Date: 20141002

File: 561-15-656

Citation: 2014 PSLRB 90

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

SARA ESAM

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA (UNION OF NATIONAL EMPLOYEES)

Respondent

Indexed as
Esam v. Public Service Alliance of Canada (Union of National Employees)

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

REASONS FOR DECISION

Before: Kate Rogers, a panel of the Public Service Labour Relations Board

For the Complainant: Russell MacCrimmon, counsel

For the Respondent: Daniel Fisher, Public Service Alliance of Canada

Decided on the basis of written submissions,
filed December 12, 2013 and January 15, February 17, March 7 and 24, 2014.

Complaint before the Board

[1] Sara Esam ("the complainant") filed a complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act (PSLRA)* against the Union of National Employees (UNE), a component of the Public Service Alliance of Canada (PSAC or "the union"), on November 8, 2013. The complainant alleged that the UNE contravened section 187 of the *PSLRA* by failing to file a grievance on her behalf and by failing to properly advise her of the implications of not pursuing a grievance. The complainant also alleged that the UNE's failure to pursue a grievance on her behalf was motivated by bad faith and hostility.

[2] In support of her complaint, the complainant provided detailed background information and submitted a number of documents. She stated that she is a unionized employee of the Social Sciences and Humanities Research Council of Canada (SSHRC) and that she is represented by the PSAC. She alleged that in late 2010, she sought advice from her local union representative about her belief that she was being harassed. On November 19, 2010, she filed a harassment complaint. She did not file a grievance.

[3] On June 1, 2011, the complainant sought advice from Franco Picciano, UNE Membership Coordinator, about whether a grievance would be filed if her employer did not find in her favour on the harassment complaint or did not follow up with any remedy. She also asked Mr. Picciano to explain the difference between a harassment complaint and a grievance.

[4] Mr. Picciano responded to her questions on June 2, 2011. He advised the complainant that he was not comfortable providing advice on a hypothetical situation, since there were too many variables to consider. He explained to her some of the differences between a harassment complaint and grievance, including the fact that there is no outside investigation to assist the union in meeting the burden of proof in the grievance process, the fact that the time limits in the grievance process are more restrictive and the fact that harassment grievances are generally not adjudicable.

[5] The complainant alleged that after the final report of the harassment investigation was released, she again asked about filing a grievance but was told that she was too late.

[6] On July 31, 2012, the complainant sent an email to Mr. Picciano, asking why a grievance had not been filed against a particular manager. He responded on July 31, 2012. He advised her that since the harassment report was still preliminary, a grievance filed before the final report was issued would be premature. He also provided some advice concerning the corrective action that she might seek. He stated that he was acting in her best interests and noted that she had told him that the investigation was affecting her health; for that reason, he was attempting to bring matters to a conclusion. He noted that he had assumed responsibility for her representation as an exception, since normally a different union representative would represent employees of the SSHRC.

[7] The complainant alleged that after the final report of the harassment complaint investigation was released, the parties entered into settlement discussions. She also alleged that although the investigation report identified a number of collective agreement violations relating to her, Mr. Picciano unilaterally decided not to file grievances on her behalf.

[8] On August 2, 2013, Heather Sams, a UNE elected officer, wrote an email to the complainant in which she stated that the UNE's president, Doug Marshall, had indicated that the remedies would be extremely limited if a negotiated settlement to the complainant's harassment complaint were not reached because no grievance had been filed.

[9] On September 23, 2013, the complainant received an email from Ms. Sams, advising her that if she were not willing to accept concessions in the settlement discussions, there were no further legal avenues to pursue. Ms. Sams wrote that this advice had come from Mr. Picciano.

[10] The complainant wrote a letter to Mr. Marshall on October 15, 2013, asking for assistance resolving her harassment complaint. She alleged that her letter was not answered.

[11] As redress, the complainant asked for a declaration that the UNE/PSAC breached its duty of fair representation, an order referring the grievance at issue to arbitration, compensation for all wages and benefits she has lost from the date on which the complaint was filed until a decision is issued, and an order of $100 000 in general damages arising from the mental distress and emotional harm caused by the

breach of the duty of fair representation, as well as any other remedy that the Public Service Labour Relations Board (PSLRB) deems just and necessary.

[12] On December 12, 2013, the union replied to the complaint. It alleged that the complaint was untimely. It further alleged that it had not acted in a discriminatory, arbitrary or bad manner in its representation of the complainant, that it was fully prepared to represent her at all times, and that it had provided her with assistance, strategic advice and representation to the best of its abilities.

[13] The union noted that Mr. Picciano's first contact with the complainant occurred in January 2011, well beyond the period for filing a grievance against harassment that occurred on or before November 2, 2010. The complainant participated in a strategy meeting held on February 15, 2011, to determine the strategy for her issues.

[14] The union noted in its response to the complaint that on June 2, 2011, Mr. Picciano provided the complainant with an explanation as to why the union recommended that she pursue a harassment complaint rather than a grievance. The union noted in particular that Mr. Picciano explained to the complainant that a grievance would be more restrictive than a complaint and would not be adjudicable. The union also noted that Mr. Picciano advised her that if a grievance were filed, a representative expert in collective agreement matters would be assigned to work with her. The complainant responded on July 31, 2012, thanking Mr. Picciano and indicating that she understood that he was concerned for her welfare and career.

[15] Between August 14 and October 4, 2012, the complainant and the union worked together to develop and negotiate corrective measures to resolve her harassment complaint. She thanked Mr. Picciano again on August 12, 2012, for his assistance.

[16] The union asked that the complaint be dismissed without an oral hearing. In the alternative, it asked that the complainant provide it with particulars so that it could provide a more specific response to the complaint.

[17] On January 15, 2014, the complainant responded to the union's reply. She acknowledged that subsection 190(2) of the *PSLRA* requires that a complaint under section 190 must be made ". . . 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." She stated that she became aware that she

had been unfairly represented only on August 2, 2013, when her local union representative told her that Mr. Marshall felt that because she had not filed a grievance, her options for a remedy of her harassment complaint would be limited if she did not reach a negotiated settlement. (It should be noted that in later submissions, both the complainant and the bargaining agent referred to this event as happening on August 3, 2013, but the date on the email correspondence attached to the complaint shows the date as August 2 and 3, 2013. I will use whichever date is cited by the parties in the particular submission.) She also alleged that additional events after August 2, 2013, supported her complaint and referred in particular to an undated letter attached to her complaint that she stated Mr. Marshall never answered.

[18] The complainant also explained that she believed that Mr. Picciano's statement in the email dated July 31, 2012, which was that he took on her case only as an exception, was a threat to stop representing her. She also stated that Mr. Marshall's failure to respond to her requests for help was an indication that there might have been other factors at play in the union's failure to pursue a grievance on her behalf.

[19] This complaint was filed under paragraph 190(1)(*g*) of the *PSLRA*. In it, the complainant alleged that the union breached its duty of fair representation under section 187. The complaint is subject to the time limit set out in subsection 190(2), which provides 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.*

[20] Given the union's allegation that the complaint is untimely, on January 21, 2014, the panel of the Board assigned to hear the matter asked the parties to provide written submissions on the preliminary issue of timeliness.

Union's submission on timeliness

[21] The union provided written submissions with attached documents on February 17, 2014. It stated that the complainant filed a harassment complaint in November 2010. On June 1, 2011, she asked the union for clarification about whether a grievance or complaint would be filed. On June 2, 2011, the union provided a comprehensive answer to her question. She thanked it for having provided such a

detailed response. The union noted that in an email to Mr. Picciano on June 21, 2011 (attached to its submissions), the complainant acknowledged that she was aware that she had a right to file a grievance and that she was aware of the grievance time limits but that she did not ask that a grievance be filed.

[22] The complainant stated that she knew of the act, omission or other matter giving rise to the complaint on August 3, 2013. That date is outside the time limit. In fact, the complainant knew or ought to have known of the circumstances giving rise to her complaint in November 2010 or, at the latest, by June 2, 2011, when she sought advice about whether to file a grievance.

[23] The union cited *Ennis v. Meunier-McKay and Canada Employment and Immigration Union,* 2012 PSLRB 30, and *Boshra v. Canadian Association of Professional Employees*, 2012 PSLRB 106, on the issue of timeliness and asked that the complaint be dismissed on the ground that it is untimely.

Complainant's submission on timeliness

[24] The complainant stated that she filed this complaint on October 30, 2013. She stated that the earliest that she knew of the circumstances giving rise to the complaint was August 3, 2013. Therefore, the complaint is timely.

[25] The complainant stated that her complaint relates to the union's failure to represent her before and after the harassment investigation, and she noted that there was correspondence between her and the union between August 3, 2013, and October 25, 2013, which confirmed the timeliness of her complaint.

[26] The complainant disputed that she was given comprehensive information about filing a grievance in June 2011 and stated that she was not aware and could not have been aware at that time of any possible complaint against the union for a breach of the duty of fair representation. In fact, she followed the union's advice and pursued a harassment complaint. She relied on that advice and pursued a harassment complaint rather than a grievance. She was not given any comprehensive advice of the impact of not filing a grievance.

[27] Citing *Jutras Otto v. Brossard and Kozubal,* 2011 PSLRB 107, the complainant argued that she did not realize that the union had violated its duty of fair

representation until August 2, 2013, when she was told that her options were limited because she had not filed a grievance.

[28] The complainant asked that the union's objection, on the basis of timeliness, be dismissed.

Union's rebuttal

[29] The union noted that the complainant consulted with her union representative in June 2011 about possibly filing a grievance. On June 21, 2011, she stated that her local union representatives had not told her that she could have filed a grievance within 25 days of the incident. Her complaint concerns her allegation that the union failed to represent her before and after the harassment investigation, which took place years earlier. On June 1, 2011, the complainant thanked her union representative for providing the very information that, three years later, forms the basis of her complaint.

Reasons

[30] This complaint was filed on November 8, 2013, even though the complainant stated in her submissions that it was filed on October 30, 2013. The letter accompanying the complaint indicates that it was sent by electronic mail on October 30, 2013. Section 2 of the *Public Service Labour Relations Board Regulations* (SOR/2005-79) provides that initiating documents must be filed in duplicate with the PSLRB Executive Director. Section 3 of the *Regulations* provides that faxes of initiating documents are permitted only if the original and a copy are filed in accordance with subsection 3(2). The *Regulations* do not provide for the electronic mail submission of initiating documents, and the PSLRB does not accept electronic mail filing of initiating documents, although it will accept the submission of other documents by electronic mail. Therefore, the complaint was filed in accordance with the *Regulations* on November 8, 2013, when it was received by regular mail.

[31] It should also be noted that subsection 9(1) of the *Regulations* provides that documents received by the PSLRB Executive Director after 16:00 local time will be marked as received on the next business day. Application of that *Regulation* explains why, for example, the union's submission on timeliness, which was sent by electronic mail on Friday, February 14, 2014, at 16:49, was marked as received by the PSLRB on Monday, February 17, 2014.

[32] Subsection 190(2) of the *PSLRA* requires that a complaint under section 190 be filed not later than 90 days after the date on which the complainant knew or ought to have known of the circumstances giving rise to the complaint. The time limitation is mandatory, and, as has been noted consistently in the PSLRB jurisprudence, no provision in the *PSLRA* gives a panel of the PSLRB the discretion to extend it. In *Castonguay v. Public Service Alliance of Canada,* 2007 PSLRB 78, the Board stated as follows at paragraph 55:

> *That wording is clearly mandatory by its use of the words "must be made no later than 90 days after the events in issue". No other provision of the* PSLRA *gives jurisdiction to the Board to extend the time limit prescribed in subsection 190(2). Consequently, subsection 190(2) of the* PSLRA *sets a boundary, limiting the Board's power to examine and inquire into any complaint that an employee organization has committed an unfair labour practice within the meaning of section 185 (under paragraph 190(1)(*g*)) of the* PSLRA*) and that is related to actions or circumstances that the complainant knew, or in the Board's opinion ought to have known, in the 90 days previous to the date of the complaint.*

[33] In *England v. Taylor et al.*, 2011 PSLRB 129, the Board noted that the only possible discretion when interpreting subsection 190(2) of the *PSLRA* arises when determining when the complainant knew, or ought to have known, of the circumstances giving rise to the complaint. In *Boshra v. Canadian Association of Professional Employees,* 2011 FCA 98, the Federal Court of Appeal held that in order to apply subsection 190(2) to the facts of a particular case, it is necessary for the Board to determine the essential nature of the complaint and to decide when the complainant knew or ought to have known of the circumstances giving rise to it.

[34] As noted, this complaint was filed on November 8, 2013. Therefore, the limitation period began to run on August 10, 2013. If the complainant knew, or ought to have known, of the circumstances giving rise to the complaint before August 10, 2013, then the complaint was filed out of time.

[35] The essence of the complaint before me is that the union breached its duty of fair representation under section 187 of the *PSLRA* by failing to submit a grievance on behalf of the complainant both before and after a harassment investigation that took place between 2010 and 2012. The complainant argued that her complaint is timely because she was not aware that the union breached its duty of fair representation until August 3, 2013, when she learned of the implications of the failure to file a grievance.

[36] In my opinion, the time limit for filing a complaint did not begin when the complainant first understood the consequences of the failure to file a grievance between 2010 and 2012; it began when she knew or ought to have known that no grievance was filed, because that is the essential nature of the complaint.

[37] On June 21, 2011, the complainant wrote as follows to Mr. Picciano in relation to the possibility of a mediation of her complaint (attachments to union submission, February 17, 2014):

. . .

> *I have decided against mediation because I simply cannot fact [sic] any more delays or the emotional toll of having yet another person involved.*
>
> *In November 2010, I decided to lay a formal complaint partly because I knew of no other course of action. Donald Roy and Arlene Hogue did not tell me I could file a grievance within 25 days. Promptness was also a factor in my decision because the SSHRC harassment policy told me that "formal complaints…should be dealt with promptly" and Jaime Pitfield confirmed this. It seemed that all would be resolved by early 2011 at the latest, and I hoped to stay in my substantive position with the guarantee of no further harassment.*
>
> *. . . Seven months have gone by since I submitted my first complaint, and I would like this process to be over as soon as possible. So I will let the complaint continue. . . .*

[38] It is clear that the complainant believed in June 2011 that her union representatives had not informed her about her right to file a grievance against her harassment. It is also clear that in June 2011, she knew that she had had a right to file a harassment grievance in November 2010. Therefore, the complaint about the union's failure to file a harassment grievance in 2010 was clearly out of time.

[39] However, the complainant also complained that the union failed to file a grievance against her employer for its failure to provide a remedy after the final harassment investigation report was released. According to the complainant, that report was released in July 2012. However, I note email correspondence between the complainant and Mr. Picciano dated July 31, 2012, in which Mr. Picciano told her that filing a grievance against the preliminary harassment investigation would be premature and that the final report was the one that mattered. From the email of

June 21, 2011, it is clear that she was aware of grievance deadlines. She had some responsibility for ensuring that a grievance was filed within the time limits against the final harassment investigation report if she was not satisfied with it. In my opinion, the time limit for a complaint against any matter related to filing a grievance against the final harassment report should have been filed at that time and not almost a year-and-a-half later.

[40] However, even if I accept that the time limit did not begin to run until the complainant learned of the implications of not filing a grievance, by her own admission, she learned of those implications at the latest on August 3, 2013, which was outside the time to make a complaint. In paragraph 1 of her submissions on timeliness, dated March 7, 2014, she wrote that ". . . the earliest date that she knew of the act, omission or other matter giving rise to this complaint was August 3, 2013."

[41] Therefore, I find that this complaint was filed outside the 90-day time limit set by subsection 190(2) of the *PSLRA* and that I do not have the jurisdiction to hear it.

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

(The Order appears on the next page)

Order

[43] I order the file closed.

October 2, 2014.

Kate Rogers,
a panel of the Public Service
Labour Relations Board