Date: 20170308

File: 550-18-10

Citation: 2017 PSLREB 23

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

AJAY LALA

Applicant

and

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 401

Respondent

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Intervenor

Indexed as
Lala v. United Food and Commercial Workers Canada, Local 401

In the matter of a motion to strike a portion of the respondent's amended reply

Before: David Olsen, a panel of the Public Service Labour Relations and Employment Board

For the Applicant: Himself

For the Respondent: Kelly Nychka, counsel

For the Intervenor: Adrian Scales

Decided on the basis of written submissions, filed November 16 and December 9, 2016.

Intervenor's motion before the Board

[1] Section 22 of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) provides that the Public Service Labour Relations and Employment Board ("the Board") may decide any matter before it without holding an oral hearing. Having reviewed all the material on file, the Board is satisfied that the documentation before it is sufficient for it to decide this matter without holding an oral hearing.

[2] On October 26, 2016, the United Food and Commercial Workers Canada, Local 401 ("the bargaining agent"), applied to amend its reply to an application for revocation of certification pursuant to s. 41 of the *Public Service Labour Relations Regulations* (SOR/2005-79) to add further particulars relating to the employer's conduct after the application for revocation was filed on October 17, 2016.

[3] On October 26, 2016, the Board granted the application. The bargaining agent filed its amended reply with the Board on that date.

[4] On November 16, 2016, the intervenor, her Majesty in Right of Canada as represented by the Staff of the Non-Public Funds, Canadian Forces, moved for an order excluding those portions of paragraph 9 of the bargaining agent's amended reply that state as follows:

> *On July 22, 2016, Mr. Lala was suspended from his employment at the base as a result of allegations of potential misconduct while on duty …* [The sentence then refers to specific alleged acts of misconduct potentially criminal in nature.]

Intervenor's submissions

[5] At paragraphs 9 to 12 of its amended reply, the bargaining agent alleges that the employer interfered with the decertification process by intentionally delaying a disciplinary investigation into allegations of workplace misconduct on the part of Ajay Lala, the representative of the applicant group.

[6] At paragraph 9, the bargaining agent listed in detail the alleged acts of misconduct. They are of a sensitive nature. The intervenor objects to their inclusion in this matter as this information is not material to the determination of the matter at issue, and the bargaining agent does not require it to establish its case of employer

interference.

[7] The Board has the authority to exclude these allegations from the bargaining agent's pleadings because pursuant to s. 21 of the *PSLREBA*, the Board may summarily dismiss any matter that in its opinion is trivial, frivolous, vexatious, or made in bad faith.

[8] Both the Federal Court and the Supreme Court of Canada have set out criteria for determining when it is appropriate to strike pleadings or a portion of them. The *Federal Court Rules* (SOR/98-106), at s. 221(1), provides that a pleading may be struck if it:

> ***221 (1)*** *…*
>
> ***(a)*** *discloses no reasonable cause of action or defence, as the case may be,*
>
> ***(b)*** *is immaterial or redundant,*
>
> ***(c)*** *is scandalous, frivolous or vexatious,*
>
> ***(d)*** *may prejudice or delay the fair trial of the action,*
>
> ***(e)*** *constitutes a departure from a previous pleading, or*
>
> ***(f)*** *is otherwise an abuse of the process of the Court ….*

[9] The portion of the pleadings referred to at paragraph 9 of the bargaining agent's amended reply can be considered vexatious, and immaterial to the true matters at issue in the bargaining agent's response to the application.

[10] The details of the disciplinary investigation that the bargaining agent raised in its amended reply, in particular the portions containing the allegations of misconduct, have no rational connection to the bargaining agent's allegations of employer interference. This investigation and its details do not form the basis for a claim of alleged employer interference with the administration of an employee organization as outlined in s. 186(1)(a) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2).

[11] This portion of the pleadings does not pertain to the genuine legal issue to be resolved in this case. Including such details in this matter will not lead to a practical result. As the courts have recognized, pleadings must not be a vehicle designed solely to harass another party. In this sense, the employer submits that this portion of the

pleadings is frivolous and vexatious (see *Sauve v. Canada*, 2010 FC 217 at para. 39; and *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 15) and that including details with respect to the allegations of serious acts of misconduct is vexatious and could dissuade the applicant from meaningfully participating in these proceedings.

[12] The intervenor submits that the facts related to its disciplinary investigation into alleged acts of workplace misconduct by Mr. Lala do not assist the Board in its determination of the matter at issue. However, should the Board be of the mind that evidence related to this investigation be heard in this matter, the intervenor submits that this should be limited to allegations specific to the employer's conduct in the investigation.

[13] Accordingly, the intervenor submits that the Board should exclude hearing evidence with respect to specific allegations of complaints made against Mr. Lala that were within the jurisdiction of this investigation. The Board should also exclude correspondence between the intervenor and the bargaining agent about the investigation and internal correspondence between witnesses of the investigation and their bargaining agent. These are not expository materials concerning the employer's conduct as it relates to the alleged interference in the representation vote.

[14] The intervenor intends to vigorously object to any witness testimony or evidence presented during the hearing that has the intention of introducing matters prejudicial to the employer's disciplinary investigation or to the persons involved, including the applicant, Mr. Lala.

Bargaining agent's submissions

[15] The bargaining agent disagrees with the intervenor's assertion that the alleged acts of misconduct are not material to the matters at issue before the Board.

[16] The nature of the allegations of misconduct is relevant to this matter because, the fact that the allegations are serious and potentially criminal in nature, is important since the intervenor's delay in proceeding with the prompt investigation of the alleged misconduct is even more unexplainable in light of the nature of the allegations. It is presumed that the more serious the allegations, the more promptly the employer would normally proceed with an investigation into the alleged misconduct.

[17] However, the intervenor did not conclude its investigation into the misconduct before the representation vote that occurred on October 17 to 21, 2016. Particularly, concerning an investigation of such serious misconduct, questions arose in the bargaining agent's members' minds as to why Mr. Lala was given so much leeway in the investigation and why the intervenor took so long to finalize its investigation.

[18] Against the backdrop of the revocation application, the inordinately lengthy investigation caused the bargaining agent's members to suspect that the employer delayed the investigation to ensure that it would not end before the representation vote occurred so that Mr. Lala would have an interest and retain his influence in the workplace when the vote took place.

[19] If in fact the intervenor is found to have delayed its investigation into the alleged misconduct, and the perception of the bargaining agent's members was that the intervenor purposely delayed its investigation so as to impact the outcome of the vote, then the employer interfered in the outcome of the vote as it lent implied support to Mr. Lala's revocation campaign through the members' perception of its conduct.

[20] The bargaining agent has no intention to harass any party and has included details about Mr. Lala's misconduct in its amended reply because it believes that they are relevant and material to the issues before the Board.

[21] The intervenor submits that the facts related to its disciplinary investigation into Mr. Lala's alleged acts of workplace misconduct do not assist the Board in its determination of the matter at issue. The employer also appears to be asking the Board to rule at this stage to exclude evidence with respect to the investigation, including correspondence between the intervenor and the bargaining agent about the investigation and internal correspondence between witnesses of the investigation and their bargaining agent.

[22] It is premature for the Board to issue a ruling on the question of what evidence should be allowed at the hearing relating to the investigation of Mr. Lala's misconduct. This motion to strike a portion of the pleadings does not ask that the Board strike out the fact that Mr. Lala was suspended as a result of potential misconduct and that an investigation occurred into the potential misconduct. Therefore, evidence relating to these matters is relevant to the proceedings.

[23] Rather than make a ruling at this stage, the bargaining agent submits that it is most appropriate for the Board to address these evidentiary issues as objections as they arise throughout the course of the hearing.

Issue

[24] Should the Board grant an order excluding those portions of paragraph 9 of the bargaining agent's amended reply on the basis that they can be considered scandalous, vexatious, and immaterial to the true matters at issue in the bargaining agent's response to the application?

Reasons for decision

[25] Section 21 of the *PSLREBA* provides that the Board may dismiss summarily any matter that in its opinion is trivial, frivolous, vexatious, or was made in bad faith.

[26] Section 40 of the *Canada Evidence Act* (R.S.C., 1985, c. C-5) provides the following:

> ***40*** *In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.*

[27] The *Alberta Rules of Court* (AR 124/2010), in particular Part 3, Division 5, entitled "Significant Deficiencies in Claims", outlines the court options to deal with significant deficiencies in pleadings as follows:

> ***3.68(1)*** *If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:*
>
> > *(a) that all or any part of a claim or defence be struck out…*
>
> ***(2)*** *The conditions for the order are one or more of the following:*
>
> > *…*
>
> > *(c) a commencement document or pleading is frivolous, irrelevant or improper;*

…

[28] In *Sauve*, the Court stated at para. 39 that "[a] claim is frivolous 'where it is of little weight or importance or for which there is no rational argument based upon the evidence or law in support of the claim.'"

[29] In *Steiner v. Canada* (1996), 122 F.T.R. 187 at para. 16 (QL), the Federal Court defined the terms "scandalous", "frivolous", and "vexatious" as follows:

> *A scandalous pleading includes one which improperly casts a derogatory light on someone, with respect to their moral character. A claim is a frivolous one where it is of little weight or importance or for which there is no rational argument based upon the evidence or law in support of the claim. A vexatious proceeding is one that is begun maliciously or without a probable cause, or one which will not lead to any practical result.*

[30] Having reviewed the arguments, I conclude that the allegation that Mr. Lala was suspended from his employment as a result of allegations of potential misconduct on July 22, 2016, and the time taken to conclude the investigation are arguably relevant to the bargaining agent's position, which is that the employer interfered with the revocation application.

[31] However, I also conclude that including in the amended reply the nature of Mr. Lala's potential misconduct casts a derogatory light on him. Other than the fact that the potential misconduct might have been serious, its nature is not material to the matters at issue before the Board, which relate to alleged employer interference with the administration of an employee organization.

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

(The Order appears on the next page)

Order

[33] In the circumstances, those portions of paragraph 9 of the bargaining agent's amended reply of October 26, 2016, commencing after the word "duty" are struck from its amended reply.

March 8, 2017.

David Olsen,
a panel of the Public Service Labour Relations and Employment Board