Date: 20131108

File: 561-02-623

Citation: 2013 PSLRB 136

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

JONATHAN DELGADO-LEVIN-TURNER

Complainant

and

CUSTOMS AND IMMIGRATION UNION

Respondent

Indexed as
Delgado-Levin-Turner v. Customs and Immigration Union

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

REASONS FOR DECISION

Before: John G. Jaworski, a panel of the Public Service Labour Relations Board

For the Complainant: Himself

For the Respondent: Sherrill Robinson-Wilson, Public Service Alliance of Canada

Decided on the basis of written submissions,
filed April 30, June 6 and July 17, 2013.

I. Complaint before the Board

[1] On April 30, 2013, Jonathan Delgado-Levin-Turner ("the complainant") filed a complaint against the Customs and Immigration Union ("the CIU" or "the respondent") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act (*"the *Act*"). The details of this complaint are that the respondent provided the complainant with advice to file a Workplace Safety and Insurance Board of Ontario ("WSIB") claim with respect to stress due to harassment that he was enduring at the hands of his employer; the harassment led to the aggravation of a medical condition. According to the complainant, his claim was denied by the WSIB, and the appeals of the denied claim were also dismissed. The complainant stated that the respondent advised him improperly about filing a WSIB claim when it knew or ought to have known it would not be successful.

[2] The complainant stated the respondent's actions led him to lose wages in the amount of $6, 489.63, which he is seeking as his redress.

[3] The respondent filed a response to the complaint on June 6, 2013, denying the complaint and stating that although it was aware that the complainant had filed a WSIB claim, it was not involved in assisting him in this regard; nor was it aware of any of the details of the claim. The complainant filed a rebuttal to the response on July 17, 2013, stating that there were documents that he had on file that clearly refuted the respondent's position.

[4] On August 13, 2013, the registry of the Public Service Labour Relations Board ("the Board") wrote to the parties, advising them that the panel of the Board had decided to proceed by way of written submissions and specifically advising them as follows:

> . . .
>
> *1) the complainant will submit his arguments in writing to the Board, and provide a copy to the other party no later than* ***September 3, 2013****;*
>
> *2) the respondent will submit its arguments in writing to the Board, and provide a copy to the other party no later than* ***September 24, 2013****; and*

> 3) *the complainant will submit his rebuttal in writing to the Board, and provide a copy to the other party no later than* ***October 1, 2013****.*
>
> *Along with their arguments, the parties are asked to provide any documentary evidence they may have. Once the exchange of written submissions is complete, the matter will be referred to the panel of the Board, who may issue a decision based on the submissions filed and the existing record. Should the panel of the Board require further submissions, or determine that an oral hearing is required, the parties will be advised accordingly.*
>
> . . .
>
> [Emphasis in original]

[5] On September 4, 2013, the complainant wrote to the Board, confirming that he realized the deadline for filing his submissions was September 3, 2013, and requesting an extension of time until Friday, September 6, 2013, to file his submissions.

[6] That request was granted, and on September 10, 2013, the parties were advised by email as follows:

> . . .
>
> *1) The complainant will submit his arguments in writing to the Board, and provide a copy to the other party no later than* ***September 6, 2013****. . . .*
>
> *2) The respondent will submit its arguments in writing to the Board, and provide a copy to the other party no later than* ***September 27, 2013****; and*
>
> *3) The complainant will submit his rebuttal in writing to the Board, and provide a copy to the other party no later than* ***October 4, 2013****.*
>
> . . .
>
> [Emphasis in original]

[7] On September 24, 2013, at 7:54 a.m., the respondent wrote via email to the Board, with a copy to the complainant, advising that it was unable to submit its arguments to the Board as it had not yet received the complainant's submissions.

[8] The complainant replied to the September 24, 2013, email that same day, at 8:10 a.m. stating that he submitted his information via email on September 7, 2013, and enquiring if the Board had received it.

[9] At 8:20 a.m. on September 24, 2013, the Board's registry wrote to the complainant, with a copy to the respondent, confirming to the complainant that the Board had not yet received his submissions, instructing him to resend the submissions, and noting, as well, if the submissions were over two megabytes in size, he might have to break them into smaller emails.

[10] At 11:19 a.m. on September 27, 2013, the Board's registry wrote to the complainant, with a copy to the respondent, following up on its email of September 24, 2013, enquiring of the complainant if he had resent his submissions, and advising him that the Board had received nothing from him.

[11] The registry officer of the Board responsible for the complaint, pursuant to instructions from me, called the complainant at the phone number given to the Board with his complaint.

[12] At 8:58 a.m. on October 2, 2013, the registry officer of the Board responsible for the complaint wrote to the complainant, via email, with a copy to the respondent, stating as follows:

. . .

> *Yesterday, October 1, 2013, I called at the two phone numbers we have on file for you and left you a message to call me back before the end of the day. When you called me back, I informed you that we still had not received your written submission, which you originally sent on September 7 by email; you said you would call me back when you arrived home and that you would try to send your submission again.*
>
> *At this time, we still have not received your submission.*
>
> *The panel of the Board assigned to this matter has directed me to inform you of the following. You are requested to provide the Board and the respondent with your submission* ***by no later than 4 p.m. on October 4, 2013.*** *The panel of the Board further directs that* ***failure to file your submission may result in the Board making a determination in this matter without any further submissions.***

> *Your submission may be filed to the Board in the following manner:*
>
> *Email: mail.courrier@pslrb-crtfp.gc.ca*
> *Fax: (613) 990-1849*
> *Mail: P.O. Box 1525, Station B, Ottawa, ON, K1P 5V2*
>
> . . .
>
> [Emphasis in the original]

[13] The complainant has not contacted the Board since the discussion referred to in the Board's email of October 2, 2013, in which the complainant stated he would contact the Board and try to send his submission again; nor has the complainant filed any submissions.

[14] This decision is based on the material and arguments contained in the complaint, the response to the complaint and the complainant's rebuttal.

II. Summary of the evidence

[15] The complainant appears to have been employed by the Canada Border Services Agency ("the employer") in Toronto. He appears to be a member of the CIU.

[16] At all material times, Mark Weber was President of CIU Local 024. At all material times, Richard Sutcliffe was the first vice-president of CIU Local 024. At all material times, Robert Borg was a member of the CIU; his position within CIU Local 024 was not evident from the material.

[17] The only evidence provided to me was copies of emails or email threads and a two-page document that appears to be a screen shot of a series of different text messages and that is identified on the bottom of each of the two pages as an "iMessage."

[18] The iMessage document shows the name of Mr. Weber on the top of both pages and a time of 10:46 p.m. on the first page and 8:02 p.m. on the second page. There are a variety of dates identified, from March 29, 2012, to August 2, 2012, and the text of the discussions is signified by speech bubbles. The speakers are not identified by the bubbles, and the first series of discussions or comments are shown as occurring before the first date identified, which is March 29, 2012. There is an edit function that is clearly indicated at the top of both pages.

[19] The iMessage was as follows:

> *I'm on it bro.*
>
> *Go home.*
> *Wsib for stress.*
> *Sleep on it.*
> *Don't let her get to u.*
>
> *March 29, 2012, 8:23 PM*
>
> *Stanley Mo is doing WSIB and Form 7 and I am going to hospital tonight or as soon as doctor can see me tomorrow.*
>
> *Ok. Do u have someone to go with u? Don't worry about tomorrow. Murray and I are on it.*
>
> *Thanks man.*
>
> *Mar 30, 2012, 9:07 AM*
>
> *Just sent you an email..*
>
> *Apr 4, 2012, 8:23 PM*
>
> *Hey Mark. What's the news on my situations with Bev and Dave Mayo*
>
> *Also, no word from CSIS yet…*
>
> *Apr 5, 2012, 2:23 PM*
>
> *Hey mark… Any word?*
>
> *Apr 10, 12:38 PM*
>
> *Mark… Call me please*
>
> *Aug 2, 2012, 11:23 AM*
>
> [*Sic* throughout]

[20] I do not know if the emails or the iMessage were edited.

[21] The only evidence I have with respect to the WSIB claim is as referenced in the iMessage.

[22] I was not provided with any of the documents pertaining to the WSIB claim or appeal; nor do I know if any exist.

[23] I was not provided with any particulars or evidence with respect to if or how the complainant lost $6, 489.63 in wages.

[24] There are a series of different email threads that are dated between June 12, 2012, and January 2, 2013, sent either by the complainant to Mr. Weber, Mr. Sutcliffe, or Mr. Borg, or by Mr. Weber, Mr. Sutcliffe or Mr. Borg to the complainant. None of those emails refers to a WSIB claim or appeal; nor is there any reference to any lost wages.

[25] The email threads that were attached to the complaint appear to be discussions about issues the complainant was having with his employer, particularly about an interview related to a secret security clearance and vague allegations relating to harassment. There is very little detail, and the last email from the complainant to Mr. Weber on January 2, 2013, at 11:42 a.m., was equally not clear. Mr. Weber responded to that email at 1:16 p.m. that same day and stated the following:

. . .

> *Not sure where you want us to go with this – there's so much.*
>
> *Regarding the request for the Union to step aside.*
> *I have spoken to National and they say that this cannot be done.*
> *Also (and I have seen this a few times now) a judge will inquire whether or not all internal mechanisms have been exhausted. If you have to answer no – you are likely sunk before you begin.*
>
> *Here's what I need from you.*
> *A – what grievances are at what level?*
> *B – What are you wanting to pursue?*
>
> . . .
>
> *If you want us to (lose) the harassment quickly – go the RDG investigation route.*
> *No matter the facts, we never win these and you'll get a response much faster than through a grievance.*

. . .

> *Let me know and I'll assign someone to work on this with you.*

. . .

[26] Mr. Weber's email of January 2, 2013, at 1:16 p.m., is the last communication between the parties I have been provided with.

III. Summary of the arguments

A. For the complainant

[27] The complainant did not file any written submissions despite being given an extension of time when requested. The only submissions available are those taken from the complaint.

[28] The complainant stated that the actions of the respondent breached paragraph 190(1)(*g*) of the *Act* because the president of CIU, Local 024, Mr. Weber, advised him to make a WSIB claim, which was denied by the WSIB and also denied on appeal. The advice, according to the complainant, caused him a loss of $6, 489.63 of wages.

[29] The complainant stated that Mr. Weber should have known the claim would be denied as it did not meet the criteria set out in the WSIB legislation.

B. For the respondent

[30] As the complainant did not file any written submissions, the respondent did not have anything to reply to. The respondent's submissions are contained in its reply to the complaint.

[31] The respondent makes three arguments in requesting that the complaint be dismissed, first, that the Board is without jurisdiction to hear the complaint, second, that the complainant has not proved a *prima facie* case, and third, that it did not assist, nor was it requested to assist the complainant in filing a WSIB claim.

i. Jurisdiction

[32] The respondent stated that the scope of the duty of fair representation as set out under the *Act* applies only to matters arising out of the *Act* or the relevant

collective agreement. In support of this, the respondent relied upon *Brown v. Union of Solicitor General Employees and Edmunds,* 2013 PSLRB 48, in which the Board stated at paragraph 52 as follows:

> *[52] Given the mandate of the* Act *and where the duty of fair representation section is situated, my view is that Parliament did not intend to give the Board unlimited jurisdiction to review all the actions of employee organizations and bargaining agents. It only makes sense that the Board's jurisdiction to hear and determine duty of fair representation complaints must in some way arise out of the parameters of the* Act *or the relevant collective agreement.*

[33] The respondent also relied on *Elliot v. Canadian Merchant Service Guild et al.,* 2008 PSLRB 3, which states as follows, at paragraph 188:

> *[188] . . . I am of the view that the duty of fair representation as set out in section 187 of the* PSLRA *relates to rights, obligations and matters set out in the* PSLRA*, that are related to the relationship between employees and their employer. In other words, the "representation" to which that section refers to is representation of employees in matters related to the collective agreement relationship or the* PSLRA*, such are* [*sic*] *representation in collective bargaining and the presentation of grievances under that* Act*.*

[34] The respondent stated that although the local representatives might have been giving advice to the complainant, and most of that advice related to obligations that arose out of the relevant collective agreement or the *Act*, the possible WSIB claim for stress is not one that falls under either the relevant collective agreement or the *Act*, and the Board therefore lacks jurisdiction to deal with the matter.

ii. No *prima facie* case

[35] The respondent argued that, in *Ouellet v. Luce St-Georges and Public Service Alliance of Canada,* 2009 PSLRB 107, the Board stated as follows at paragraph 31:

> *[31] The burden of proof in a complaint under section 187 of the* Act *rests with the complainant. That burden requires the complainant in this case to present evidence sufficient to establish that the bargaining agent failed to meet their duty of fair representation.*

[36] In *Jackson v. Customs and Immigration Union and Public Service Alliance of Canada,* 2013 PSLRB 31, the Board stated as follows at paragraph 67:

> *[67] To establish a* prima facie *case of a breach of section 187 of the* Act*, there must be evidence that the action or inaction by the respondents was arbitrary, discriminatory or in bad faith. The complainant has not adduced such evidence.*

[37] The respondent argued that the only evidence provided, the cryptic iMessage, is simply insufficient to meet the *prima facie* test.

iii. Denial of request for assistance

[38] The respondent stated that the complainant did not approach Mr. Weber for assistance in regards to filing a WSIB claim.

C. Complainant's reply

[39] In his response to the respondent's reply, the complainant stated that there was documentary evidence to prove his case.

IV. Reasons

[40] The respondent objected to the Board's jurisdiction on the basis that section 187 of the *Act* does not apply to matters that are outside the *Act* or the relevant collective agreement.

[41] In objecting to the jurisdiction of the Board, the burden of proof was with the respondent to submit sufficient evidence to convince me that this matter is clearly outside the *Act* or the relevant collective agreement. The material before me is insufficient to do so, and as such, the objection to the jurisdiction of the Board must fail.

[42] A complaint filed under paragraph 190(1)(*g*) of the *Act* alleges an unfair labour practice within the meaning of section 185, which states as follows:

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

[43] The portion of section 185 of the *Act* to which the complaint relates is section 187, which holds an employee organization to a duty of fair representation and states as follows:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[44] For the complaint to be successful, the complainant had to establish that the respondent or its officers or representatives acted, in the course of their representation of him, in a manner that was arbitrary, discriminatory or in bad faith.

[45] As set out in *Ouellet* and *Jackson*, the complainant has the burden of establishing that an unfair labour practice occurred. The documents and facts that he submitted do not establish a violation of section 187 of the *Act.*

[46] On April 30, 2013, the complainant filed his complaint alleging that based on advice from Mr. Weber of the CIU, he made a WSIB claim, which ended up being denied both upon its initial submission and later on appeal. He stated that he suffered a loss of wages in the amount of $6489.63. He alleged that the respondent knew that he would not meet certain criteria and ". . . should have known better." He attached to his complaint a variety of emails and email threads. He also attached a two-page document that does not appear to be an email or email thread but some form of a screen shot of a text message. On the bottom of both of the pages of this document is the term "iMessage."

[47] The iMessage is set out in its entirety at paragraph 19 of this decision. While the iMessage does refer to the WSIB, the discussion appears to be a series of different very short messages, which do not relate to one another or quite frankly make any sense. I do not know if there is one particular conversation thread or many, I do not know if the document has been edited and I have no context for the document.

[48] The other emails and email threads provided with the complaint certainly do indicate that there is an ongoing relationship between the complainant and the respondent and some of its officers, including Mr. Weber, Mr. Sutcliffe and Mr. Borg. It is clear to me that the complainant is having some ongoing issues with his employer with respect to an interview that is either being carried out or that had been carried out by Canadian Security Intelligence Service about a secret security clearance. There are vague allegations of harassment. Unfortunately, it is unclear from the material that the complainant attached as to the specifics of the issues he is having. However, what is clear from the attachments is that the respondent and its officers appear to be

engaged with the complainant and appear to want to assist him; however, there seems to be a disconnect between the complainant and the respondent's representatives, as set out by the following email sent by Mr. Weber to the complainant on December 11, 2012 at 4:35 p.m:

> *Hello Jonathan*
>
> *The last communication I had with you was September 26th. You asked me if the Union was willing to step aside. When I asked what specifically you wanted us to step aside from I received no answer.*
>
> *The last I have from Murray is that he left a message for you on November 15th.*
> *I do not know if you've spoken to him since.*
> *As of then, you still had not submitted your human rights complaint.*
>
> . . .
>
> *If there are any new issue* [*sic*]*, I have not been made aware of them.*
> *If these are the same issues from before – I thought that you were going the Human Rights route?*
>
> . . .

[49] The last email thread enclosed with the complaint contained an email from Mr. Weber to the complainant that was dated January 2, 2013, at 1:16 p.m. and was set out at paragraph 25 of this decision. It is clear from that email that the respondent is engaged and trying to determine from the complainant what he wants them to do about a variety of issues. It is clear from the questions that are being asked of the complainant that the respondent wants to know what grievances are at what level and what the complainant wants to pursue. This is far from evidence of a bargaining agent being in breach of paragraph 190(1)(*g*) of the *Act*. In fact, it is the opposite.

[50] None of the emails or email threads attached to the complaint references a WSIB claim or a workplace injury, save and except the very limited reference that was sent before March 29, 2012, at 8:23 p.m., in the iMessage.

[51] There is nothing from the WSIB or from an appeal. There is no other documentation. There is nothing to substantiate the claim that the complainant actually made a claim to WSIB, that his claim was denied or denied on appeal, that he

lost the wages he claims, and that, most importantly, the respondent had anything to do with it.

[52] It is clear from the minimal material provided that the respondent was engaged with the complainant, and it appeared that it was attempting to provide him with assistance with respect to a number of workplace issues. Without any further facts, the complaint does not disclose any case, and must fail.

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

(The Order appears on the next page)

V. Order

[54] The objection to jurisdiction is dismissed.

[55] The complaint is dismissed.

November 8, 2013.

John G. Jaworski,
a panel of the Public Service
Labour Relations Board