

Date: 20161107

File: 525-02-66

XR: 561-02-519, 537, 541, 561 and 671

Citation: 2016 PSLREB 109

*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

SUSAN BIALY, KAMALARANJINI MYLVAGANAM AND NAUSHEEN KHAN

Applicants

and

**JOHN GORDON, ANTHONY TILLEY, JEANNETTE MEUNIER-MCKAY,
STEVE McCUAIG, PUBLIC SERVICE ALLIANCE OF CANADA,
GARY TRIVETT AND ROBYN BENSON**

Respondents

Indexed as
Bialy v. Gordon

In the matter of a request for the Board to exercise any of its powers under section 43
of the *Public Service Labour Relations Act*

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

For the Applicant: Susan Bialy, Kamalaranjini Mylvaganam and Nausheen Khan

For the Respondent: No one

Decided on the basis of written submissions,
filed October 6, 2016.

REASONS FOR DECISION

I. Request before the Board

[1] On October 6, 2016, Susan Bialy, Kamalaranjini Mylvaganam and Nausheen Khan (“the applicants”) requested that the Public Service Labour Relations and Employment Board (“the Board”) reconsider a decision on five unfair labour practice complaints that it issued on September 19, 2016, indexed as *Bialy v. Gordon*, 2016 PSLREB 87 (“the original decision”). The application was made under section 43 of the *Public Service Labour Relations Act* (“the Act”) and has been determined solely on the basis of the complainants’ written submissions, which are on file with the Board. No responding submissions were sought from the respondents.

II. Background to the request for reconsideration

[2] Through five separate complaints, filed between June 2011 and February 2014, the applicants alleged that the respondents failed in their duty of fair representation on their behalf. These complaints were all filed under s. 190(1)(g) of the *Act* and alleged that the respondents had acted in an arbitrary manner and in bad faith in connection with a settlement agreement reached between the Public Service Alliance of Canada and the applicants’ employer, Human Resources and Skills Development Canada, which provided for, among other things, withdrawing salary protection grievances that had been filed on the applicants’ behalf. All five complaints were consolidated and heard together on July 7 to 9 and September 8, 2015.

[3] In the original decision, the Board determined that the applicants had failed to satisfy their burden of demonstrating that the respondents had acted in an arbitrary, discriminatory or bad faith manner, dismissed the five complaints and ordered that files 561-02-519, 537, 541, 561, and 671 be closed.

III. Summary of the arguments

[4] In their written submissions, which consist of a 125-page document, the applicants raised several alleged errors of facts and of law on the part of the Board, they criticized the Board for refusing to exercise its jurisdiction in some instances and for exceeding it in others, they alleged that the Board failed to observe the rules of natural justice, they disagreed with how the Board related the facts, and they criticized the Board for failing to consider evidence that had been placed before it during the original hearing and for failing to give some of the said evidence the appropriate weight.

IV. Reasons

[5] This application for reconsideration was made under subsection 43(1) of the Act, which reads as follows:

43. (1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.

[6] The reconsideration under subsection 43(1) of the Act is neither an appeal nor a request for a redetermination on the same record. It is a limited exception to the finality of the Board's decisions, which enables a decision-maker to revisit a prior decision in the light of fresh evidence or arguments that could not reasonably have been presented at the original hearing. As confirmed by the Federal Court of Appeal in *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376, at para 7 & 8, the determination of a request for reconsideration by the same decision-maker that rendered the original decision does not attract a reasonable apprehension of bias.

[7] The Board has developed jurisprudence that is helpful in setting out the appropriate use of its reconsideration power. In *Chaudhry c. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39, the Board wrote the following, at para 29:

29 A review of the jurisprudence shows the following guidelines or criteria for reconsidering a decision of the PSLRB (see Quigley, Danyluk, Czmola and Public Service Alliance of Canada). The reconsideration must:

- *not be a relitigation of the merits of the case;*
- *be based on a material change in circumstances;*
- *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
- *ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;*
- *ensure that there is a compelling reason for reconsideration; and*
- *be used "...judiciously, infrequently and carefully..." (Czmola).*

[8] Clearly, the applicants' submissions would be better suited to support an appeal or an application for judicial review, rather than a request for reconsideration under subsection 43(1) of the *Act*. As stated earlier, such a request is not an alternative method of appeal, nor does it enable the Board to draw a different conclusion from the evidence that was already before it at the original hearing.

[9] Contrary to the criteria set out in *Chaudhry*, the applicants are in effect relitigating the merits of their complaints, they are not raising any material change of the circumstances known at the original hearing and they are not adducing fresh evidence or advancing new arguments that could not, with reasonable diligence, have been adduced or advanced before the Board at the original hearing. Simply put, the applicants have not even argued, let alone established, that any of the required criteria exist to justify a reconsideration of the original decision. Therefore, their request must, on its face, be dismissed.

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

(The Order appears on the next page)

V. Order

[11] The application for reconsideration of the decision in 2016 PSLREB 87 is dismissed.

[12] I order that file 525-02-66 be closed.

November 7, 2016.

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