complaints on the ground that I was biased and thus unable to render decisions in an independent, fair and impartial manner. The request, which consisted of a one-and-a-half page email, was sent to the Board on May 15, 2012.

[6] The complainants' request was brought to my attention, and I invited the parties to file written submissions on the recusal request and to specifically refer to the test set out by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.,* [1978] 1 S.C.R. 369, and in *R. v. S. (R.D.),* [1997] 3 S.C.R. 484.

[7] The complainants were invited to submit their representations first but informed the Board at the deadline that they would not make any representations further to those already submitted in their email of May 15, 2012.

[8] The respondents, who had been invited to submit their representations second, filed detailed submissions within their deadline.

[9] The complainants, who were afforded a right of reply, again informed the Board before their deadline that no further submissions on recusal would be made. Instead, they chose to file an 11-page document that addressed the merits of their complaints and the remedies that they seek.

II. Summary of the arguments

A. For the complainants

[10] The complainants argued that, since their complaints were made against both the bargaining agent and the employer, and since I have in the past acted as counsel for the employer, I cannot render decisions in an independent, fair, objective, impartial and unbiased manner.

[11] The complainants argued that, by questioning the legislative authority or power under which I could grant some of the redress that they seek, in particular the revocation of a settlement agreement between the bargaining agent and the employer because it is unconscionable, I have exhibited a closed mind and clear bias against their position.

[12] The complainants also argued that I turned a blind eye toward or ignored documentary evidence about certain grievances involving them that are not before me. They also alleged that I warned them to not directly name the Minister of Human Resources and Skills Development as a party to another complaint they wanted to consolidate with these four complaints.

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

[13] The respondents' counsel first referred me to *Committee for Justice and Liberty et al.*, in which the Supreme Court, at page 394, explained as follows the test for determining whether reasonable cause exists for the apprehension of bias:

. . .

> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded [sic] persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. . . ."*

[14] The respondents added that the Board has applied that test on numerous occasions, notably in *Nelson v. Canadian Security Intelligence Service*, 2012 PSLRB 65, and in *Singaravelu v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 8.

[15] According to the respondents, mere suspicion about bias by a judge or a member of an administrative tribunal is not sufficient to conclude that he or she is biased. On that point, they referred me to paragraph 27 of *Singaravelu,* which suggested that a person seeking the recusal of a decision maker must demonstrate that, beyond mere suspicion and in all probability, a reasonable and well-informed person would believe that the decision maker is biased and would not decide the case fairly.

[16] The respondents argued that the complainants failed to present any causal link between my previous employment and my alleged partiality, adding that the mere fact of representing the employer in the past does not automatically disqualify someone from being capable of rendering unbiased decisions as a Board member. They referred to subsection 18(1) of the *Act* and suggested that being a former employee of the Department of Justice did not disqualify someone from being appointed to the Board.

[17] The respondents also submitted that providing parties with information about the extent of a board member's powers and informing parties about procedural matters and Board practices of which they may be unaware (i.e., whom to name as a respondent or using accessible fonts in correspondence) is helpful for the efficient

administration of justice, that it is an essential component of a member's role, and that it could be particularly important in cases in which one party is self-represented.

[18] According to the respondents, such interventions by Board members on procedural matters can only help facilitate a more focused and expeditious hearing that respects procedural fairness. The resulting agreements and undertakings of the parties in this case is an example of the efficiencies that such intervention can generate.

III. Reasons

[19] After carefully considering the parties' written submissions and the applicable case law, I have decided to dismiss the complainants' request for recusal for the following reasons.

[20] First, I feel compelled to clarify two important facts. Contrary to what the complainants alleged, these complaints were not filed against the employer. The employer is not a party to any of the four complaints. The parties are the complainants, their bargaining agent and four of its representatives. Second, during the two pre-hearing conferences over which I presided, I did not make any determinations or issue any directions or orders about the merits of these complaints or of the remedies sought.

[21] As correctly pointed out by the respondents' counsel, the test for determining whether reasonable cause exists for the apprehension or a reasonable likelihood of bias was developed as follows by the Supreme Court in *Committee for Justice and Liberty et al.* (see p. 394):

. . .

> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded [sic] persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. . . ."*

. . .

[22] In addition, the question of the nature of the evidence required to demonstrate an appearance of bias was raised as follows by the British Columbia Court of Appeal in *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228:

. . .

> *. . . An accusation of that nature . . . ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. . . . suspicion is not enough. . . .*

. . .

[23] That principle was endorsed recently by the Board in *Singaravelu*, at para 27, and in *Nelson*, at para 10. I share the views expressed in both decisions and believe that the complainants were required to demonstrate beyond mere suspicion that a reasonable and well-informed person could believe that, in all likelihood, I would be biased in my handling of the four complaints and that I would not render a fair decision. In my view, they failed.

[24] At no time during the two pre-hearing conferences did I act in a manner that could be considered biased against the complainants or unduly favourable to the respondents. I believe that a reasonable person considering my actions and comments during those pre-hearing conferences would reach the same conclusion.

[25] As I stated, the employer is not a party to the four complaints, but even if it were, no evidence was led to suggest that I was consulted or that I provided legal advice or representation to the employer on matters or issues that are the subject of the four complaints. The mere fact that I was formerly counsel with the Department of Justice and that I provided, from time to time, advice to different departments, including the HRSDC, in no way affects my capacity to demonstrate a completely impartial and unbiased mind in ruling on these complaints. The complainants' suspicions are simply insufficient to demonstrate bias on that basis.

[26] As correctly argued by the respondents, other Board members have worked in the federal government or for bargaining agents earlier in their careers. The expertise gained from specializing in labour relations for the federal government, for bargaining

agents or in the private sector has often been considered an asset to the Board. For that reason, the *Act* provides for a representative Board.

[27] Any comments that I made during the pre-hearing conferences on the potential limits of my jurisdiction with respect to some of the remedies that the complainants seek does not, in my view, amount to impartiality. Nothing improper lies in questioning, in the context of a pre-hearing conference, the legislative authority or power under which I could award such remedies. The exchange in question amounted to nothing more than a frank and forthright discussion of relevant issues to be addressed at some later point and far from demonstrated a closed mind on my part or bias towards the complainants' position.

[28] Unfortunately, the complainants did not specify the documentary evidence to which I allegedly turned a blind eye or ignored, which makes it impossible for me to respond to this point. I recall discussing the relevance of other outstanding or unresolved grievances involving the complainants, but as I indicated to them, those grievances are not properly before me. In addition, as I indicated at the start of my reasons, I did not make any determinations or issue any directions or orders during the two pre-hearing conferences over which I presided.

[29] Finally, I never warned the complainants to not name the Minister as a party. I believe that my questioning of the complainants' grounds for directly naming the Minister of Human Resources and Skills Development as a party to another complaint that the complainants were contemplating filing and consolidating with the four complaints already before me was proper, since there was a possibility that I could be designated to hear and determine that complaint. Again, the exchange took part during a frank and forthright discussion about procedural issues, which, in my view, should be considered constructive and essential for the efficient administration of justice.

[30] I am confident that a reasonable and right-minded person viewing my interventions during the two pre-hearing conferences would not have noted a reasonable apprehension of bias but rather several efforts on my part to accommodate diligent but inexperienced self-represented litigants by providing the parties, especially the complainants, with two opportunities to better understand the process. On the face of it, there is simply no connection between the complaints before me and the reasons on which the recusal request is based.

[31] For those reasons, I find that there is no basis to support the complainants' request that I recuse myself.

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

(The Order appears on the next page)

IV. Order

[33] The request for recusal is denied.

[34] The complaints shall be scheduled for a hearing before me in accordance with the Board's practice.

November 23, 2012.

Stephan J. Bertrand,
a panel of the Public Service
Labour Relations Board