Date: 20150722

File: 561-02-640

Citation: 2015 PSLREB 66

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

SCOTT EDWARD VERWOLD

Complainant

and

TREASURY BOARD (CORRECTIONAL SERVICE OF CANADA)

Respondent

Indexed as
Verwold v. Treasury Board (Correctional Service 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: Himself

For the Respondent: Lesa Brown, counsel

Decided on the basis of written submissions, filed February 19, March 5 and 19, 2014.

[1] 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 Public Service Labour Relations Board (PSLRB or "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 *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *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.

I. Complaint before the Board

[2] Scott Edward Verwold (the “complainant”), an employee of the Correctional Service of Canada (the “respondent”) occupied the position of Chief, Works and Engineering at Matsqui Institution in Abbotsford, British Columbia. On August 15, 2013, he filed an unfair labour practice complaint with the PSLRB that alleged violation by the respondent’s deputy head of paragraphs 190(1)(*f*) and (*g*) of the *PSLRA*.

[3] The complaint was filed using Form 16, as required by the formerly named *Public Service Labour Relations Board Regulations* (SOR/2005-79). In response to item 4 requesting identification of the act complained of, the complainant referred to paragraph 190(1)(*f*) of the *PSLRA* and stated that the employer had not responded in a timely fashion to a reclassification grievance he had filed on August 18, 2010 under the applicable collective agreement. The complainant referred to a second grievance he had filed in December 2012, to which he was awaiting response from the respondent. The complaint also stated that the respondent had applied for exclusion of the complainant’s position from the bargaining unit represented by the Public Service Alliance of Canada (the “bargaining agent”) in 2009 to which the bargaining agent

objected and alleged that the respondent's deputy head interfered in the process in that the hearing into that matter that had been scheduled before the PSLRB in 2011 had been postponed indefinitely at the deputy head's request.

[4] The complainant also alleged that since the application for exclusion of his position, union dues had been deducted from his pay, which he alleged to be in excess of $4000, even though the bargaining agent refused to represent him. The complaint sought the return of the amounts so deducted, plus $1200 in lost interest on that amount and $10,000 for stress caused by the employer as a result of the complainant's allegedly having to operate what he termed as "in a limbo", being neither represented nor recognized as unrepresented.

[5] By letter addressed to the complainant and dated August 19, 2013, the PSLRB's Registry informed him that paragraph 190(1)(*f*) of the *PSLRA* was not open to him as a ground for his complaint, as that provision pertains to a complaint by a bargaining agent or employer that the other party has not respected the applicable terms and conditions of employment of an individual occupying a position having been designated to provide essential services. The letter also provided a summary of the types of complaint that could be filed under paragraph 190(1)(*g*) of the *PSLRA* and requested that the complainant specify the particular provisions of the *PSLRA* that applied to his particular situation. He was also asked to complete the PSLRB Request for Particulars form.

[6] The complainant filed the Request for Particulars form on August 28, 2013, to which was attached a cover letter dated August 23, 2013, and approximately 50 pages of documents, primarily consisting of email correspondence. The complainant alleged that the respondent had acted unfairly under section 185 of the *PSLRA* by postponing a scheduled hearing before the PSLRB and requiring him to perform the duties of a position excluded from the bargaining unit, while being compelled to pay union dues.

[7] On September 26, 2013, the respondent filed its reply to the complaint. It stated that as the complainant had not specified the provision under section 185 upon which his complaint was founded, the respondent could not provide a more comprehensive response and sought dismissal of the complaint on that basis.

[8] In his response dated October 8, 2013, the complainant stated that the respondent had violated paragraph 186(1)(*a*) of the *PSLRA* by interfering with his

representation by the bargaining agent to which he was paying dues and by postponing the hearing scheduled to deal with his exclusion from the bargaining unit.

[9] The bargaining agent having withdrawn its objection to the respondent's application for exclusion from the bargaining unit, in a decision dated October 24, 2013, the PSLRB declared the complainant's position managerial or confidential pursuant to section 71 of the *PSLRA* (PSLRB File No. 572-02-1751). In view of this development, in a letter from the PSLRB's Registry dated December 2, 2013, the complainant was requested to provide a statement of his intention concerning his complaint. In his reply dated December 10, 2013, the complainant stated that he maintained his complaint, as the exclusion of his position did not resolve the spirit of his original complaint.

[10] In its reply dated January 10, 2014, the respondent maintained that the complaint was outside the purview of paragraph 186(1)(*a*) of the *PSLRA*, that the issue of exclusion had been dealt with by the Board's decision, and that the issue of remedy did not come within section 190 of the *PSLRA*.

[11] In a letter from the PSLRB dated January 22, 2014, the parties were informed that the matter would proceed by written submissions on the substance of the complaint and were requested to advise the PSLRB whether they relied on the documents already provided or intended to provide further submission. Both parties having indicated their intention to file additional submissions, a schedule for filing was determined and the parties advised that a decision would be issued based on the submission and the existing record.

II. Summary of the arguments

A. For the respondent

[12] The respondent framed the issue to be determined as whether the Board should dismiss the complaint for lack of jurisdiction.

[13] The respondent submitted that while the complainant identified that he alleged a violation of paragraph 186(1)(*a*) of the *PSLRA*, only an employee organization has standing to submit a complaint pursuant to that provision. Since the complainant does not meet the definition of an employee organization, he does not have standing to submit the complaint.

[14] The respondent further submitted that the documentation submitted by the complainant does not indicate that he was represented by a bargaining agent nor that referred to the complainant's correspondence to the PSLRB dated October 8, 2013, in which he stated as follows: "… as the Bargaining Agent in my case (PSAC) has declined to represent me, I am respectfully asking that I be considered unrepresented by them and bargaining on my own behalf."

[15] The respondent submitted that the complaint should be dismissed for lack of jurisdiction on the basis that the complainant had not demonstrated that he had standing to file the complaint. In support of its argument, the respondent cited the following decisions: *Reekie v. Thomson,* PSSRB File No. 125-02-88 (19990721); *Feldsted, Czmola and Llewellyn v. Treasury Board and Correctional Service of Canada*, PSSRB File Nos. 161-02-944, 947and 954 (19990429); *Buchanan v. Correctional Service of Canada*, 2001 PSSRB 128; *Laplante v. Treasury Board (Department of Industry and the Communication Research Centre)*, 2007 PSLRB 95; *Bialy et al. v. Heavens and Treasury Board*, 2011 PSLRB 101.

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

[16] The complainant submitted that the PSLRB's order excluding his position from the bargaining unit did not address the spirit of his complaint, nor had the respondent refunded the union dues withheld from his pay. The complainant stated that the respondent had treated him inappropriately for an inordinate period of time and should be held accountable.

[17] The complainant submitted that the respondent did not adhere to the time limits for responding to his grievances specified in the grievance procedure in the applicable collective agreement. In support of this argument, the complainant cited *Dhaliwal v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 109.

[18] Concerning the respondent's argument that that the complaint should be dismissed because not made by an employee organization, the complainant submitted that as an excluded employee not represented by an employee organization, he would be deprived of the right to have his concerns heard.

[19] The complainant argued that it is the intent of the *PSLRA* to protect employees and to guide employers as to the satisfactory treatment of employees. The complainant submitted that the respondent failed to act diligently and had no intention of acting fairly in his case. The complainant referred to correspondence from the respondent dated December 18, 2013 stating that as deduction of union dues had been stopped and never held in a suspense account, no monies were owed him.

[20] The complainant reiterated the claim for damages set out in his complaint.

C. Respondent's reply

[21] Concerning the complainant's reference to grievances he had filed, the respondent stated that they are not before the Board in this matter.

[22] Regarding the correspondence of December 18, 2013, the respondent acknowledged that it had been issued, and noted that subsequent communications with the complainant advised him that he would be refunded from the suspense account in accordance with applicable policies.

III. Reasons

[23] For the following reasons, the complaint against the respondent will be dismissed for lack of jurisdiction.

[24] The complaint was filed under paragraphs 190(1)(*f*) and (*g*) of the *PSLRA*. As paragraph 190(1)(*f*) is not a ground open to the complainant for the reasons set out in paragraph 5 of this decision, there remains paragraph 190(1)(*g*). In his correspondence dated October 8, 2013, the complainant alleged that the respondent had violated paragraph 186(1)(*a*) of the *PSLRA*. The relevant statutory provisions read as follows:

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

185. *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

186. *(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*

(a) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or

(b) discriminate against an employee organization.

(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,

(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,

(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or

(iv) has exercised any right under this Part or Part 2;

(b) impose, or propose the imposition of, any condition on an appointment, or in an employee's terms and conditions of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Part or Part 2; or

> *(c) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from*
>
> *(i) testifying or otherwise participating in a proceeding under this Part or Part 2,*
>
> *(ii) making a disclosure that the person may be required to make in a proceeding under this Part or Part 2, or*
>
> *(iii) making an application or filing a complaint under this Part or presenting a grievance under Part 2.*

[25] An employee organization is defined as follows in subsection 2(1) of the *PSLRA*:

> *"employee organization" means an organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of Parts 1 and 2, and includes, unless the context otherwise requires, a council of employee organizations.*

[26] Subsection 186(1) provides that neither an employer nor a person acting on behalf of an employer shall: participate in or interfere with the formation or administration of an employee organization; participate in or interfere with the representation of employees by an employee organization; discriminate against an employee organization.

[27] As shown in the case law cited by the respondent, the PSLRB and its predecessor Public Service Staff Relations Board have been consistent in holding that only an employee organization or its duly authorized representative may base a complaint on the violation of paragraph 186(1)(*a*) of the *PSLRA*. In *Bialy et al.*, the former Board stated the following:

> ***16*** *In my view, only an employee organization or a duly mandated representative may complain of a violation of the prohibitions set out in paragraph 186(1)(a) of the new Act.*
>
> *. . .*
>
> ***19*** *The prohibition set out in paragraph 186(1)(a) of the new Act is directed at protecting an "employee organization"*

> *from interference by the employer. This interpretation is reinforced by the wording of paragraph 186(1)(b) that, like paragraph 186(1)(a), refers to an "employee organization" as opposed to a "person," referred to in subsection 186(2).*

[28] Nothing in the complaint or in the documents filed in support of it indicates that it is related to the formation or administration of an employee organization, the representation of employees by an employee organization, or discrimination against an employee organization. Accordingly, subsection 186(1) of the *PSLRA* is not available to the complainant as a ground for his complaint under paragraph 190(1)(*g*). As the complainant does not have standing to file the complaint, the Board is without jurisdiction to entertain the complaint.

[29] While the complainant's status to file the complaint is clear, I would be remiss if I did not comment on the true substance of his complaint. His submissions to the Board echo the sentiments of many employees who come before the Board in similar matters.

[30] There is no question but that the complainant found himself in an extremely frustrating situation. His position, which had previously been excluded when occupied by the former incumbent, was again proposed for exclusion by the respondent in December 2009. The bargaining agent, as is its right, filed an objection to the exclusion and advised the complainant that it would not represent him in that matter. A hearing on the issue was scheduled before the PSLRB for the summer of 2011, but at the last minute, the respondent decided that it would review its designation structure, a process which took another two years to complete. Unfortunately, the process can be long and frustrating for employees such as the complainant and leave them feeling unfairly treated, even if no violation of the *PSLRA* has taken place.

[31] From a review of the complainant's submissions, it becomes clear that while the length of the process gave rise to his feelings of being unfairly treated, it was a lack of communication on the part of the respondent that exacerbated the situation. As he stated in a submission to the Board, he was a simple employee caught in a fight between two giants. The complainant filed copies of many emails with the Board to illustrate his allegations that there was a failure on the part of the respondent to communicate with him and keep him advised of the process and developments in his case. In essence, he felt abandoned by both his bargaining agent and his employer and the filing of the present complaint was his method of addressing this issue. Given the

nature of the complaint and issues before the Board, the respondent did not address the issue of communication, as it was not relevant to the issues technically before the Board. The complainant's written submissions are nonetheless a cautionary tale to all those involved in the process regarding communication with employees and the effect that a lack of communication can have.

[32] The complainant also makes reference in his submissions to the fact that the respondent did not respect the timelines in responding to the grievances which he had filed. I would simply note that in the case of a failure to respond to a grievance within the set timelines, an employee has the right to transmit his or her grievance to the next level in the grievance process. There is no requirement for the employee to await the response of the employer before proceeding to the next level.

[33] While I have a great deal of sympathy for the position in which the complainant found himself, I am unable to find that he has standing to file the present complaint and must dismiss it.

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

(The Order appears on the next page)

IV. **Order**

[35] The complaint is dismissed.

July 22, 2015.

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