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File: 561-34-552

Citation: 2013 PSLRB 47

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

PETER GABRIS

Complainant

and

CEDRIC D'SOUZA AND ESTHER BURT

Respondents

Indexed as
Gabris v. D'Souza and Burt

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

REASONS FOR DECISION

Before: Linda Gobeil, a panel of the Public Service Labour Relations Board

For the Complainant: Himself

For the Respondents: Andrew Beck, Public Service Alliance of Canada

Decided on the basis of written submissions, filed February 13, April 24 and June 1, 2012, and February 12, March 5 and March 12, 2013.

I. Complaint before the Board

[1] On February 13, 2012, Peter Gabris ("the complainant") filed a complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*") alleging that the representatives of the Public Service Alliance of Canada ("the bargaining agent"), Cedric D'Souza and Esther Burt ("the respondents"), failed in their duty of fair representation imposed by the *Act*.

II. Summary of the evidence

A. Complainant's submissions

[2] In his written submissions, the complainant alleged that, after he was forced to withdraw from a course following a decision by his management, he decided on June 7, 2011 to file a grievance against that decision.

[3] The complaint alleged that, once he received management's reply at the second level of the grievance process denying his grievance on October 14, 2011, he emailed his bargaining agent representative on November 1, 2011, asking for an update on his grievance and for an explanation of the second-level reply. The complainant indicated that he then received a response from the bargaining agent representatives, the respondents, on November 14, 2011, indicating that they agreed with management's position and that they would not refer his grievance to the next level of the grievance process.

[4] In his submission dated June 1, 2011, the complainant maintained that while he met with a bargaining agent representative over his grievance issue, he never met with Mr. D'Souza but only had a telephone conversation with him. The complainant argued that he received only three emails from the respondents dealing with his grievance and challenged the respondents' position that he received timely information. The complainant also claimed that while it appears that the regional vice president was consulted on his grievance, it remained that the conclusion reached by the respondents that his grievance had no merit was flawed.

[5] The complainant also argued that the respondents' decision not to transmit his grievance to the third level of the grievance process was made arbitrarily and in bad faith. The complainant argued that the respondents did not address his issues or explain its position to him. He also maintained that the respondents did not fully examine the issue and that they did not give enough weight to his interests as a

member of the bargaining agent, as stated in his February 12, 2013 submissions as follows:

> *I am arguing that the decision to not transmit my grievance to the third level was completely arbitrary as evidenced by the UTE response as to why they made that decision.*
>
> *I am arguing that they failed in their duty to represent me to their best ability and to the point where I, as the member being wronged, was satisfied with the response from management.*
>
> *I am arguing that once the UTE signed my grievance form, and all the transmittal forms, that they committed themselves to represent me in this matter to a point of acceptable resolution.*
>
> *I am arguing that the UTE did not properly investigate the incident according to UTE guidelines as evidenced in the lack of information contained in the grievance file.*

[6] The complainant filed a complaint with the Public Service Labour Board ("the Board") on February 13, 2012 against the respondents under paragraph 190(1)(g) of the *Act,* alleging that the respondents acted arbitrarily and in bad faith.

B. Respondents' submissions

[7] In his submissions, the respondents' representative argued that the complaint should be dismissed since it was filed outside the 90-day time limit prescribed in subsection 190(2) of the *Act.* He indicated that the complainant became aware of the respondents' decision not to refer the grievance to the third level of the grievance process on November 14, 2011, but that he filed his complaint with the Board only on February 13, 2012, one day late.

[8] Alternatively, the respondents' representative argued that, if I did not dismiss the complaint on the basis of timeliness, nevertheless, I should dismiss it as unfounded on its merits.

[9] Essentially, the respondents' representative argued that the bargaining agent's decision not to refer the complainant's grievance to the third level of the grievance process has been clearly communicated to the complainant and that, while the respondents did not agree with the complainant's position on the grievance, nevertheless, they never acted arbitrarily.

[10] The representative for the respondents argued that the respondents had all the information needed to make a determination on the outcome of the complainant's grievance and that, after assessing the matter, they determined that the grievance was not likely to succeed and that his requested remedy was not likely to be granted.

[11] In support of his argument, the representative for the respondents referred me to *Canadian Merchant Service Guild v. Gagnon et al.,* [1984] 1 S.C.R. 509. The representative for the respondents also referred me to *Exeter v. Canadian Association of Professional Employees, 2009 PSLRB 14, Halfacree v. Public Service Alliance of Canada, 2010 PSLRB 64, Tsai v. Canada Employment and Immigration Union, 2011 PSLRB 78.*

III. Reasons

A. Timeliness of the complaint

[12] On February 13, 2012, the complainant filed a complaint with the Board pursuant to paragraph 190(1)(*g*) of the *Act* against the respondents. Essentially, he argued that the respondents should have referred his grievance to the third level of the grievance process and that, by refusing to do so, they acted arbitrarily and in bad faith.

[13] In his submissions dated April 24, 2012 and March 5, 2013, the representative for the respondents asked that the complaint be dismissed on the basis that it is untimely since it was filed after the expiry of the 90-day time limit stipulated in subsection 190(2) of the *Act,* which reads as follows:

> ***190.*** *(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[14] The parties do not dispute that the complainant was made aware on November 14, 2011 of the respondents' decision not to refer his grievance to the third level of the grievance process. It is also clear that the complaint was filed with the Board on February 13, 2012.

[15] In the present matter, the 90-day time limit, calculated from the date the complainant was made aware of the respondents' position, November 14, 2011, expired on Sunday, February 12, 2012. The complainant filed his complaint on

Monday, February 13, 2012, one day late, according to the respondents. However, section 10 of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") provides that, when calculating a time limit, if the time limit in which to file a document expires on a holiday, like in this matter, a Sunday, the document may be filed the next day, in this case, on Monday, February 13, 2012. Section 10 of the *Regulations* reads as follows:

> ***10.*** *If the time limit, under these Regulations, for the filing or presentation of a document expires on a Saturday or a holiday, the document may be filed on the day next following that is not a Saturday or a holiday.*

[16] I find that the complaint was filed within the prescribed time limit.

B. Merits of the complaint

[17] In his submissions, the complainant argued that the respondents should have informed him that they would not represent him, that his grievance had merit, that the respondents should have challenged his employer's response and that they failed to represent him in not advancing his grievance until they obtained a response that was satisfactory to him.

[18] The representative for the respondents argued that the respondents had communicated and explained to the complainant their reasons for not pursuing the grievance beyond the second level of the grievance process and that, in the respondents' view, the complainant's grievance was without merit.

[19] Moreover, the representative for the respondents submitted that the complainant has not provided evidence that the respondents acted in an arbitrary fashion while dealing with his grievance.

[20] It is clear that the parties disagree as to the merits of this grievance and as to how the respondents should have handled it past the second level of the grievance process.

[21] That said, it is also clear to me that, in this case, and despite the fact that the complainant might not have been happy with the outcome of his grievance, there is absolutely no evidence that the respondents acted in bad faith or that they failed in their duty of fair representation.

[22] The evidence adduced demonstrated that the respondents tried through two levels of the grievance process to convince the complainant's employer of the merits of his grievance, to no avail. Moreover, it was demonstrated that the respondents took the time to assess the merits of the grievance. The unchallenged evidence is also to the effect that the respondents consulted each other on the issue and that they even referred the matter to a regional vice-president of the bargaining agent for advice (paragraphs 11 to 13 of the respondents' submissions of April 24, 2012.)

[23] In addition, during the grievance process, the evidence demonstrated that the respondents kept the complainant abreast, through documents and meetings, of the efforts made to resolve the grievance (paragraphs 6 to 8, 10 and 13 of the respondents' submissions of April 24, 2012).

[24] As the Board stated in *Theaker v. Union of Solicitor General Employees and Public Service Alliance of Canada,* 2013 PSLRB 17, the burden of proof in a complaint alleging that the bargaining agent failed to meet its duty of fair representation rests with the complainant. In this case, I find that the complainant did not meet that burden of proof. The mere allegation that the respondents did not agree with his position on the grievance and that they did not conduct a sufficient analysis does not constitute proof that they acted unfairly.

[25] I believe that the representative for the respondents demonstrated that they tried to move the complainant's grievance forward by filing it at the first two levels of the grievance process. It is also part of the documentary evidence that the respondents kept the complainant informed, that they consulted him and that they conducted the necessary analysis before concluding that they were satisfied with the position of his employer. As stated as follows in *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28, at para 17:

> *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.*
> *. . .*

[26] In *Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128, the Board decided at para 38 that the ". . . bar for

establishing arbitrary conduct - or discriminatory or bad faith conduct - is purposely set quite high."

[27] Being unsatisfied with the respondents' decision not to pursue the grievance does not provide substantiation of an allegation that the respondents acted in an arbitrary manner or that they failed in their duty of fair representation. The complainant had to demonstrate through evidence that that was the case. He did not meet his burden of proof. Moreover, as for the complainant's argument that the respondents was obliged to advance his grievance until they obtained an answer that satisfied him, I find that there is absolutely no obligation on the respondents to do so. The jurisprudence on this issue is clear and places no such obligation on bargaining agents. Again, given the facts of this case, the respondents' decision not to refer the grievance to the third level of the grievance process was not a decision taken in bad faith or arbitrarily.

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

(The Order appears on the next page)

IV. Order

[29] The complaint is dismissed.

April 24, 2013

Linda Gobeil,
a panel of the Public Service
Labour Relations Board