Date: 20130225

File: 561-02-540

Citation: 2013 PSLRB 17

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

K. JOY THEAKER

Complainant

and

UNION OF SOLICITOR GENERAL EMPLOYEES AND PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Indexed as
Theaker v. Union of Solicitor General Employees and Public Service Alliance of Canada

In the matter of a complaint 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 Complainant: herself

For the Respondents: Patricia Harewood, Public Service Alliance of Canada

Heard at Edmonton, Alberta,
January 9 and 10, 2013.

I. Complaint before the Board

[1] On December 6, 2011, K. Joy Theaker ("the complainant") made a complaint against the respondents: the Union of Solicitor General Employees and the Public Service Alliance of Canada (PSAC). The complainant alleged that the respondents breached their duty of fair representation by refusing to attempt to settle eight grievances she had filed against her employer and by refusing to file a new bad faith grievance against her employer following an unsuccessful mediation session.

[2] The complaint was filed under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). That provision reads as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> ***. . .***
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

Section 185 of the *Act* defines an unfair labour practice as anything prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1). The provision of the *Act* referenced under section 185 that applies to this complaint is section 187. That provision reads 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.*

In essence, section 187 was enacted to hold employee organizations and their representatives to a duty of fair representation, a duty that, according to the complainant, the respondents did not fulfill when they refused to settle her grievances and to file a fresh bad faith grievance against her employer following a failed mediation session.

II. Hearing

[3] In their written reply to the complaint, and at the hearing, the respondents raised preliminary objections, which I dealt with at the outset of the hearing. For the

most part, I reserved on the preliminary objections and indicated to the parties that I would hear the complaint on the merits. When asked to proceed with her case shortly after the lunch break, the complainant stated that she was not prepared to proceed, as she felt somewhat overwhelmed by the process. At her request, I adjourned the hearing until the next morning so as to provide her with the remainder of the day and evening to finalize her preparation.

[4] At approximately 20:40 that evening, the complainant faxed a handwritten medical note to the Board's assigned registry officer. The note was dated January 8, 2013, which predated the commencement of the hearing, and stated the following:

> *To whom if may concern,*
>
> *Please be advised that Ms Karen Theaker might have to leave hearing if her anxiety will prevent her to continue during period of Jan 09 – Jan 11/ 2013. Thank you.*

[5] Two hours later, at approximately 22:46, on January 9, 2013, the complainant sent an email to the Board's assigned registry officer indicating that "for medical reasons" she would be unable to proceed with her complaint. She added that while she understood that her absence could result in a dismissal of her complaint, she felt that requesting an adjournment of these proceedings would only further delay the resolution of her ongoing grievances against her employer. The complainant specifically requested that her complaint "not be adjourned."

[6] I was provided with the above mentioned note and email shortly before the hearing was scheduled to resume on January 10, 2013. Given the complainant's statement that she was unable to proceed, her request that the matter not be adjourned and the fact that the respondents' representative and witness had both travelled to Edmonton and were ready to proceed, I decided to proceed with the hearing in the complainant's absence.

A. <u>Summary of the evidence</u>

[7] The respondents called Ray Domeij as their sole witness. Mr. Domeij is an experienced grievance and adjudication officer with the PSAC who had been assigned to the complainant's grievances sometime in the spring of 2011. At that time, the complainant had 13 ongoing grievances against her employer, dealing with

discrimination, harassment and failure to accommodate, 8 of which had been referred to adjudication and 7 of which were scheduled for hearing before an adjudicator.

[8] For a number of reasons, a request was made by the complainant to adjourn the scheduled hearing of seven of her grievances, but the parties to those grievances agreed that they would make use of the scheduled hearing dates for mediation purposes.

[9] Mr. Domeij indicated that it became clear during the mediation process that, although the employer's representatives appeared to be well-intentioned, the mandate they had received would unlikely meet the complainant's expectation and may in fact antagonize her. He was told by the employer's representatives that they would attempt to secure a different mandate with the hope of making a formal offer during the upcoming summer.

[10] According to Mr. Domeij, no offer was made by the employer and he simply did not feel that he was in a position to make an offer at that time, as he had not been provided with the employer's formal position, nor had the complainant provided him with hers, and he knew that the parties were still too far apart.

[11] Mr. Domeij also indicated that, although he was asked by the complainant to file a bad faith grievance against the employer following the unsuccessful mediation attempt, he felt that there simply was no basis for filing such a grievance.

[12] Mr. Domeij added that notwithstanding the fact that the complainant filed this complaint against the respondents shortly after, officials of the national component of the PSAC agreed to continue to represent the complainant with her eight pending grievances, which have been set for hearing before an adjudicator, and assigned a different PSAC representative to her cases.

B. <u>Summary of the arguments</u>

[13] The respondents submitted that there is simply no factual foundation to support a section 190 complaint and that the complainant had failed to meet her onus of establishing grounds for an unfair labour practice.

[14] The respondents argued that there was no absolute right to union representation and that bargaining agents benefit from significant latitude in

determining which matters they would support. The respondents recognized that, while they were required to act fairly, genuinely and with integrity and competence when making such determinations, no failure to meet these requirements had been demonstrated by the complainant in this case.

[15] In support of their arguments, the respondents referred me to the following authorities: *Exeter v. Canadian Association of Professional Employees*, 2009 PSLRB 14; *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509; and *Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128.

III. Reasons

[16] As the Board stated in *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, the burden of proof in a complaint under section 187 of the *Act* rests with the complainant. That burden requires the complainant to present evidence establishing, on a balance of probabilities, that the respondents failed to meet their duty of fair representation.

[17] The Board has often commented on unionized employees' right to representation. In *Halfacree v. Public Service Alliance of Canada,* 2009 PSLRB 28, at para 17, the Board rejected the idea that it was an absolute right, as follows:

> *[17] The respondent, as a bargaining agent, has the right to refuse to represent a member, and a complaint to the Board is not an appeal mechanism against such a refusal. The Board will not second-guess the bargaining agent's decision. The Board's role is to rule on the bargaining agent's decision-making process and not on the merits of its decision. . . .*

The Board's role is to determine whether the respondents acted in bad faith or in a manner that was arbitrary or discriminatory in their representation of the complainant.

[18] As the Board stated in *Manella,* at para 38, ". . . [t]he bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high. . . ." It requires the complainant to establish a violation of section 187 of the *Act,* which in turn requires her to put forward the factual foundation supporting that the respondents acted in a manner that was arbitrary, discriminatory or in bad faith. I find that no such foundation was offered by the complainant here. Based solely on the facts alleged in the complaint, I am unable to find a foundation of arbitrary conduct,

discriminatory treatment or bad faith on the part of the respondents that is sufficient to establish a violation of section 187 of the *Act*. To meet her burden, the complainant was required to adduce sufficient evidence to show that the respondents had somehow failed to meet their duty of fair representation. She certainly did not help her case by not appearing at the hearing and by essentially requesting that the matter be heard *in absentia*.

[19] I find that the complainant failed to present evidence outlining the details of her complaint to the extent necessary to establish how the acts or omissions of the respondents violated section 187 of the *Act*. Her failure to attend the hearing and her request that the proceeding not be adjourned, knowing that her absence could result in a dismissal of her complaint, demonstrated to me that she has abandoned her complaint. I can conclude only that the complainant does not intend to pursue her complaint and that, for all intents and purposes, she has abandoned it.

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

(The Order appears on the next page)

IV. Order

[21] The complaint is dismissed.

February 25, 2013.

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