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Citation: 2015 PSLREB 51

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

JULIE INKEL

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Inkel v. Public Service Alliance of Canada

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

Before: Stéphan J. Bertrand, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Michel Gilbert, counsel

Heard at Québec, Quebec,
January 13 and 14, 2015.
(PSLREB Translation)

I. Complaint before the Board

[1] On June 12, 2012, Julie Inkel ("the complainant") filed a complaint against the Public Service Alliance of Canada ("the respondent"). The complaint was received and stamped by the Board on June 15, 2012. The complainant alleged that the respondent failed its duty of fair representation by refusing to support grievances that she wanted to file against her employer, Fisheries and Oceans Canada. Her complaint was filed under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"), which reads 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.*

[2] Section 185 of the *Act* defines an unfair labour practice as ". . . anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1)" of the *Act*. The provision of the *Act* referred to in section 185 most relevant to the circumstances of this complaint is section 187, which reads as follows:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[3] That provision was enacted to require that employee organizations and their representatives ensure fair representation, which according to the complainant is a duty that the respondent failed to carry out.

[4] In its initial response to the complaint and at the start of the hearing, the respondent raised a preliminary objection claiming that several of the allegations on which the complaint was based were inadmissible and could not be considered because they did not take place within the time 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.*

[5] Thus, according to the respondent, any measure, action, omission or circumstance that might have given rise to the complaint and that the complainant knew of or should have known of before March 17, 2012, i.e., 90 days before the complaint was filed, are inadmissible and irrelevant for the purposes of this case. The complainant did not challenge the respondent's position on that subject and did not present any relevant evidence or documentation dated before March 2012.

[6] 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 ("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) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* 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

[7] The complainant testified on her own behalf and did not call any other witnesses. Counsel for the respondent called two witnesses, Michel Plamondon, President of Local 10050 of the Union of Environment Workers, an affiliate of the respondent, and Nathalie Tardif, Vice-President of the same local.

[8] The complainant testified that she has worked for Fisheries and Oceans Canada for several years. She indicated that following the arrival of a new manager in 2008, she suffered harassment from him, and that she went on sick leave from June 22, 2009, to February 2, 2012. Although she briefly mentioned certain exchanges she had with representatives of the respondent between July 2011 and December 2011,

primarily to provide some context about her employment status and her return to work, she did not provide any clarification or submit any documents about her exchanges because they occurred well before the 90-day period set out in subsection 190(2) of the *Act* and she knew of them before then.

[9] As for the facts relevant to this case, the complainant testified that she met with her immediate supervisor on March 1, 2012, and that he gave her a letter from Health Canada confirming that she was fit to return to her work position without any restrictions. Therefore, she had to return to her former position on March 19, 2012. The letter in question was not submitted as evidence.

[10] The complainant refused to return to her former position and asked her employer to obtain clarification from Health Canada or to obtain a new Health Canada evaluation about her ability to return to her former position in light of the harassment in 2009 that according to her had led to her taking extended sick leave. The employer refused.

[11] On March 12, 2012, the complainant consulted Mr. Plamondon and Ms. Tardif about the employer's position. She testified that she wanted a grievance filed to challenge the employer's position. However, her complaint indicated that she only wanted to know her options. Following a series of emails between Mr. Plamondon and the employer and a meeting he had with an employer representative, the complainant was eventually assigned to another position with the Coast Guard as an accommodation measure. She still held that position when she filed her complaint. Therefore, she was not required to return to her former position on March 19, 2012. According to Mr. Plamondon, his objective was to find the best possible solution within the limits that the bargaining agent could require under such circumstances. His priority was to dialog with the employer and to maintain the complainant's employment relationship and salary rather than file a grievance that had little chance of success. In his opinion, that was fair and appropriate representation, which led to a positive result for the complainant.

[12] On March 30, 2012, the complainant filed a harassment complaint against her former manager about events from 2008 to 2009. Mr. Plamondon testified that that complaint was prepared with the bargaining agent's support and assistance. He referred me to several emails showing the bargaining agent's study of the complaint

and the numerous recommendations and advice provided to the complainant before her harassment complaint was filed. According to Mr. Plamondon, it was another example of the respondent's fair and appropriate representation.

[13] On June 6, 2012, the employer advised the complainant that her harassment complaint was unfounded. That letter was not adduced as evidence. On June 11, 2012, the complainant emailed Mr. Plamondon and Ms. Tardif, asking them if she could challenge the employer's decision. Twice on that same day, Mr. Plamondon replied to her that he wanted to verify some things and that he would get back to her shortly.

[14] On June 12, 2012, the complainant prepared this complaint and sent it to the Board, which received it on June 15, 2012. She confirmed that she did not receive a response from Mr. Plamondon about whether it was possible to challenge the employer's decision on her harassment complaint before preparing and filing her unfair labour practice complaint against the respondent.

[15] On June 14, 2012, Mr. Plamondon advised the complainant by email that the employer's internal harassment complaint process was not adjudicable and that the respondent would not provide representation in the file.

[16] On June 28, 2012, the complainant emailed Mr. Plamondon and Ms. Tardif. In her email, she indicated that she had filed her complaint based on recommendations from third parties, and she apologized and stated that she was not targeting Mr. Plamondon or Ms. Tardif personally, that she recognized that they had done everything that they could in the file, that nothing in the complaint related to their actions or conduct, that they did not have to worry because she had not sought any remedy in her complaint, that she thanked them for supporting her since November 2011, and that she appreciated everything they had done for her. I find it useful to reproduce certain passages of that email, which read as follows:

> [Translation]
>
> *You should have received a letter from the board (blah, blah, blah), I forget the name, of labour relations advising you that I filed a complaint against the union. I did it, but I apologize, I did not target you personally, or Nathalie. I know that you did what you could in my file. . . So, Michel, Nathalie, there is nothing in the complaint against you, I had to name Michel as the representative but I also clearly mentioned that I was filing it against the union, not against the persons*

> *representing me.*
>
> *So, don't worry, because I did not indicate anything for the question: what remedy do you seek? Just so that my complaint follows its path at the Board and that we don't return the file to the DFO to defend me.*
>
> *I would appreciate it if we could talk Nathalie and Michel to clarify everything. I really do not want to cause you s . . . . I tend to listen to the Board's advice and I want to have every chance on my side so that an investigator can finally review my case. That is why I filed this complaint.*
> *In closing, thank you for your support since last November, I appreciate everything you do for me. I hope that this will not change our relationship.*

III. Summary of the arguments

A. For the complainant

[17] The complainant's arguments were very brief. She simply submitted that the respondent had a duty to provide her with support and assistance in her different conflicts with the employer. She seemed at times to refer to the events of 2011, which obviously could not support her complaint given the applicable limitation, which she acknowledged at the outset of the hearing.

[18] As for her harassment file, the complainant pointed out that the respondent acted in an arbitrary and superficial manner and that it did not conduct a serious and in-depth review of her case.

[19] Although the complainant did not indicate any concrete corrective measures in her complaint, as is seen in the complaint form and her email dated June 28, 2012, at the hearing, she asked for her union dues to be reimbursed, but did not specify for which period and at which rate, along with the sum of $100 000 for pain and suffering.

B. For the respondent

[20] The respondent also submitted that the complainant failed her obligation to meet her burden of establishing that it or its representatives, as applicable, acted in an arbitrary or discriminatory manner or in bad faith and that the complaint was unfounded.

[21] Counsel for the respondent referred me to several emails showing the degree to which, on more than one occasion, his client provided fair and appropriate

representation to the complainant. According to him, if his client did not conduct a serious or in-depth study of the harassment file, it was because it did not have the opportunity before the complaint was filed.

[22] As for the corrective measures the complainant requested at the hearing, the respondent reminded me that she had claimed no such request earlier, particularly in her complaint. The respondent also submitted that she provided no evidence to support her claims.

IV. Reasons

[23] As the former Board determined in *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, in a complaint under section 187, the complainant bears the burden of proof. Thus, the complainant had the burden of presenting evidence sufficient to establish that the respondent failed to meet its duty of fair representation.

[24] In addition, as indicated in *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28, the Board's role is not to determine whether the respondent's decision to not represent the complainant was correct, i.e., whether it was founded. Instead, the Board must rule on the issue of whether the respondent acted in bad faith or in an arbitrary or discriminatory fashion as part of the decision-making process that led to its response with respect to representing the complainant.

[25] Both this and the former Board have examined, in many decisions, the requirements to support an allegation of bad faith or arbitrary or discriminatory actions. Thus, in *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, the Board referred to certain cases that provide jurisprudence in this area, as follows:

. . .

> ***22*** *With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of* Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:*
>
> > The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the

> relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible.
>
> . . .
>
> ***23*** *In* International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.*, [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, ". . . a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."*
>
> . . .

[26] The former Board also examined a bargaining agent's decision as to whether there was a basis for representation in *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, which set out, in particular, the following useful orientations and principles:

> . . .
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> *44 . . . It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (*Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in* Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.):*
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> . . .
>
> 42. When a union decides not to proceed with a grievance because of relevant workplace considerations — for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit — it is doing its job of representing the employees. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and

> such a decision will not amount to a violation of [the duty of fair representation].
>
> . . .

[27] The evidence presented in this case did not convince me that the respondent or its representatives showed an insensitive or nonchalant attitude about the complainant's interests. It also did not establish that they apparently acted for inappropriate reasons or out of hostility toward her or that the respondent's representatives established a distinction between bargaining unit members based on illegal, arbitrary or unreasonable grounds. The many emails from Ms. Tardif and Mr. Plamondon clearly testified to that, including, for example, Ms. Tardif's of March 13, 2012.

[28] I am satisfied that the complainant obtained fair and appropriate representation under the circumstances of this case, particularly with respect to her assignment to a Coast Guard position. As for her harassment complaint file, specifically her desire to challenge the employer's dismissal of that complaint, I obviously cannot conclude that the respondent duly examined the circumstances of the case, that the merits of the case were duly weighed and that the respondent made an informed decision as to the relevance of following up on the employer's decision as it was not given the opportunity.

[29] Without formally requesting the respondent's representation, the complainant consulted it on June 11, 2012, to obtain suggestions, inquire about her options and the next steps, and find out if it was possible to challenge the employer's decision on her harassment complaint. The next day, she prepared and filed her unfair labour practice complaint against the respondent without even waiting to learn of its answers to the questions she had asked the day before. There is no doubt in my mind that she acted precipitously and that she gave no opportunity for the respondent to perform the necessary verifications and to provide her with a more comprehensive and detailed answer. Therefore, I cannot conclude that the respondent or its representatives acted in an arbitrary or discriminatory manner or in bad faith in this case.

[30] Even had Mr. Plamondon provided more comprehensive and detailed answers to the complainant in his June 14, 2012, email, those answers could not have served as the basis for this unfair labour practice complaint as she did not know of them when she prepared and filed her complaint. Her testimony was clear on that point.

[31] As the respondent submitted, the complainant failed her obligation to establish facts in support of section 190 of the *Act* being breached. No act or omission by the respondent's representatives, specifically Mr. Plamondon and Ms. Tardif, could be considered arbitrary, discriminatory or in bad faith. In fact, the complainant's June 28, 2012, email fully supports that conclusion.

[32] As I concluded that the respondent did not breach section 190 of the *Act*, there is no need to address the corrective measures issue. However, I would like to point out that during the hearing, the complainant adduced no evidence about the union dues that she paid or the pain and suffering that she allegedly endured.

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

(The Order appears on the next page)

V. Order

[34] The complaint is dismissed.

June 1, 2015.

PSLREB Translation

Stéphan J. Bertrand,
a panel of the Public Service
Labour Relations and Employment Board