Date: 20141021

File: 561-34-545

Citation: 2014 PSLRB 92

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

CLAUDIA GAL

Complainant

and

PATRICE CHOUINARD AND ANDRÉ ST-AMAND

Respondents

Indexed as
Gal v. Chouinard and St-Amand

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: Marie-Hélène Tougas, Professional Institute of the Public Service of Canada

For the Respondents: Léa Bou Karam, counsel

Heard at Montreal, Quebec,
March 25 to 27 and April 9, 2014.
(PSLRB Translation)

I. Complaint before the Board

[1] On January 30, 2012, Claudia Gal ("the complainant") filed a complaint under section 190 of the *Public Service Labour Relations Act* ("the *Act*") against Patrice Chouinard and André St-Amand ("the respondents"). The complainant alleged that the respondents violated subparagraph 186(2)(*a*)(i) of the *Act* by discriminating against her with respect to her employment, specifically by refusing to consider her application for acting appointments as part of a staffing process, allegedly on the grounds that she was carrying out the duties of a union local president at the relevant times.

[2] Subparagraph 186(2)(*a*)(i) of the *Act* reads as follows:

> ***186.*** *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization . . . .*
>
> *. . .*

[3] In their written response and at the hearing, the respondents raised a preliminary objection that several of the facts in support of the complaint were inadmissible and could not be considered because they did not take place before the deadline set out 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.*

[4] The respondents also denied violating subparagraph 186(2)(*a*)(i) of the *Act* by discriminating against the complainant with respect to her employment during the

relevant period, i.e., from October 31, 2011, to January 30, 2012.

II. Summary of the evidence

[5] At the hearing, I heard testimony from the following five witnesses: the complainant; Serge Cléroux, a group leader (in a position classified MG-05) and union steward; Patrice Chouinard, the director of the Canada Revenue Agency's (CRA) Montreal Tax Services Office ("the TSO") at the relevant time; André St-Amand, the assistant director of the Montreal TSO at the relevant time; and Lucie Arsenault, a manager at the Montreal TSO.

[6] The complainant testified that she joined the CRA in September 1999. At the time of her complaint, she held an auditor position, classified AU-03. However, she was released from her responsibilities as an auditor in April 2010, when she was appointed the president of the Montreal AFS (Audit, Financial and Scientific) subgroup of the Professional Institute of the Public Service of Canada.

[7] As subgroup president, and assisted by an executive council made up of nine union delegates, the complainant represented AFS subgroup members at union-management consultation tables and at the first and second levels of the grievance resolution process.

[8] As soon as she assumed the position, the complainant described her relationship with management as tense, particularly with Mr. Chouinard. She stated several facts about the often negative professional relationship she had with Mr. Chouinard during her presidential mandate, and she attributed all blame to him. However, she confirmed that she never filed a complaint about Mr. Chouinard's alleged actions or words, other than the subject matter of this complaint. I have chosen to not reproduce Mr. Chouinard's alleged actions or words, qualified as intimidating, as they were without consequence and uncorroborated and they occurred well before October 31, 2011. Although those facts at least demonstrate the difficult and tense relationship between the complainant and Mr. Chouinard, they are not part of this complaint and could not constitute prohibited discrimination, as I found in my reasons (see paragraph 36).

[9] In October 2010, the CRA began a staffing process to create a pool of candidates who could be appointed to acting or permanent MG-05 team leader positions. According to Mr. Chouinard, that process was not his responsibility but

Mr. St-Amand's, the resource person. Mr. Chouinard was not made aware of any directives about potential appointments that resulted from it. Mr. St-Amand corroborated that fact in his testimony.

[10] In June 2011, about a dozen employees, including the complainant, possessed the required qualifications for the positions to be staffed and were placed on a list of candidates suitable for appointment to such positions, as applicable. At the same time, the complainant emailed the managers at the Montreal TSO, indicating that she was interested in and available for a permanent or an acting MG-05 position. However, in his testimony, Mr. Chouinard alluded to a conversation with the complainant in September 2011 during which she apparently told him that she wanted to be appointed to such a position on an acting basis while retaining her responsibilities as AFS subgroup president and remaining released full-time. According to Mr. Chouinard, that option seemed completely inconceivable as the complainant could not have carried out team leader duties (position classified MG-05) while retaining her presidential duties, which would have contradicted the purpose of an acting appointment. Thus, Mr. Chouinard told her that were she offered such an appointment in the short term, she would have a choice to make between retaining her union president position and turning down the appointment or accepting the appointment and resigning her president position. In cross-examination, the complainant did not remember that meeting. However, she did not deny that one took place or deny Mr. Chouinard's statements.

[11] Between June and October 2011, the CRA appointed a few candidates to acting positions classified MG-05. The complainant was not appointed. She adduced two examples as evidence in an attempt to shed doubt on the validity of those appointments. Disappointed at not having been considered during that period, the complainant spoke with the CRA's assistant commissioner for the Quebec Region about her issues. He suggested that she discuss it with Mr. Chouinard. She requested a meeting with Mr. Chouinard through her union representative, Serge Cléroux, who had been a group leader since 2001. The meeting in question was scheduled for October 31, 2011.

[12] The complainant showed up for the October 31, 2011, meeting accompanied by Mr. Cléroux. Mr. St-Amand accompanied Mr. Chouinard because he was the resource person for the MG-05 position staffing process. During that meeting, which the

complainant and Mr. Cléroux qualified as hostile, according to the complainant, Mr. St-Amand allegedly indicated to her that she would not be considered a candidate for an acting MG-05 position because she was unavailable due to her union responsibilities and that she could be considered only if a permanent position was to be staffed. The complainant testified that she clearly indicated to Mr. St-Amand that she could easily make herself available by delegating her union responsibilities as AFS subgroup president to other delegates. Mr. Cléroux corroborated that portion of her testimony. He presented few relevant facts in the remainder of his testimony. Mainly, he tried to paint a very negative image of Mr. Chouinard by adducing a collective grievance about him signed by 11 CRA employees on December 20, 2011.

[13] According to the complainant, it seemed obvious that her AFS subgroup president position was the main obstacle to an MG-05 position acting appointment. She adduced as evidence documents confirming a colleague's acting appointment to such a position that allegedly happened after the October 31, 2011, meeting and before she filed her complaint.

[14] In his testimony, Mr. St-Amand indicated that at least four team leaders under his management were part of the executive committee of the union subgroup of which the complainant was president. He reviewed the different CRA policy instruments, specifically its staffing policy. Mr. St-Amand reminded me that it was important to note that the CRA had several staffing measures at its disposal to fill temporary operational needs, including (i) pools of candidates made following formal staffing processes, (ii) notices of interest, (iii) lateral transfers from equivalent positions, and (iv) ad hoc appointments for short periods. According to him, no hierarchy governs the measure to apply; it depends on the context and the organizational needs of the department in question. For example, an ad hoc appointment would be preferred to replace an employee on vacation or short-term sick leave, as the goal would be to minimize disruptions to the operations of the department in question. In addition, even when a candidate from a pool created in a formal staffing process receives an acting appointment, managers desiring to fill positions temporarily can consider several placement criteria.

[15] Mr. St-Amand also indicated that at her request, he met with the complainant on September 7, 2011, to discuss the staffing processes in question and that she informed him of her desire to be appointed to such a position on an acting basis while retaining

her responsibilities as AFS subgroup president and remaining released full-time. According to Mr. St-Amand, the purpose of an acting appointment is to fill a position to ensure that specific duties are carried out in accordance with the department's needs. Therefore, the person appointed must be available to carry out those tasks. In his opinion, someone in a union subgroup president position who is released full-time could not be available to carry out the duties of the team leader position to be filled. For those reasons, Mr. St-Amand could not support the complainant's aspirations at the September 7, 2011, meeting.

[16] As for the two acting appointment examples that the complainant adduced, Mr. St-Amand saw no problem with the staffing measure chosen or the candidates appointed. In his opinion, the first situation justified the manager in question, Ms. Arsenault, using an ad hoc appointment as it was a matter of filling a position due to an unexpected sick leave that was initially believed short term, and a lateral transfer from an equivalent position would not have disrupted the affected sector's operations in any way. The second appointment was made from a pool of candidates from a formal process that included the complainant. The selected candidate had the best results in the competency evaluations. Although Ms. Arsenault testified as to the reasons that justified the two acting appointments in question, I did not feel that it was essential to reproduce her entire testimony, as she is not a subject of the complaint, and she confirmed that she did not receive any directives from the respondents about the appointments, which the complainant did not contest at the hearing.

[17] The respondents' testimonies about the words exchanged during the October 31 meeting did not correspond with the testimonies of the complainant and Mr. Cléroux. According to the respondents, the complainant essentially reiterated to them what she had already expressed to each of them separately a few weeks earlier, i.e., her desire to be appointed to an acting MG-05 position while retaining her AFS subgroup president responsibilities and remaining released full-time. Mr. St-Amand testified that during that meeting, he advised the complainant that although he was not involved in selecting candidates for the acting MG-05 positions, he did not consider her available to fill such a position if she continued to assume her AFS subgroup president responsibilities full-time. He added that if an acting MG-05 position needed to be filled, the manager in question would use the pool of candidates from the staffing process for an MG-05 position and that had the human resources department suggested the

complainant's application and had she been offered an acting position, she would then have had the choice of accepting the acting appointment offer and resigning from her AFS subgroup president position or retaining her president position and declining the offer. In his testimony, Mr. Chouinard corroborated those facts. He added that he reiterated that choice to the complainant in the event that an acting MG-05 appointment offer were made to her in the short term. According to the respondents, at the meetings in September 2011 and at the October 31 meeting, the complainant never suggested that she would resign from her president position and would agree to no longer be released full-time were she offered such an appointment. According to the respondents, she wanted to be appointed to an acting MG-05 position and receive the related higher pay while continuing to hold her union position and being released from all responsibilities associated with such a position. According to the respondents, that was simply incompatible with the reason for an acting appointment and the CRA's organizational needs.

[18] Several times during her testimony, the complainant criticized the CRA's staffing practices and several acting appointments it made during the 12 months preceding her complaint. Such dissatisfaction should have been the subject of one or more complaints with the Public Service Staffing Tribunal, which does not seem to have occurred. It goes without saying that had that tribunal concluded that the appointments in question were made according to the usual rules, the complainant certainly could not have based her complaint on that evidence. If not, I could have considered some of those facts, if any link was made to the complaint, which was not the case. No documentary evidence was presented about it during the hearing, apart from two notices of acting appointments lasting less than six months. In addition, in cross-examination, the complainant confirmed that several ways exist to staff a position and that in some situations, the CRA could proceed with acting appointments without using a staffing process, such as to cover a sick leave, which occurred in one of the two acting appointment notices that the complainant presented.

[19] The complainant left her AFS subgroup president position in April 2012. A few months later, she accepted an acting appointment in an MG-05 position. She still held that position at the time of the hearing.

[20] During his testimony, Mr. Chouinard did not deny that union-management relations were tense between 2009 and 2011. He noted that it was a difficult period,

marked by corruption allegations, internal investigations, dismissals, physical assaults on a manager and negative media coverage. According to him, he was constantly in crisis management.

III. Summary of the arguments

A. For the complainant

[21] The complainant submitted that under subsection 191(3) of the *Act*, the respondents had to demonstrate that at the relevant time they did not discriminate against her with respect to her employment because she was a union leader. According to her, they did not meet that burden.

[22] Specifically, the complainant maintained that Mr. St-Amand's statements at the October 31, 2011, meeting clearly represented discrimination against her and that that discrimination was based solely on the fact that she was president of a union subgroup at the CRA at relevant time. She referred me to *Stonehouse v. Canada (Treasury Board)*, PSSRB File No. 161-02-137 (19770524), at para 53 to 55.

[23] According to the complainant, the facts demonstrated that her position within the union organization and the employer's perception that she was not available constituted the main obstacles to an acting appointment to an MG-05 position, despite the fact that she indicated to the respondents that she would be available.

[24] The complainant submitted that two versions exist of the words exchanged at the October 31, 2011, meeting, i.e., the version she presented in her testimony, which Mr. Cléroux corroborated, and the version the respondents presented. According to her, in such a situation, I must believe the person who made the allegation (the complainant, in this case), not the person denying the allegation (the respondents, in this case). In support of that argument, the complainant referred me to the 1897 decision *Lefeunteum v. Beaudoin* (1897), 28 S.C.R. 89, in which Judge Taschereau stated the following:

> *I have only one additional reason to give for our interference upon a question of fact with the concurrent findings of the two courts below. It is that it appears to me to have been lost sight of that it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative,* magis creditur duobus testibus affirmantibus quam mille

> negantibus, *because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed.*
>
> *Then as to the various conversations upon which an important part of the case turns, the following sentence of the Master of Rolls in* Lane *v.* Jackson *(1), has full application.*
>
> > I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means, I give full credit to both parties.
>
> *In* Chowdry Deby Perad *v.* Chowdry Dowlut Sing *(2), Mr. Baron Parke remarks:*
>
> > In estimating the value of the evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may lie explained by supposing that his attention was not drawn to the conversation at the time.

[25] In support of her arguments, the complainant also referred me to *Lamarche v. Marceau*, 2007 PSLRB 18, *Faryna v. Chorny*, [1952] 2 D.L.R. 354, and *Sheraton Ltd. v. Hotel and Club Employees' Union, Local 299* (1980), 26 L.A.C. (2d) 122.

B. <u>For the respondents</u>

[26] The respondents submitted that under subsection 190(2) of the *Act*, the circumstances giving rise to the complainant's complaint must have occurred in the 90 days before the date on which the complaint was filed, i.e., between October 31, 2011, and January 30, 2012, the date on which the complaint was filed. According to them, several of the facts of which they were accused occurred well before that 90-day period. Therefore, I do not have the authority to decide whether those facts constitute unfair labour practices.

[27] The respondents also submitted that the key point in support of the complaint in question allegedly occurred at the October 31, 2011, meeting, and that no action, gesture or words that occurred at that meeting could represent an unfair labour

practice. They added that the fact that the complainant was not appointed to an acting MG-05 position before she filed the complaint was not linked to her union membership.

[28] According to counsel for the respondents, the respondents made no illegal or anti-union action or gesture between October 31, 2011, and January 30, 2012. In addition, apart from the fact that Mr. St-Amand was the resource person in the staffing process for an MG-05 position, the respondents were in no way involved, directly or indirectly, in the appointments for that process and did not give any directives or orders to the managers responsible for those appointments. The respondents maintained that because they had no control over appointments resulting from that process, no link could be or was established between the exchanges on October 31, 2011, and the alleged prohibited discrimination.

[29] The respondents pointed out that two contradictory versions were raised of the evidence of the discussions between the parties about the complainant's availability for an acting MG-05 position at the October 31, 2011, meeting. Their version should be preferred as the testimonies of the complainant and Mr. Cléroux were rife with inconsistencies with respect to the facts supporting the complaint.

[30] According to the respondents, the fact that the complainant did not receive an acting appointment to an MG-05 position before her complaint cannot be explained by illegal or anti-union considerations but instead by her results in the staffing process in question. According to them, the criteria that the managers in question used during that staffing process were perfectly legitimate and were based on the CRA's operational needs at the relevant time.

[31] Finally, the respondents maintained that they met the burden imposed on them under subsection 191(3) of the *Act.*

IV. Reasons

[32] The complainant alleged that the respondents violated paragraph 186(2)(*a*) of the *Act* by discriminating against her with respect to her employment, specifically by refusing to consider her application for acting appointments to MG-05 positions as part of a staffing process, allegedly on the grounds that she was carrying out a union local president's duties at the relevant times.

[33] Under subsection 191(3) of the *Act*, a complaint made in writing and indicating such a failure constitutes evidence of the failure, and the burden of proving the contrary is on the respondents.

[34] However, I agree with the respondents' arguments that several of the facts of which they were accused occurred well before the 90-day period set out in subsection 190(2) of the *Act*. Therefore, I cannot decide whether those facts constituted unfair labour practices. That 90-day period set out in subsection 190(2) is mandatory and must be respected. That reasoning is consistent with past decisions by the Board, including *Gignac v. Fradette*, 2009 PSLRB 18, and *Walters v. Public Service Alliance of Canada*, 2008 PSLRB 106.

[35] As for Mr. Chouinard, I am unable to conclude that he discriminated against the complainant during the relevant period, i.e., from October 31, 2011, to January 30, 2012, as he was not responsible for the staffing process in question. He did not instruct anyone to do anything about that process, and he would not have made the alleged illicit statement.

[36] Even were I to agree that the professional relationship between the complainant and Mr. Chouinard could have been more cordial or that he made certain gestures or inappropriate statements, it remains that the facts that support the alleged discrimination must have occurred before the deadline, which is not so in this case. No actions or words Mr. Chouinard did or said between October 31, 2011, and January 30, 2012, could constitute the type of discrimination referred to in paragraph 186(2)(*a*) of the *Act.*

[37] The respondents presented an understanding of the words exchanged at the October 31, 2011, meeting that differed greatly from the understanding that the complainant and Mr. Cléroux presented in their testimonies. I find it plausible that the parties did not communicate their respective positions as clearly as they believed they had or that they misinterpreted their respective positions. It goes without saying that had one of the parties communicated in writing its understanding of the discussion at the October 31, 2011, meeting, it would have forced them to clarify their respective positions, which unfortunately did not occur in this case.

[38] Although I agree that two versions exist of the words exchanged at the October 31, 2011, meeting, I do not agree with the complainant's claim that I must

prefer the version of the person who made the allegation. Subsection 191(3) of the *Act* represents a reversal of the burden of proof, which therefore forces the respondents to deny or disprove the complainant's allegations. If the complainant's claim applied strictly, no respondent could meet the burden imposed by that paragraph. As for *Lefeunteum*, I believe that Judge Taschereau was dealing with a reversal of the burden of proof similar to what applies in this case. Additionally, *Lefeunteum* deals with testimonies that were all equally credible, which is not so in this case, as I am of the opinion that the employer's version is more credible. Finally, not only did the respondents deny hearing the complainant state at the October 31 meeting that she would abandon her AFS subgroup president position were she appointed to an acting MG-05 position, but also they alleged that they heard her state the opposite. Therefore, the principle set out in *Lefeunteum* could easily apply against the complainant.

[39] Mr. Cléroux's testimony was not very relevant and was extremely biased, as was the complainant's. It seemed clear that they were trying to argue the collective complaint from December 20, 2011, not the fact that was the subject of this case. Having considered all the evidence, I do not find that the testimonies of those two witnesses, as presented at the hearing, and particularly with respect to the narratives presented in their testimonies, are in harmony with the preponderance of probabilities that a practical and informed person would find reasonable under the circumstances (*Faryna v. Chorny*). I found their testimonies rather improbable and self-serving.

[40] Unlike in *Stonehouse*, the respondents gave the complainant the opportunity to explain herself at the October 31, 2011, meeting. Unfortunately, she simply did not express herself well, or the respondents misunderstood her. Unlike the facts in *Lamarche*, the respondents did not invoke a pretext aimed at concealing the true reason for not considering her application. The concerns of the manager in question were legitimate and reasonably based on the CRA's operational needs.

[41] In terms of the complainant's criticisms about CRA staffing practices and the merits of certain acting appointments it made, it is not my role to rule on that type of complaint as part of an unfair labour practice complaint made under paragraph 186(2)(*a*) of the *Act*. As argued by the respondents, the fact that the complainant did not receive an acting appointment to an MG-05 position before her complaint is not explained by anti-union considerations but instead by her results in the staffing process for an MG-05 position or by explanations about the department's needs. That

point was illustrated perfectly in the November 7, 2011, appointment in which the selected applicant had had better results than the complainant, a fact that she did not deny or challenge in her testimony.

[42] If Mr. St-Amand stated what the complainant alleged he stated at the October 31, 2011, meeting, is there a link between that presumed statement and the alleged discrimination? The answer to that question is "No," and I rely on the evidence about the November 7, 2011, appointment, the only appointment to an MG-05 position made during the relevant period. With respect to that appointment, Ms. Arsenault testified that she completed an appointment form for an MG-05 position, that she chose to proceed from the pool of candidates from the staffing process for an MG-05 position, that she chose commonly used selection criteria for that type of appointment, that she in no way excluded the complainant's candidacy, that she submitted her appointment form to the human resources department, which applied the selection criteria to the candidates in the pool and provided a list of potential candidates for the appointment in question, that the complainant's name was not on the list, that the selected candidate's name was first on the list, that she did not receive any directives from the respondents to not consider or to exclude the complainant, and that she did not give such directives to the human resources department. Therefore, the respondents were unable to discriminate against the complainant for that appointment. In this example, the required link between the act and the anti-union sentiment simply does not exist. In fact, no such link exists in either side's adduced evidence.

[43] I cannot fail to mention again the absence of involvement, participation or directives from the respondents during the only appointment at the Montreal TSO that was presented to me for the relevant period. The evidence did not demonstrate any gesture or action by the respondents that precluded the complainant from being appointed to an acting MG-05 position during the relevant period or that resulted in discrimination against her. Under the circumstances, the statements that the parties exchanged at the October 31, 2011, meeting do not constitute discrimination with respect to employment. In addition, I prefer Mr. St-Amand's calm, consistent and credible testimony to those of the complainant and Mr. Cléroux. His testimony clearly established that he simply tried to indicate to the complainant that she could not expect the managers in question to consider her as available to hold an acting team leader position and receive the pay associated with that position while continuing to

hold her AFS subgroup president position and being released from her responsibilities of the team leader position. His version, fully corroborated by Mr. Chouinard, in no way constitutes discrimination within the meaning of paragraph 186(2)(*a*) of the *Act*. Excluding the complainant from an acting appointment based on her unavailability did not constitute an illegal act or anti-union discrimination if the reason for such an appointment and the related operational needs are considered.

[44] Therefore, I am satisfied that the evidence presented by the respondents demonstrated that there was no breach of subsection 186(2) of the *Act* with respect to the complainant between October 31, 2011, and January 30, 2012.

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

(The Order appears on the next page)

V. Order

[46] The complaint is dismissed.

[47] I order the file closed.

October 21, 2014.

PSLRB Translation

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