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File: 525-02-43
XR: 560-02-58, 65, 66 and 68

Citation: 2012 PSLRB 127

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

ZABIA CHAMBERLAIN

Applicant

and

TREASURY BOARD (Department of Human Resources and Skills Development)

Respondent

Indexed as
Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations Board

For the Applicant: Herself

For the Respondent: Caroline Engmann, Counsel

Decided on the basis of written submissions,
filed June 9, 2011, November 8, 2011, July 11and 12, 2012.

Request before the Board

[1] Zabia Chamberlain ("the applicant") seeks a review of decision 2010 PSLRB 130 under section 43 of the *Public Service Labour Relations Act* ("the *Act*") on the basis of the jurisprudence related to the application of that section, of new evidence received by the applicant between August 2010 and April 26, 2011, of arguments that she was unable to make at the hearing of the complaints held July 26-30, 2010, that evidence of one witness was ignored, that clear evidence of financial penalties imposed against her were ignored, submitted exhibits that were ignored, that proper attention was not paid to case law which she submitted and that written submissions filed by both parties were ignored. As a result, she alleges that she did not receive a fair and unbiased hearing. By way of remedy, the applicant requests that the Public Service Labour Relations Board ("the Board") rescind its decision in 2010 PSLRB 130 and that it accept jurisdiction over her complaints.

Summary of the evidence

[2] On December 3, 2008, the applicant filed a grievance, alleging that her employer, the Department of Human Resources and Skills Development, had not sufficiently dealt with the harassment that had been inflicted upon her by her supervisor. She also filed four related complaints alleging violations of section 133 of the *Canada Labour Code* in 2009. The grievance and the complaints were heard together from July 26 to 30, 2010. After the hearing, the applicant attempted on a number of occasions to submit additional materials. On October 27, 2010, the Board's registry advised the applicant that no further evidence or submissions would be accepted. The decision was rendered on December 13, 2010. The decision-maker determined that he did not have jurisdiction over the grievance and dismissed it. At the same time, he accepted jurisdiction over the four complaints, but only as they related to allegations of reprisal that occurred on or after January 23, 2009, and ruled that other elements of the complaints were untimely. After the decision was issued, the applicant sought information from the Board as to why there had been no mention of the case law that she had submitted and why the decision contained no reference to harassment by the Treasury Board Secretariat. The Board responded on December 23, 2010.

[3] The applicant filed for judicial review of the portion of the decision related to the alleged violations of the *Canada Labour Code*, R.S.C. 1985, c. L-2, on the basis of a

breach of procedural fairness, among other things. In addition, she sought judicial review before the Federal Court of the portion of the decision which dismissed her grievance for want of jurisdiction. Both applications for judicial review were filed with the Federal Court and the Federal Court of Appeal prior to the applicant filing her application under section 43 of the *Act*.

[4] In her arguments before the Federal Court of Appeal, the applicant based her request on allegations that the Board denied her a fair opportunity to present her case. She alleged that the Board declined to issues summonses to witnesses that she wished to call as the panel member allowed the employer's objections to the summonses. She also alleged that using the five hearing days to deal with jurisdictional matters raised by the employer was unfair. She argued that the Board was not impartial in its dealings with her, that it did not refer to many of the documents and jurisprudence that she had placed before it, that it gave closer attention to the jurisprudence relied on by the employer, and that it made many findings of fact with which she disagreed. Many of those same documents and arguments were also used before the Federal Court in support of the judicial review application on her grievance and in support of this application.

[5] On June 9, 2011 the applicant submitted her application under section 43, accompanied by a series number of documents in support. The documents were composed primarily of the documents filed with the Federal Court and the Federal Court of Appeal in support of her application for judicial review of 2010 PSLRB 130. Included were the attestations of members of her support network in attendance during the hearing before the Board who had perceived the panel member as being short and impatient with the applicant.

[6] As her application for judicial review before the Federal Court of Appeal was outstanding when she filed the present application, the applicant was notified on September 12, 2011 that a decision on this application was held in a abeyance pending the Court's decision. The application for judicial review was dismissed on February 8, 2012, and leave to appeal to the Supreme Court of Canada was denied on August 9, 2012.

Summary of the arguments

[7] In an email to the Board on November 8, 2011, the applicant stated that her section 43 application raises issues of procedural fairness and natural justice in the proceedings before the Board in 2010 PSLRB 130 and that the Board's jurisprudence supports her application. In particular, she referred to the Board's decisions in *Bouchard v. Public Service Alliance of Canada*, 2009 PSLRB 31, *Martel v. Public Service Alliance of Canada*, 2009 PSLRB 151, and *Bremsak v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 126. All those decisions were about applications made under section 43 of the *Act.* The applicant argued that, regardless of the then pending judicial review applications, the Board had full jurisdiction and a legislated mandate to ensure that it would act with credibility, fairness and equity and that it would judiciously exercise the powers granted under its mandate.

[8] The employer opposed this application as an attempt by the applicant to relitigate the matters already dealt with in 2010 PSLRB 130, which the applicant sought to have judicially reviewed.

Reasons

[9] In *Chaudhry v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 39, the Board member set out the guidelines or criteria for reconsidering a Board decision. One is that a decision made under section 43 of the *Act* cannot relitigate the merits of a case (see paragraph 29).

[10] I carefully reviewed each page of the documents submitted by the applicant in support of her application as well as all the correspondence in the Board file. The documents submitted are copies of those filed in support of her applications for judicial review and include copies of the exhibits accepted and rejected by the panel of the Board in the process of the hearing that led to 2010 PSLRB 130.

[11] I agree with the employer that this is an attempt to relitigate decisions made by the panel of the Board during the course of the hearing in order to secure another outcome. It is also an attempt to secure an outcome different from that obtained in the applicant's applications to the Federal Court of Appeal and the Federal Court. The arguments in support of this application are the same as those dealt with by the Federal Court of Appeal in *Chamberlain v. Canada (Attorney General)*, 2012 FCA 44 and by the Federal Court in *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027.

[12] At paragraphs 14 through 22 of its decision, the Federal Court of Appeal dealt with the allegations of procedural fairness, substantive errors of law or fact, and the reasonableness of the Board's findings on the applicant's *Canada Labour Code*-based claims.

[13] At paragraphs 19 to 22 of that decision, in dismissing the applicant's application for judicial review, the Federal Court of Appeal wrote the following:

> *[19] The fact that Ms Chamberlain may not agree with the Board's conclusions on issues, with its assessment of the relevance of the material before it, or with its selection of the material that it included in its reasons, comes nowhere near to establishing that a reasonable person, who had thought the matter through in a practical way, would infer that the Board had not adjudicated Ms Chamberlain's complaints fairly.*
>
> ***(ii) substantive errors***
>
> *[20] I am not persuaded by Ms Chamberlain's written or oral submissions that the Board committed any reviewable error of law or fact. She emphasized at the hearing that, in finding no evidence of any reprisal by the employer, the Board relied too heavily on the facts found by the Adjudicator in dismissing her grievances, namely the absence of* prima facie *evidence that the employer had disciplined Ms. Chamberlain for invoking her rights under the Code.*
>
> *[21] In the context of this case, there are substantial similarities between the concepts of reprisal and discipline, and the evidence pertaining to them. Accordingly, in my view it was not unreasonable for the Board to have given significant weight to the findings on the grievances when making analogous findings on the complaints.*
>
> *[22] I would only add that the reasons given by the Board indicate that, despite the voluminous and confusing nature of Ms. Chamberlain's submissions, it dealt fully and fairly with her complaints and the issues they raised.*

[14] The applicant also applied to the Federal Court for judicial review of the adjudicator's decision to dismiss her grievance. Again, in that application, she alleged that the adjudicator violated the requirements of procedural fairness and was biased. At paragraph 8 of the Federal Court's decision, it notes that the allegations of bias and of a violation of procedural fairness were considered by the Federal Court of Appeal in its decision on the claims related to the *Canada Labour Code* (see 2012 FC 1027).

[15] At paragraph 20 of the decision, the Federal Court notes that the written submissions filed with the two courts in support of the applications for judicial review were very similar on the points of procedural bias and fairness. In both proceedings, the applicant alleged that she was not provided with the opportunity to present her case in full, that her evidence and cited jurisprudence were not sufficiently considered, and that the summonses to witnesses whom she had wished to call were not issued. The Federal Court found that all elements required for the application of the principle of issue estoppel were present in the case before it and the case that had been before the Federal Court of Appeal. The same parties were involved in both cases, a final decision had been made in the earlier case and the same question was decided in the earlier case. In addition, the Federal Court stated as follows at paragraph 25:

> *[25] . . . The Federal Court of Appeal hears appeals from this Court and decided precisely the same issue as is now before me regarding the alleged bias of the Adjudicator and the claim that he violated the principles of procedural fairness. Accordingly, the decision in* Chamberlain *is binding on me, and for this reason as well Ms. Chamberlain's bias and procedural fairness claims must be dismissed.*

[16] As noted earlier, I reviewed each page of the documents submitted in support of this application. The grounds for the applicant's request are synonymous with her applications for judicial review of 2010 PSLRB 130 before both the Federal Court of Appeal and the Federal Court. As the Federal Court of Appeal determined that the applicant was treated fairly and that there was no breach of natural justice, the Board, like the Federal Court, is bound by that decision. Consequently, I find that there is no basis upon which to grant the applicant's application.

[17] Also as noted earlier, I find that this application under section 43 of the *Act* is an attempt to relitigate matters previously decided upon by the Board. I find nothing in the applicant's documents which indicates any new evidence relative to the events which are the subject of the *Canada Labour Code* complaints. Consistent with the jurisprudence of the Board, in the absence of new evidence or a breach of natural justice, an application under section 43 of the *Act* must fail.

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

(The Order appears on the next page)

Order

[19] This application is denied.

November 28, 2012.

Margaret T.A. Shannon,
a panel of the Public Service
Labour Relations Board