Date: 20120210

File: 561-02-450

Citation: 2012 PSLRB 15

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

LISE SUZANNE JUTRAS OTTO

Complainant

and

RAYMOND BROSSARD and ALEX KOZUBAL

Respondents

and

TREASURY BOARD (Department of Indian Affairs and Northern Development) and DEPUTY HEAD (Department of Indian Affairs and Northern Development)

Intervenors

Indexed as
Jutras Otto v. Brossard and Kozubal

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: Herself

For the Respondents: Helen Nowak, Public Service Alliance of Canada

For the Intervenors: *Diane Bodnar, Department of Indian Affairs and Northern Development*

Heard at Winnipeg, Manitoba,
November 9 and 10, 2011.

I. Background

[1] This decision follows from the orders made in *Jutras Otto v. Brossard and Kozubal*, 2011 PSLRB 107.

[2] Lise Suzanne Jutras Otto ("the complainant") was previously employed at Indian and Northern Affairs Canada (INAC) as an independent assessment process support officer with the Indian Residential Schools Adjudication Secretariat. Her position was classified PM-3, and she held it from November 10, 2008 to October 3, 2009.

[3] On July 14, 2009, the complainant filed a grievance seeking a harassment-free work environment, with the initial support of the respondents. On September 3, 2009, INAC informed her that she was being rejected while on probation and that her employment would effectively come to an end on October 3, 2009.

[4] On March 23, 2010, the complainant filed a complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, in which she complained that Raymond Brossard and Alex Kozubal ("the respondents") acted in an arbitrary manner when they failed to transmit her harassment grievance to the second level of the grievance process and to file a grievance in connection with her rejection on probation. The respondents were representatives of her bargaining agent, the Public Service Alliance of Canada.

[5] In 2011 PSLRB 107, I allowed the complaint and ordered that a separate hearing be scheduled to address the remedy issue, while encouraging the parties to reach a resolution, through mediation or otherwise. The parties were unable to resolve the remedy issue, and a hearing was scheduled for November 9 and 10, 2011, in Winnipeg, Manitoba, during which I invited the parties to present evidence and arguments in support of their respective positions.

II. Issue

[6] At issue is what constitutes an appropriate remedy in the applicable circumstances, which are fully outlined in 2011 PSLRB 107.

III. The evidence

[7] Only the complainant presented evidence during the hearing. The respondents did not present evidence, but they did cross-examine the complainant.

[8] The complainant stated that she had been denied her right to challenge her rejection on probation and that she should be compensated for future losses associated with this wrongful denial. She added that she had suffered anxiety attacks, stress and symptoms of depression as a direct result of the respondents' misconduct.

[9] The complainant filed six exhibits that essentially established her former employment status at INAC, the salary that she was paid in 2009, the amount of union dues that she paid in 2009, contribution rate projections for the Canada Pension Plan (CPP) and for the federal public service pension plan under the *Public Service Superannuation Act* (*PSSA*), R.S.C., 1985, c. P-36.

[10] The source of most of the complainant's documentary evidence originated from web pages of Public Works and Government Services Canada and of the Treasury Board of Canada Secretariat. No independent evidence was produced to establish the extent of her loss.

IV. The arguments

A. For the intervenors

[11] Although INAC did not participate actively during the hearing, Diane Bodnar, a director of human resources for the Manitoba region of INAC, attended the proceeding and addressed the Public Service Labour Relations Board ("the Board") on the issue of the time limits associated with the grievance process. She indicated to the Board that INAC would consent to a request to extend the time limit within which to file a grievance, should the complainant seek to file one about her rejection on probation, and that INAC would not challenge its timeliness, nor the timeliness of her ongoing harassment grievance.

B. For the complainant

[12] The complainant submitted that she suffered losses and damages as a result of her rejection on probation and of the respondents' misconduct. She summarized those losses and damages as follows:

- loss of wages (October 4, 2009 to November 1, 2018)	$ 537 206.80
- return of union dues paid (for 2009)	$ 687.54
- CPP contributions – employer's share (2010-2018)	$ 21 264.20
- CPP pension (2% per year of employment until 2018)	$ 180 000.00
- superannuation contributions – employer's share	$ 31 585.20
- *PSSA* pension (2% per year of service until 2018)	$ 216 000.00
- loss of federal government employee benefits	$ 10 800.00
- pain and suffering	$ 102 456.26
Total:	$1 100 000.00

[13] The complainant added that she had attempted to mitigate her losses and damages by securing employment in both the public and private sectors but had been unsuccessful so far. She claimed to have suffered serious financial hardship, which has taken a significant toll on her health and well-being.

[14] According to the complainant, the only remedy that can provide her with appropriate relief consists of compensating her financially for the losses and damages she has allegedly suffered and will continue to suffer until November 1, 2018, the date on which she always intended to retire. However, the complainant conceded in her rebuttal argument that the compensation package should probably be claimed, for the most part, from the employer rather than from the respondents, whom she believes are only partly accountable for the alleged losses and damages.

C. For the respondents

[15] The respondents' representative indicated that she agreed fundamentally with the Board's findings in 2011 PSLRB 107 and that the respondents had indeed failed to meet their representation duty. According to the respondents, the appropriate remedies in these circumstances consist of relaxing the time limits to file the complainant's rejection on probation grievance, ensuring that she is provided with initial representation with respect to that filing and with respect to reactivating her harassment grievance, and ensuring that the respondents conduct a full and complete

analysis of her grievances once they have all the relevant documentation. Doing so would put the complainant back into the position she would have been in, but for the respondents' misconduct. That solution, according to the respondents, also represents the corrective measures most logically connected to their breaches. In support of their contentions, the respondents referred me to *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 124.

[16] The respondents further contended that, although it would be appropriate to order representation for the complainant for her two grievances during the grievance process and possibly at adjudication, should the respondents' analysis of the merits of the grievances support a referral to adjudication, it would not be appropriate to order representation at adjudication, as that would put the complainant in a better position than she would have been in, but for the violations. In support of their contention, the respondents referred me to *Peacock v. Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN*, 2005 PSSRB 9.

[17] The respondents argued that the complainant's proposed remedies are punitive in nature and not logically connected to the breaches that occurred. They added that the period of future losses that she defined, from October 2009 to November 2018, is arbitrary and is not supported by any logical rationale. They also argued that the complainant failed to establish a causal connection between the losses and damages allegedly suffered and the violations committed. Finally, they contended that none of the calculations and projections that she provided were credible, as she filed no actuarial report and no medical report in support of those losses and damages. According to the respondents, there is no precedent for the type of award that she seeks.

V. Reasons

[18] The remedies that the Board may order when a complaint is well-founded are set out in paragraph 192(1)(*d*) of the *PSLRA*, which reads as follows:

> ***192.*** *(1) If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
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> . . .

> *(*d*) if an employee organization has failed to comply with section 187, an order requiring the employee organization to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on any proceeding that the Board considers that the employee organization ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;*

[19] In *Ménard*, the Board elaborated on the meaning and purpose of that provision and stated as follows:

> . . .
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> *[28] Paragraphs 192(1)(*a*) to (*f*) of the* Act *refer to specific orders about the different breaches of the* Act *for which a complaint may be filed under subsection 190(1). A cursory analysis of paragraphs 192(1)(*a*) to (*f*) shows that the legislator's intent was to set out specific orders for the different breaches of the* Act*. In general, each order aims to return to the complainant what was lost or not received because of the breach of the* Act*. Specifically with respect to the duty of representation, paragraph 192(1)(*d*) states that the Board may require the employee organization to take and carry on on behalf of the complainant or to assist the complainant to take and carry on any proceeding that the Board considers that the employee organization ought to have taken and carried on on the complainant's behalf or ought to have assisted the complainant to take and carry on. Clearly, the remedy directly addresses the breach committed.*
>
> *[29] Under that legal framework, the word "including" in subsection 192(1) of the* Act *serves to introduce or "include" specific measures adapted to different breaches of the* Act*. However, it should not be understood as limiting the power of the Board to order other measures as long as they are logically connected to the breach committed.*
>
> *[30] Subsection 99(1) of the* Canada Labour Code *("the* Code*") includes provisions similar to those of subsection 192(1) of the* Act*. On the limited remedial authority of the Canada Industrial Relations Board (CIRB), the Supreme Court of Canada wrote the following in* Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369:*
>
> . . .
>
> The remedy directed by the Board was not patently unreasonable; rather, it was eminently sensible and appropriate in the circumstances. A remedial order will be considered patently unreasonable where: (1)

> the remedy is punitive in nature; (2) the remedy granted infringes the *Charter*; (3) there is no rational connection between the breach, its consequences, and the remedy; (4) the remedy contradicts the objects and purposes of the Code. A rational connection did indeed exist between the breach, its consequences and the remedy and the remedy affirmed the objects and purposes of the Code.
>
> . . .

Ménard suggests that, although the remedial corrective measures that can be ordered in such cases are not restricted to those set out in paragraph 192(1)(*d*) of the *PSLRA*, they must not be punitive in nature or infringe the *Canadian Charter of Rights and Freedoms*, enacted as Part I of the *Constitution Act, 1982*, and must be logically connected to the breach of the *PSLRA* and its consequences.

[20] The damages sought by the complainant are for the most part future losses that extend 10 years. Her claim is not supported by credible, independent evidence of actual loss. It is not supported by a reasonable rationale; nor is it logically connected to the breach of the *PSLRA* that occurred and to its consequences. Moreover, to hold the respondents accountable for the different types of losses that she claimed over such a long period would certainly be punitive in nature.

[21] As suggested in *Ménard,* punitive damages ought to be restricted to malicious, oppressive and high-handed misconduct, which I do not believe occurred in this case. Although I found the respondents' conduct careless and negligent, nothing in the evidence I heard in 2011 PSLRB 107 led me to conclude that they acted in a malicious, oppressive or high-handed fashion.

[22] In fact, the complainant admitted in her rebuttal comments that most of the amounts claimed in her compensation calculation should be directed at the employer rather than at the respondents. Despite that admission, she provided no evidence or arguments that could assist me in determining what, if any, percentage of her claim could or should be attributed to the respondents; nor did she provide a causal connection between the respondents' conduct and the amounts claimed.

[23] None of the financial calculations proposed by the complainant were supported by credible, independent evidence. For example, the amount claimed for pain and suffering is based solely on the difference between the total amount sought by the

complainant, i.e., $1.1 million, and other specific amounts claimed. She tendered no medical reports or other independent evidence in support of her claim for pain and suffering.

[24] As for the complainant's claim for a reimbursement of her union dues, I agree that, for the same reasons as those found at paragraph 34 of *Ménard,* such a claim is not warranted, given that she continued to receive, during the relevant period, all the benefits and protections of a collective agreement.

[25] In *Ménard*, the Board stated:

. . .

> *[34] The complainant demanded the repayment of all the union dues that she paid for the period in question. She has not specified the period; however, it covers at most January to November 2010. It is true that the complainant did not receive union representation for her November 2009 grievance because the respondent withdrew it. However, the complainant received all the benefits and protections of a collective agreement. She could have made use of union services had she experienced other problems at work. In short, she benefited from being a member of her bargaining unit. Therefore, I am not prepared to accept her claim for the reimbursement of the dues that she paid.*

. . .

[26] I do not believe that any of the monetary damages claimed by the complainant are appropriate or warranted in this case. However, the corrective measures proposed by the respondents' representative appear much more logically connected to the breaches committed by the respondents, especially given the likelihood of success associated with rejection on probation cases and the fact that the complainant could have grieved the rejection on probation without the respondents' support as far back as March 2010, when she became aware that they had failed to do so on her behalf.

[27] After considering the parties' arguments, I conclude that the appropriate remedy in this case is to provide the complainant with an opportunity to pursue her harassment grievance with the assistance of the respondents or of her bargaining agent, subject to a further assessment of her harassment grievance by the respondents once all pertinent information is received. I also take notice that INAC has consented to extend the time limit within which to file a grievance about the complainant's rejection on probation and I conclude that she should be provided with representation

with respect to filing such a grievance. For the same reason, I also conclude that the complainant should be provided with representation with respect to the transmittal of her harassment grievance to the second level of the grievance process.

[28] While I am of the view that representation should be provided by the respondents by referring the harassment grievance to the second level of the grievance process and by filing a new grievance about the complainant's rejection on probation, I am not prepared to direct the respondents to proceed to adjudication on those two grievances. At paragraphs 67 and 68 of *Peacock*, the Board commented as follows on this issue:

> *[67] In my view, directing the bargaining agent to proceed to adjudication puts Ms. Peacock in a better position than she would have been, had the bargaining agent filed her grievance at the second level of the grievance process. As I indicated earlier, not much evidence was led by either the bargaining agent or Ms. Peacock concerning the merits of this grievance. This case is not directed at the failure of the bargaining agent to take a case to adjudication, but rather the failure of the bargaining agent to take the steps necessary to ensure that the grievance was presented at each level of the grievance process, so that the position of the complainant was protected. A bargaining agent is not required to take every case forward to the grievance process, but it is required to examine the merits seriously before deciding not to take a case to the grievance process. In this case, the bargaining agent did not get to a serious examination of the merits, because of the negligence of the local president.*
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> *[68] It appears from the submissions of the respondent that, if I relieve Ms. Peacock from the timeliness bar to her grievance, it intends to represent her at any adjudication hearing. In my view, it is premature to make an order that the bargaining agent proceed through to adjudication at its own cost, as requested by Ms. Peacock. It is not apparent to me, from the evidence tendered at this hearing, that the bargaining agent has made a serious examination of the merits of the grievance. It may well have done so, but as I have indicated, this was not a case where the bargaining agent raised as a defence to the complaint that it had seriously examined the merits of the grievance and determined not to proceed further with the handling of Ms. Peacock's grievance. I note that bargaining agents are given fairly wide latitude in the decision to take a matter to adjudication. In my view, it would not be a proportional remedy to order that the bargaining agent must take a matter to adjudication, where it failed to present the*

> *grievance at second level of the grievance process. Further, such an order is not consistent with the grievance adjudication scheme, which requires the grievance procedure in the collective agreement to be exhausted prior to a reference to adjudication. The proper remedy on the evidence in this case is to . . . permit the bargaining agent to present the grievance at the second level of the grievance process. I therefore am not prepared at this time to make an order that the bargaining agent proceed to adjudication and bear the costs of proceeding to adjudication.*

[29] For the same reasons as those expressed in *Peacock*, I believe that directing the respondents to proceed to adjudication on the two grievances would put the complainant in a better position than she would have been in, had the respondents acted on the harassment grievance and filed a new grievance about the rejection on probation.

[30] As to whom the following orders should be directed, I am guided by subsection 192(3) of the *PSLRA*, which provides as follows:

> ***192.*** *(3) If the order is directed to a person who has acted or purported to act on behalf of an employee organization, the order must also be directed to the chief officer of that employee organization.*

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

(The Order appears on the next page)

VI. Order

[32] I declare that the employer has waived its right to challenge the timeliness to refer the complainant's harassment grievance to the second level of the grievance process.

[33] I declare that the deputy head of the Department of Indian Affairs and Northern Development has consented to extend the time limit within which to file a grievance about the complainant's rejection on probation and that it has waived its right to challenge its timeliness.

[34] I order the respondents and the chief officer of the Public Service Alliance of Canada to ensure that the complainant is provided with representation in connection with the referral of her harassment grievance to the second level of the grievance process and that an appropriate analysis of that grievance is conducted.

[35] I order the respondents and the chief officer of the Public Service Alliance of Canada to ensure that the complainant is provided with representation in connection with filing a new grievance about her rejection on probation and that an appropriate analysis of that grievance is conducted.

February 10, 2012.

Stephan J. Bertrand,
Board Member