Date: 20150611

File: 561-34-497

Citation: 2015 PSLREB 54

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

JOËLLE FILLET

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Fillet v. Public Service Alliance of Canada

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

Before: Steven B. Katkin, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Herself

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

Heard at Ottawa, Ontario,
December 16, 2013.
(PSLREB Translation)

I. Matter before the Board

[1] On January 25, 2011, Joëlle Fillet ("the complainant"), then with the Canada Revenue Agency ("the employer"), filed a complaint with the Public Service Labour Relations Board ("the former Board") under section 190 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), alleging that her bargaining agent, the Public Service Alliance of Canada ("the respondent") had violated its duty of fair representation under section 187.

[2] On August 4, 2011, following a mediation session, the parties reached a settlement agreement for the complaint ("the agreement") in which the complainant released the respondent and agreed to withdraw her complaint.

[3] In a letter dated July 23, 2012, the complainant advised the former Board that she felt that the respondent had not respected the agreement and that, consequently, she was not withdrawing her complaint. She noted that the respondent allegedly failed its duty of fair representation.

[4] A preliminary decision was rendered in *Fillet v. Public Service Alliance of Canada*, 2013 PSLRB 43 ("*Fillet 2013*"). That decision dealt with the jurisdiction of a panel of the former Board to render a decision about an allegation that the terms of a settlement agreement about an unfair labour practice complaint were not respected and, as applicable, to order a remedy. The order in that decision reads as follows:

> ***Order***
>
> *[17] I declare that the parties do not dispute that the settlement agreement of August 4, 2011 is final and binding.*
>
> *[18] I further declare that a panel of the Board has jurisdiction to determine an allegation that the terms of a settlement agreement for an unfair labour practice complaint were not respected.*
>
> *[19] I also declare that a panel of the Board has jurisdiction to order the remedy it deems appropriate in the circumstances.*
>
> *[20] This case will be scheduled for a hearing to determine whether the respondent failed to comply with the terms of the settlement agreement of August 4, 2011 and, if necessary, to determine the appropriate remedy in the circumstances.*

[Emphasis in the original]

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the new Board.

II. Summary of the evidence

[6] The complainant first submitted evidence in support of her allegation that the respondent breached the terms of the agreement. The respondent then submitted evidence in response to her allegations and in support of its claim that the agreement's terms had been respected, except for the complaint being withdrawn, the implementation of which rested solely on her. The respondent's witnesses were David Girard, a grievance and adjudication officer for the respondent, and Érik Gagné, a labour relations officer with the Union of Taxation Employees (UTE), a component of the respondent. The parties submitted 23 documents as evidence.

[7] Mr. Girard and the complainant signed the agreement. She stated that she was lucid and competent when she signed it and that she had the opportunity to read it before signing it. The agreement was submitted as evidence, on consent, and reads as follows:

[Translation]

. . .

The parties agreed to mediation to resolve PSLRB complaint 561-34-497 filed by Joëlle Fillet. The parties agree that all aspects of this matter have been resolved to their satisfaction

in accordance with the conditions set out below.

The parties agree as follows:

***The Public Service Alliance**, subject to any position that it may wish to adopt in future cases involving similar issues or circumstances, agrees to the following:*

1. *to reactivate grievance No. 2010-1280-70071825 and to represent the complainant at the third and fourth grievance levels. The file will then be sent to the representation section for analysis and for referral to adjudication. If the referral to adjudication is dismissed, the Alliance agrees to provide a written and detailed notice of the reasons for not referring it. The complainant will have the opportunity to provide her position before the Alliance's final decision;*

2. *The Alliance representative assigned to the file shall be a staff member of the Union of Taxation Employees. The first meeting with the complainant and with each representative shall take place in the presence of David Girard, Grievance and Adjudication Officer.*

3. *to seek an amendment to the grievance to include the following in the wording:*

   "as well as the rights abuse of which I was a victim when my contract was not renewed"

4. *to seek an amendment to the grievance to include the following in the wording:*

   "I ask that the employer rescind its decision to not extend my contract and that no other measure be substituted for it"

   "I ask that the employer reinstate me in my duties, retroactive to May 14, 2010"

5. *to make representations to the Canada Revenue Agency to obtain explanations for the reasons for refusing the complainant's candidacy in several competitions to which she applied between February 2010 and August 4, 2011;*

Joëlle Fillet agrees to the following:

6. *to withdraw complaint 561-34-497;*
7. *to release the Public Service Alliance of Canada, its employees and its representatives from any responsibility for complaints, claims or other recourse arising from this dispute;*

> ***The parties agree to the following:***
>
> *8. to not disclose the contents of these settlement terms other than for administrative or legal purposes;*
> *9. this agreement is a complete and final settlement of the specific issues and conditions associated with the employee's complaint and shall not create any precedent.*
>
> . . .

[8] The complainant alleged that the respondent did not respect clauses 1, 2, 3, 4 and 5 of the agreement. I will deal with each allegation separately.

A. Allegation that clause 1 of the agreement was not complied with

1. The reactivation of the complainant's grievance

[9] The first component of clause 1 of the agreement is the respondent's agreement to reactivate the complainant's grievance. In an email sent on August 18, 2011, at 13:10, Mr. Girard advised the complainant that she would be represented at the third level of the applicable process by Bill Blair, the respondent's regional vice-president, and that he would be responsible for reactivating her grievance and asking to amend it.

[10] In an email sent to the employer on August 19, 2011, at 08:30, on which Mr. Girard was identified as receiving a copy, Mr. Blair mentioned that the complainant's grievance was pending presentation at the third level of the grievance process and that he wished to amend the grievance by adding certain things as indicated in that same email.

[11] In an email sent to Mr. Blair the same day, at 10:14, the employer informed him that the complainant represented herself at the third level of the grievance process via written submissions and that it had provided her with its decision at that level on May 9, 2011. She acknowledged receiving that decision on May 18, 2011. At 13:09, Mr. Girard emailed her, asking if the information received from the employer was accurate and that, if so, she provide him with the relevant documents and advise him if she had presented the grievance at the fourth level. At 15:06, she replied to him that she had followed the advice of counsel, whose services she had retained, and that she did not present her grievance at the fourth level. She asked him if that would cause a problem.

[12] Still on August 19, 2011, in an email sent at 15:41, Mr. Girard advised the

complainant as follows:

> [Translation]
>
> . . .
>
> *First, I received the documents that you sent me that contain information that I was unaware of before and that we did not discuss in mediation. I will see what I can do now, but it certainly changes some things. According to the information exchanged in mediation, the last action that you took on the file was to send it to the third level.*
>
> *The employer will not respond twice at the third level, and because you did not refer the file to the fourth level, the grievance is now clearly out of time. After consulting with Éric [sic], I will try to see what can be done. I still have one or two "aces" up my sleeve.*
>
> . . .

[13] In her testimony, the complainant acknowledged that the respondent reactivated her grievance. She also acknowledged that on August 4, 2011, she knew that the respondent had not presented her grievance at the fourth level of the applicable process. As for counsel whose services she had retained, she maintained that she so advised Mr. Girard during mediation and that she mentioned it in an email she sent him on September 9, 2011. According to her, he did not ask her any questions about it and told her that the respondent would proceed to the fourth level. She concluded that what she had done with respect to her counsel had not been the right thing to do.

[14] According to Mr. Girard, he would never have signed the agreement with the wording in clause 1 had the complainant told him that she was represented by counsel, whose services she had retained for the procedures at the third level of the grievance process. Had he known, he would have asked her the same questions, i.e., what was going on and whether the grievance had been presented at the fourth level, and he would have requested copies of the documents. He also would not have written the email to her on August 18, 2011. He added that when a grievance deals with how a collective agreement was interpreted, the bargaining agent's approval is required. Her grievance challenged her term appointment not being renewed and alleged that the employer discriminated against her. Mr. Girard testified that between 13:10 on August 18, 2011, and 13:09 on August 19, 2011, he learned that her counsel had

represented the complainant at the third level.

[15] Mr. Gagné testified that he learned of the agreement after it was signed. He was not aware that the complainant was represented by counsel, whose services she had retained, at the third level of the grievance process. He then contacted Mr. Blair to have her file reactivated at the third level.

[16] In an email to the employer dated September 9, 2011, Mr. Blair requested an extension of the deadline for presenting the complainant's grievance at the fourth level of the applicable process on the grounds that the respondent was unaware that she had presented her grievance at the third level. In an email dated September 19, 2011, the employer agreed to the grievance being presented at the fourth level but noted that the issue of the presentation deadline would be dealt with in its decision at that level.

2. Representation

[17] The second component of clause 1 of the agreement was the complainant's representation at the third and fourth levels of the grievance process. As she had already been represented by counsel, whose services she had retained, at the third level, which the respondent did not know about, the respondent's commitment to represent her at the fourth level must be examined.

[18] The complainant adduced in evidence a copy of the grievance transmittal form, which she signed on October 12, 2011. Mr. Blair also signed it on behalf of the respondent, which agreed to represent her at the fourth level of the grievance process.

[19] Mr. Gagné testified that he presented the complainant's grievance at the fourth level of the applicable process on January 6, 2012, which was confirmed by his letter to her on January 12, 2012.

[20] The complainant did not challenge the fact that Mr. Gagné presented her grievance at the fourth level of the grievance process. In her testimony and during Mr. Gagné's cross-examination, she focused primarily on the issue of whether she had authorized him to use a summary of her grievance, which she had prepared, to represent her at the fourth level. According to her, during a meeting with Mr. Gagné and Mr. Girard on December 5, 2011, to discuss her file, she had been unable to authorize Mr. Gagné to use her summary because he did not take the documents directly from her and stated that he had the entire file.

[21] Mr. Gagné testified that he read the complainant's summary of her grievance at the December 5, 2011, meeting but that he did not remember if he received a copy of it before or during the meeting. He stated that the summary contained all the facts that she alleged and that he asked her if she objected to him presenting it as evidence at the fourth level of the grievance process. At the meeting, she did not ask him if he would use other documents. He testified that when he represented her at the fourth level, he gave the employer's representative a copy of the summary and that they discussed it.

3. <u>Analysis of the complainant's file</u>

[22] In the last component of clause 1 of the agreement, the respondent agreed to send the complainant's grievance to its representation section for an analysis and a referral to adjudication. If the respondent decided to refuse the grievance's referral to adjudication, it agreed to provide her with a notice of the reasons for that decision. It was indicated that she would have the opportunity to provide her position before the respondent made its final decision.

[23] On February 1, 2012, the employer dismissed the complainant's grievance at the fourth level of the applicable process and sent her its decision in a letter dated February 23, 2012. The reasons for the dismissal were that the grievance had been presented at the fourth level on October 13, 2011, nearly five months after the third-level decision, dated May 18, 2011, and that thus the grievance's presentation at the fourth level had been out of time. The grievance was also dismissed on its merits because the employer was satisfied that management had acted in good faith when it did not renew her term appointment and that no discrimination against her had occurred. In a letter to the complainant on February 27, 2012, Mr. Gagné also sent her a copy of the fourth-level decision and a notice of a reference to adjudication of a grievance, which she had to complete if she wanted the respondent's representation section to analyze her grievance. She completed the form and sent it to him on February 28, 2012.

[24] Nicole Brazeau analyzed the complainant's grievance. She is a grievance and adjudication analyst with the respondent. Her analysis was sent to Mr. Gagné, the complainant and Mr. Girard on April 26, 2012. Following the file's evaluation, Ms. Brazeau recommended that the grievance not be referred to adjudication. The

analysis consisted of nine pages, to which were attached four pages of *PSLRA* excerpts and eight pages of summaries of grievance adjudication decisions under the *PSLRA* about term appointments not being renewed. The analysis considered the issues the complainant raised in the summary she made of her grievance.

[25] The complainant had a chance to speak with Ms. Brazeau before the analysis was completed. After receiving the analysis, on April 26, 2012, she wrote an email to Ms. Brazeau on April 29, 2012, in which she wrote as follows: "[translation] On reading your letter . . . it seems consistent with our discussion . . . ."

[26] The complainant testified that Mr. Girard promised her that he would refer her grievance to adjudication. According to him, he could not promise that a grievance would be referred to adjudication because, in such cases, the respondent's procedure provides that a grievance-and-adjudication analyst makes that decision after evaluating the file. He stated that he discussed that with the complainant during mediation, to not create false expectations.

[27] Mr. Gagné stated that he agreed with the analysis of the complainant's grievance and that he found it thorough and complete. According to him, analysts' decisions are maintained unless new evidence appears or facts change.

B. Allegation that clause 2 of the agreement was not complied with

[28] In her testimony, the complainant acknowledged that the meeting with Mr. Girard and Mr. Gagné took place on December 5, 2011.

C. Allegation that clauses 3 and 4 of the agreement were not complied with

[29] In an email to the employer on August 19, 2011, Mr. Blair asked it to amend the complainant's grievance at the third level of the applicable process to textually reproduce the desired amendments contained in clauses 3 and 4 of the agreement. Mr. Gagné stated that the request for amendments was also part of his representations at the fourth level. In an email to the complainant dated February 28, 2012, Mr. Gagné wrote the following: "[translation] In my presentation, I asked that the wording of your grievance be amended. The Assistant Director refused to amend the wording for administrative reasons . . . ." In that regard, on January 24, 2012, the employer emailed Mr. Gagné, advising him that its practice was to not amend a grievance's wording at the fourth level. The complainant did not dispute that evidence of the respondent.

D. Allegation that clause 5 of the agreement was not complied with

[30] In an email dated April 24, 2012, Mr. Blair asked the employer for the explanations mentioned in clause 5 of the agreement. The same day, the employer replied as follows:

> [Translation]
>
> *Ms. Fillet did not receive a term appointment offer during the year in which her name was on the recall list for the following reasons:*
>
> *We had six employees appointed to term positions from the DVPE* [Data Verification and Program Evaluation] *- and paid by the DVPE, which obviously affected our needs and therefore our hiring or lack of hiring.*
> *We had no operational need to hire everyone named on the list.*
>
> *I feel that it is important to note that no term appointment was offered to other individuals named on the recall list - Ms. Fillet is not the only one who was affected.*
>
> . . .

[31] The complainant stated that she was not satisfied with the employer's explanation in the letter Mr. Gagné sent her on February 27, 2012. Among other things, that letter explained that the pool of qualified employees ended on May 14, 2011, and that, consequently, her name was no longer on the recall list. She stated that she asked Mr. Gagné to pursue the matter further.

[32] Mr. Gagné testified that he asked Mr. Blair to ask the employer questions because according to the established hierarchy, Mr. Blair deals with employer contacts. Mr. Gagné deals only with employer representatives at the fourth level of the grievance process.

[33] The complainant did not know why her application was not retained as part of the competitions. According to her, during mediation, Mr. Girard promised her that he would obtain information, but he did not. However, she acknowledged that that was not part of the agreement. He testified that while he was employed by the respondent, he never committed to doing anything in a written agreement or made verbal promises. He did not make a promise to the complainant; instead, he told her that he would try.

III. Summary of the arguments

A. For the complainant

[34] The complainant pointed out that in the beginning, she trusted the respondent but that she did not feel supported or guided. According to her, the respondent did some things but did not do other things or only half-did them. She submitted that the respondent did not comply with clauses 4 and 5 of the agreement and that for that reason, she should be compensated.

B. For the respondent

[35] The respondent argued that it did not violate the agreement. The delay presenting the complainant's grievance at the fourth level of the applicable process was in no way the respondent's fault but was instead the responsibility of counsel whose services she had retained without the respondent's knowledge.

[36] The respondent presented the complainant's grievance at the fourth level of the applicable process and conducted an in-depth analysis of its chances of success at adjudication, and she had the chance to provide her comments on that analysis.

[37] During his representations at the fourth level of the grievance process, Mr. Gagné provided the employer with a copy of the complainant's summary of her grievance. Although she wanted Mr. Gagné to go beyond what she had written, the respondent submitted that it had been under no such obligation.

[38] As for the amendments that the complainant wanted to make to her grievance, the respondent pointed out that Mr. Blair first made that request in his August 19, 2011, email and then Mr. Gagné made it in his representations at the fourth level of the applicable process. The respondent argued that it had no obligation to provide a result.

[39] As for clause 5 of the agreement, the respondent pointed out that the complainant testified that she was not satisfied with the responses she received. According to the respondent, it complied with clause 5 through the questions Mr. Blair asked and through the employer's response.

[40] In support of its argument, the respondent cited *Bouchard v. Lahaie et al.*, 2013 PSLRB 143.

IV. Reasons

[41] Paragraph 15 of *Fillet 2013* reads in part as follows:

> *. . . when the parties to a complaint have entered into a final and binding agreement to resolve that complaint, it is no longer appropriate to examine the merits of the case. When a party alleges non-compliance with a settlement agreement, the question instead is whether the terms of the agreement were breached and, if so, what remedy is appropriate to address the infraction. . . .*

[42] As indicated in the order in *Fillet 2013*, the parties do not dispute that the agreement dated August 4, 2011, is final and binding.

[43] The complainant acknowledged that she retained the services of counsel to represent her at the third level of the grievance process without the respondent's knowledge. She acknowledged that the respondent reactivated her grievance and did not dispute that Mr. Gagné presented her grievance at the fourth level. That is sufficient to conclude that the respondent respected that part of clause 1 of the agreement.

[44] The point that the complainant disputed, which was whether she authorized Mr. Gagné to use her summary of her grievance at the fourth level of the grievance process, does not help me decide in any way whether the respondent failed to respect clause 1 of the agreement; therefore, I will not rule on it.

[45] As for the detailed written notice of the respondent's reasons for refusing to refer the complainant's grievance to adjudication, I find that Ms. Brazeau's analysis was thorough and that it was supported by the applicable legislation and jurisprudence. The complainant had the opportunity to provide her comments before the decision was made not to make that referral.

[46] Based on the evidence, I find that the respondent respected clause 1 of the agreement.

[47] The complainant acknowledged that the respondent respected clause 2 of the agreement.

[48] For clauses 3 and 4, Mr. Blair made the request for amendments in his email to the employer on August 19, 2011. In addition, that request was also part of

Mr. Gagné's representations at the fourth level of the grievance process. Because the complainant did not dispute that evidence, I find that the respondent respected clauses 3 and 4 of the agreement.

[49] As for clause 5 of the agreement, the complainant was not satisfied with the explanations that the employer provided to Mr. Blair's email request of February 24, 2012, and that Mr. Gagné sent to her on February 27, 2012. In her opinion, Mr. Gagné should have pursued it further. However, clause 5 does not indicate the level of representation to which the respondent committed. The request for explanations was made, and the employer provided its explanations. The respondent was not required to pursue the matter further under clause 5.

[50] Finally, according to the complainant, during the mediation, Mr. Girard apparently promised her that he would obtain more information but did not. He stated that he did not make a promise in that regard but that he would try to obtain more information from the employer. Regardless, such a commitment is not part of the agreement. In that regard, paragraph 33 of *Vogan v. Public Service Alliance of Canada*, 2004 PSSRB 159, as follows, is relevant:

> *[33] During a mediation session, discussions frequently take place concerning different scenarios. As well, the parties have the opportunity to exchange information on issues they feel are important. Not all that is discussed is agreed to by both parties. In the end, what the parties have agreed to should be consigned to the mediation agreement. If there is a disagreement between the parties as to what was agreed upon during mediation, the parties can then rely on the text of their agreement.*

[51] Thus, my opinion is that all the evidence demonstrated that the respondent respected clauses 1, 2, 3, 4 and 5 of the agreement and that instead the complainant did not respect her commitment to withdraw the complaint as set out in clause 6 of the agreement.

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

(The Order appears on the next page)

V. Order

[53] I declare that the respondent respected the terms of clauses 1, 2, 3, 4 and 5 of the agreement.

[54] In addition, I declare that the complainant did not respect her commitment to withdraw her complaint as set out in clause 6 of the agreement.

[55] I order this file closed.

June 11, 2015.

PSLREB Translation

Steven B. Katkin,
a panel of the Public Service
Labour Relations and Employment Board