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File: 561-02-762

Citation: 2015 PSLREB 93

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

BERYL NKWAZI

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Nkwazi v. Professional Institute of the Public Service of Canada

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

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Beryl Nkwazi, self-represented

For the Respondent: Martin Ranger, counsel

Decided on the basis of written submissions, filed June 24, July 29, August 11 and 24, and October 1 and 8, 2015.

I. Complaint before the Board

[1] The complainant, Beryl Nkwazi, alleges that her bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC or "the respondent"), has failed in its duty of fair representation on her behalf. The PIPSC responds that it has fulfilled its duty to her and requests that the case be summarily dismissed, as the allegations do not disclose, *prima facie*, a breach of the duty of fair representation. For the reasons that follow, I conclude that the complaint should be dismissed.

II. Summary of the evidence

[2] This decision is based on the parties' written submissions and the initial complaint and response. The parties differ on their perceptions of the facts, but I believe that their assertions and written documents are sufficient to rule on the complaint. The issue is whether the complainant's allegations can support her claim that the respondent acted in an arbitrary or discriminatory way or showed bad faith in its representation. If they cannot, then the complaint should be summarily dismissed.

[3] The complainant worked as a registered nurse for the Correctional Service of Canada (CSC or "the employer") at its Regional Psychiatric Centre (RPC) until her retirement on June 12, 2014. The immediate cause of the complaint was the fact that according to the complainant, the respondent had failed to properly represent her before the employer, to the point that she felt that in some way, the respondent was reproducing the harassment she had suffered at the employer's hands. Some background is necessary to understand the contexts of both the complaint and the respondent's actions.

[4] In 2001, the Canadian Human Rights Tribunal (CHRT) issued a decision, *Nkwazi v. Canada (Correctional Service)*, 2001 CanLII 6296, allowing in part Ms. Nkwazi's complaint against the employer. Her casual employment contract with the CSC, which had been renewed nine times, was suddenly not renewed. The CHRT found that the non-renewal was based on discrimination on the grounds of race and ethnic origin, and it awarded Ms. Nkwazi monetary compensation as well as reinstatement in her casual position with the CSC. The CHRT found that some, but not all, of the racial discrimination allegations were founded. In particular, the employer's actions relating to training or pay were not discriminatory. However, the treatment inflicted by one former supervisor did amount to discrimination. In addition, the CHRT found that the

CSC's callous treatment of the complainant at the time her contract was not renewed bordered on cruelty, and one of the remedies was for the CSC to issue a formal letter of apology to her.

[5] In June 2011, Ms. Nkwazi filed a grievance stating that following the CHRT's decision, she had never been properly accommodated and had been forced to work in a harmful environment, since she had continued to encounter at work the former supervisor who had harassed and discriminated against her. She took sick leave in 2009. In February 2011, she attempted a return to work at the CSC, seeking an assignment (such as a night shift) that would ensure no contact with her former supervisor.

[6] The former supervisor had retired in 2008 but continued to lead nurse-training groups in the workplace. After one incident in the nurses' lounge that Ms. Nkwazi complained about, the employer told the former supervisor not to enter the nurses' lounge. Still, it remained possible for Ms. Nkwazi to encounter the former supervisor, an occurrence she found extremely difficult to cope with. According to her, the employer was not doing enough to accommodate her request to avoid any contact with that supervisor.

[7] Ms. Nkwazi's grievance was heard at the final level on January 19, 2015. In the meantime, she had retired, as of June 13, 2014. Based on her email exchanges with the respondent included in her complaint, she seems to imply that she was forced to retire, but according to her email exchanges with the employer, her retirement appears to have been her own decision.

[8] On April 8, 2014, Ms. Nkwazi received a letter from her employer stating that after a five-year leave without pay, she had to either commit to returning to work by June 1, 2014, or retire from the public service. The letter suggested that she consider retirement on medical grounds as a possibility. In her response, Ms. Nkwazi appears to have chosen ordinary retirement, as follows:

> [From an email dated May 20, 2014, from the complainant to the employer]:
>
> *I spoke with someone at the Pension center and they told me anyone over 60 can retire for no reason. Retiring for medical reasons is irrelevant at that age. All they need to send me forms for retirement is an approximate date of last day of*

> *employment, and they said RPC need to provide me with that. The last Pension estimate was calculated on 12 June and I would request that the last day of employment be 12 june 2014 if that is okay with you.*
>
> [*Sic* throughout]

[9] Between the final-level hearing held on January 19, 2015, and when she received the employer's final level response in mid-July 2015, Ms. Nkwazi received no news from the respondent. In the meantime, on July 7, 2015, she filed the present complaint with the Public Service Labour Relations and Employment Board ("PSLREB" or "Board").

[10] Following the employer's final-level decision, the PIPSC officer (employer relations officer or "ERO") responsible for Ms. Nkwazi's file recommended that the grievance not be referred to adjudication. According to his letter dated July 24, 2015, his recommendation was based in part on the fact that the complainant was already retired and in part on the lack of evidence to sustain the harassment and discrimination allegations. In that letter, the ERO indicated that Ms. Nkwazi could request reconsideration by the PIPSC's president, which Ms. Nkwazi did not request. She states in her submissions that by then, she had lost faith in the PIPSC and in its ability to defend her interests.

[11] The complainant asserts that the respondent did not make sufficient efforts to contact the witnesses necessary to support the grievance's allegations.

[12] The respondent counters that it had tried to communicate with the witnesses that the complainant suggested but that they either could not confirm the harassment or could not be reached.

[13] The complainant and the ERO had discussed the witnesses issue before the final-level grievance hearing. Following the September 30, 2014, second-level hearing of the discrimination grievance, for which the complainant thanked the ERO for his representation ("Thank you so much for presenting my case so well, I could not have done half as well"), there were exchanges about potential witnesses. The complainant first suggested one witness, who told the ERO she had not witnessed any of the alleged harassment.

[14] On October 16, 2014, the ERO wrote the following email to the complainant: "It appears we will need additional names to support any allegations of harassment.

Otherwise, we will have extreme difficulty in proving these allegations contained within the grievance."

[15] The same day, in response, the complainant proposed the names of other potential witnesses to the ERO, although for at least two of them, she was unable to provide any contact information.

[16] On October 31, 2014, the ERO wrote an email to the complainant, stating as follows:

> *Please sign the transmittal today if you want to proceed with your grievance ... I have spoke [sic] directly to 2 of your potential witnesses names [sic] you supplied, and both were not able to support any evidence of harassment. I have also emailed and left messages last week to the other 2 witnesses who had contact information, but have received no reply. I will keep you updated.*

[17] On November 21, 2014, the complainant wrote: "... Yes there are no witnesses but that does not mean I was not subjected to harassment and discriminatory behavior Witnesses could not want to get involved too especially if they are still working there."

III. Summary of the arguments

A. For the complainant

[18] In her application to the PSLREB, the complainant states that she feels that her employer has ignored her harassment complaints and that the respondent has not represented her interests. She had to wait until July 2015 for a response to the final-level hearing of January 2015; the respondent did nothing to press the employer to respond more quickly. The complainant believes that the respondent failed her by not supporting her sufficiently.

[19] The application to the PSLREB ends with what Ms. Nkwazi is seeking, as follows:

> *I hope this committee* [the Board] *will support me in my quest to realise full vindication for my initial complaint of discrimination and later forms of differential treatment, harassment and intimidation at the hands of the same individual,* [the former supervisor].

[20] The complainant submits that the respondent (and the employer) failed to observe the terms and conditions of the relevant collective agreement by waiting from

January to July 2015 to respond to the final-level grievance (the employer by not responding, and the respondent by not enforcing the deadlines).

[21] The complainant asserts that the respondent "allowed" delay tactics on the part of the employer and that therefore it failed to carry out its duty to implement the provisions of the relevant collective agreement (that provides, according to the complainant, for a 28-day period to respond at the final level).

[22] In short, the respondent did not champion the complainant's cause, as she states in her August 11, 2015, submissions, as follows:

> *... the Respondent [sic] representation was not fair or genuine, was not undertaken with integrity and had serious and major negligence favouring the Employer. It is not far-fetched to conclude that the charade was designed to make the griever [sic] give up and go away.*

[23] According to the complainant's August 24, 2015, submissions, the respondent did not fully understand her discrimination and harassment experience and consequently did not act to help her:

> *Only if one has, as the old adage says, 'walk a mile in my shoes' to appreciate my experiences, people might have not 'witnessed' my experiences a harassment, but I recognized what she* [the former supervisor] *was doing. People however did recognize my distress, sometimes I wish I had never gone back there. It is much too late for hind site for me.*
>
> *PIPS union chose to fail to fully appreciate my case and situation and instead colluded with the Employer and The CHRC to not represent me in good faith as they should have and broke the principles of fair representation for all employees in a non discriminatory way as already argued, under section 190 of the Public Service labour Relations Act.*
>
> [*Sic* throughout]

[24] In her final submissions, the complainant maintained her point that her witnesses were not contacted, implying that the respondent had not done due diligence.

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

[25] According to the respondent, the complaint is ". . . vague, unclear and contains no clear statement of allegations." Moreover, it was premature, since when it was filed,

the employer had not yet responded at the final level, and the respondent had not yet decided whether to refer the grievance to adjudication. The complainant could have availed herself of the respondent's internal appeal mechanism to challenge the ERO's July 2015 recommendation not to refer the grievance to adjudication.

[26] The respondent states in its submissions that it did not think the complainant had a strong enough harassment and discrimination case to justify the referral to adjudication, which in large measure was due to the absence of independent witnesses.

[27] The ERO made a genuine attempt to contact the suggested witnesses. Those who were reached stated that they had not witnessed harassment. For some witnesses, there was no contact information.

[28] The respondent submits that it acted fairly and reasonably in light of the case law and the particular circumstances of the case. The complainant has not shown how the respondent acted in such a way as to breach its duty of fair representation. Correspondence from the respondent to the complainant shows that the matter was considered seriously and in good faith.

IV. Reasons

[29] The respondent's duty of fair representation stems from section 187 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*):

> ***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.*

[30] The leading case in the interpretation of this duty is *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, in which the following statement on the duty of fair representation is found, at page 527:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[31] The *PSLRA* does not provide for exclusive representation by a bargaining agent for the grievance procedure; under section 208, any employee can grieve any term or condition of employment. However, the reference to adjudication does need the bargaining agent's support if the grievance concerns the application or interpretation of a collective agreement. This would be the case for a harassment grievance.

[32] The duty of fair representation has long been recognized in the context of the federal public service. Bargaining agents negotiate on behalf of the employees in their bargaining units, and the duty of fair representation extends beyond the grievance procedure. It also includes representing the employee's interests (*Benoit v. Trimble*, 2014 PSLRB 46 at para. 43, aff'd 2014 FCA 261).

[33] A complaint against a bargaining agent for breaching the duty of fair representation is concerned only with the bargaining agent's actions when it represented the employee. The question is, did the bargaining agent act in a way that was discriminatory, arbitrary or marked by bad faith? Barring a finding of such behaviour, the PSLREB can go no further, and it certainly cannot render a decision on the validity of the underlying grievance.

[34] Since *Gagnon*, the PSLREB and other labour boards have rendered many decisions on the duty of fair representation. The threshold for establishing a breach of this duty is high and complaints are rarely substantiated. As stated as follows in *Manella v. Treasury Board of Canada Secretariat*, 2010 PSLRB 128, at para 38:

> *[38] The cited cases are consistent with the general theme in the duty-of-fair-representation jurisprudence that bargaining agents should be accorded substantial latitude in their representational decisions. The bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high. Examining the facts alleged by the complainant, I do not find the basis for an arguable case that the PSAC's decision not to support the grievor was made perfunctorily or in a cursory fashion. . . .*

[35] Complaints have been successful in cases of egregious bad faith (*Benoit*), outright arbitrariness (*Taylor v. Public Service Alliance of Canada*, 2015 PSLREB 35 and *Perron v. Customs and Immigration Union*, 2013 PSLRB 13) or serious negligence amounting to arbitrariness (*Jutras Otto v. Brossard and Kozubal*, 2011 PSLRB 107).

[36] In this case, the complainant alleges two main indicators of the respondent's bad faith and arbitrary actions: the undue delay in obtaining a response from the employer without insisting that it adhere to prevailing deadlines, and the negligence of not following up with the witnesses. At the time the complaint was filed, no decision had been made on the referral to adjudication. By the time the PIPSC responded to the complaint, the ERO had already made his recommendation not to refer the grievance to adjudication. Therefore, that recommendation has also been taken into account in this decision in considering how the respondent dealt with the complainant.

[37] Given the number of cases the respondent deals with, the complainant's expectations with respect to timelines may be unrealistic. In *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13, the former Public Service Labour Relations Board stated as follows at para 57:

> ***57*** *Mr. Bahniuk raises a concern in his various emails about the bargaining agent agreeing with the employer to extend the time limits for various levels of the grievance procedure. In his view, this delayed his grievances and is a breach of the duty of fair representation. I appreciate the complainant's concerns about his grievances proceeding in a timely manner. However, in my view, it has to be recognized that extensions of time limits are a normal, and even necessary, aspect of the practicalities of managing grievances. Certainly, an agreement to extend time limits is preferable to letting time limits lapse, thereby jeopardizing the validity of the grievance itself. There are undoubtedly situations where excessive and objectionable delay has been caused by extensions of time, but that is not the evidence in this case.*

[38] The complainant raises a concern about the delay from January 2015 to July 2015 for a response from the employer at the final level of the grievance procedure. The grievance was first filed in June 2011 and was heard at the second level only in September 2014. The complainant makes no mention of this delay as an indication of unfair representation.

[39] In his July 2015 letter concerning the employer's final decision, setting out his recommendation not to refer the matter to adjudication, the ERO seems to imply that the grievance lost some of its urgency, since it was no longer a matter of obtaining proper accommodation, which was the complainant's initial claim in the grievance. The respondent did support the grievance through the final level. The ERO is obviously well aware of the case; he knows its details and its shortcomings.

[40] Given the time taken up by the grievance process (from 2011 to 2015), and given the ERO's awareness of the facts and collaboration with Ms. Nkwazi, I cannot conclude that the respondent's patience in waiting six months for the final reply, rather than demanding an earlier response, can be taken as a sign of the respondent's bad faith, arbitrariness or discrimination.

[41] The complainant also raised concerns about the ERO's efforts to find witnesses to the employer's alleged discriminatory actions reported in the grievance.

[42] Considering the ERO's efforts at developing the grievor's case (as demonstrated, for instance, by the October 16, 2014, email to her stating that additional witnesses were needed, without which the allegations would be difficult to prove) and given that he followed up trying to find witnesses, I have some difficulty concluding there was any bad faith in the way the witness situation was handled.

[43] The evidence supports the ERO's claim that he attempted to contact the witnesses since all indications were that he intended to go ahead with the final-level grievance. His lack of success at securing the participation of any witnesses to support Ms. Nkwazi's grievance can be explained by the time that had elapsed since the incidents to which it relates had occurred, which may have impacted on their recollection of events, the possible unwillingness of some of the witnesses to get involved, and the ERO's inability to reach at least two of them because the contact information provided by the complainant was insufficient.

[44] In the end, the ERO decided to recommend that the grievance not go to adjudication because he recognized its weaknesses. It was not based on discrimination, bad faith or arbitrariness, but rather on an evaluation done by someone who, according to the email exchanges, had done his best to carry the grievance forward to the final level. The complainant did not challenge the recommendation nor did she ask the respondent to reconsider it.

[45] The complainant also seems to imply that the respondent did not intervene in her retirement decision. Yet, she made no mention in her allegations of ever consulting the respondent about her retirement. All the correspondence in the retirement file is between the complainant and the employer.

[46] In these circumstances, I find it difficult to find fault with the respondent's actions. I cannot find that it acted in bad faith or in an arbitrary or discriminatory fashion. It pursued the grievance to the final level and despite its documented efforts, it failed to find witnesses that would have been helpful at the final level of the grievance procedure and essential to go to adjudication.

[47] Ms. Nkwazi's, complaint must be dismissed. Her allegations, even if taken as true, do not amount to a breach of the duty of fair representation. As she stated in her complaint, she is seeking a vindication of the alleged wrongful actions of her employer. She devoted much of her complaint to the alleged harassment and discrimination by the employer. I am not seized with the grievance, and I cannot rule or make any finding on its merits.

[48] For its part, the respondent convinced me that it did its best to support Ms. Nkwazi in her grievance against the employer. As the ERO states in his letter to her of July 24, 2015, the accommodation issue became a less-pressing issue in the respondent's mind once she chose to retire. Given the everyday pressures on bargaining agent resources, this is understandable. Accommodation was no longer an issue; labour relations were no longer at stake. The harassment grievance, as real as it was for Ms. Nkwazi, was a difficult matter to pursue, for several reasons: there was a dearth of witnesses, she had been absent from the workplace for five years, and her former supervisor had retired and thus had no authority over the complainant at the time she filed her grievance.

[49] There is no reason to question the complainant's sincerity about the distress that she says she experienced. However, deciding an unfair labour practice complaint against the respondent is not a matter of ruling on the underlying grievance. Rather, my task is to decide whether the complainant's allegations could support an unfair representation case against the respondent, claiming that it acted in bad faith, arbitrarily or in a discriminatory way. The information presented in this case does not support such a finding.

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

(The Order appears on the next page)

V. Order

[51] The complaint is dismissed.

December 8, 2015.

Marie-Claire Perrault,
a panel of the Public Service Labour Relations and Employment Board