Date: 20170721

File: 561-34-597

Citation: 2017 FPSLREB 12

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

MOHAMMED RIMFA TIBILLA

Complainant

and

Union of Taxation Employees - PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Tibilla v. Union of Taxation Employees - Public Service Alliance of Canada

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

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

For the Complainant: Himself

For the Respondent: Christopher Schulz, Public Service Alliance of Canada

Heard at Montreal, Quebec,
November 29 and 30, 2016.

I. Complaint before the Board

A. Background

[1] On November 29, 2012, Mohammed Rimfa Tibilla ("the complainant") filed a complaint with the former Public Service Labour Relations Board (PSLRB) under s. 190(1)(g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) alleging that the Union of Taxation Employees, a component of the Public Service Alliance of Canada ("the respondent"), committed an unfair labour practice within the meaning of s. 185. In particular, he alleged that the respondent had refused to refer to the PSLRB a grievance he had filed and that it had refused to inform him of his rights to refer it. The date on which he stated he knew of the act, omission, or other matter giving rise to the complaint was September 23, 2012.

[2] In the section of the complaint form that deals with the steps the complainant took to resolve the issue, he stated that he had filed a case with the Federal Court and a complaint with the Canadian Human Rights Commission.

[3] By way of corrective action, he requested that the PSLRB investigate the matter and set aside the respondent's final decision.

[4] He also alleged that claims of a breach of procedural fairness, falsification of an evaluation, discrimination, and bad faith were deliberately left off the grievance form.

[5] On December 13, 2012, the PSLRB wrote to the complainant, acknowledging its receipt of his complaint and observing that the grievance referred to in the complaint appeared to be dated June 2009 and to be about his performance appraisal.

[6] The PSLRB noted that the *PSLRA* provides that a complaint may only be filed under s. 190 no later than 90 calendar days following the date on which the complainant knew or ought to have known of the act or omission giving rise to the complaint and that there is no provision to extend that deadline. The PSLRB sought clarification from the complainant as to how September 23, 2012, was the date on which he first became aware of the alleged failure to represent him fairly.

[7] On December 17, 2012, the complainant replied to the PSLRB's letter, in part as follows:

…

> *2] In June 2010, I received a negative reply, dated June 9th 2010 to my grievance from Canada Revenue Agency.*
>
> *3] On June 29th 2010, I requested the union to refer the grievance to either the PSLRB or the Federal Court for an independent adjudication. To date, the union has not responded to my requested, and in addition it did not provide me with any information about the legal options available to me.*
>
> *4] As a result of the non response from the syndicate, I applied to the Federal Courts for review of the grievance. I was unsuccessful at the Federal Courts.*
>
> *5] Up till this point in time, the union has still not responded to my requests, hence I decided to take an action against it in order to impel a reaction from it - in the nature of response to my requests in terms of referring the matter to the PSLRB.*
>
> *6] Consequently, on August 21st 2012, I brought an action against the union which certainly obliged it to respond.*
>
> *7] Subsequently, on September 23, 2012, I received a Memorandum of Facts and Law dated September 20th 2012 from the Union (Respondent) in which it stated in paragraph 9, at page 15 of that decision as follow:*
>
> 8] "The grievance was [not] one which could be referred to adjudication, pursuant to section 209 of the PSLRB. Accordingly, the employer's decision at the final level of the grievance procedure was binding and final, pursuant to sections 214 and 236 of the PSLRA […]"...
>
> *9] It was only at this point in time that I knew that the union would not and/or had refused to refer the matter to the PSLRB and the reasons for the refusal. Thus the Memorandum of Fact and Law of the union effectively became the source of me knowing that it had refused to refer the matter to the PSLRB.*
>
> [*Sic* throughout]

[8] On March 6, 2013, the respondent replied to the complaint. It referred to Mr. Tibilla's letter of December 17, 2012.

[9] The respondent submitted that from Mr. Tibilla's submissions, the alleged actions complained of occurred between 2007 and 2010. Given that Mr. Tibilla filed his complaint on November 29, 2012, the respondent objected to the PSLRB's jurisdiction

to deal with it on the basis that the time limit set out in the *PSLRA* to file a complaint had not been met.

[10] The respondent also submitted that the fact that the complainant had brought an action against it at the Federal Court on August 21, 2012, dealing with its duty of fair representation, which is the same issue that was brought before the PSLRB, was evidence that he was aware of the facts giving rise to the complaint well before September 23, 2012. The respondent requested that the PSLRB dismiss the complaint without an oral hearing, for lack of jurisdiction.

[11] On March 19, 2013, the PSLRB advised the parties that it had determined that the issue of its jurisdiction would proceed by way of an oral hearing, which took place in Montreal, Quebec, on November 29 and 30, 2016, before the PSLRB's successor, the Public Service Labour Relations and Employment Board ("the PSLREB").

[12] At the commencement of the hearing, the parties agreed that the PSLREB would hear their evidence both with respect to the merits of the complaint as well as to the preliminary objection to jurisdiction and that I would reserve my decision on the preliminary objection.

[13] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent changing the names of the Public Service Labour Relations and Employment Board, the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act* and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*") and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[14] After hearing the parties' evidence on the preliminary matter going to jurisdiction, and their submissions in argument, I have concluded that I do not have jurisdiction to hear the complaint on its merits as it was filed beyond the 90-day mandatory time limit set out in s. 190 of the *Act*.

[15] I will recite only the evidence and argument relevant to the timeliness issue.

II. Summary of the evidence on the timeliness issue

[16] The complainant testified on his own behalf. Lyson Paquette, a labour relations officer employed by the Union of Taxation Employees, testified on behalf of the respondent.

A. For Mr. Tibilla

[17] Mr. Tibilla was a term employee with the Canada Revenue Agency from April 2006 until June 2009 in Brossard, Quebec, as an audit officer. He started as a collections officer and was promoted to an audit officer position. Throughout this period, he was a term employee, and his term was renewed more than four times. He was a member of the Union of Taxation Employees.

[18] Michel Adam was Mr. Tibilla's manager from December 6, 2006, until June 30, 2009. François Blais was his team leader from December 6, 2006, to October 10, 2008. Christian Dion was his next team leader, from October 2008 until June 2009.

[19] Mr. Tibilla testified that in evaluating his performance in April 2007, Mr. Blais stated that the complainant had met his requirements and did not need supervision or an action plan, yet he indicated that Mr. Tibilla had difficulty doing his work. Mr. Tibilla disagreed with this comment.

[20] In June 2008, Mr. Tibilla requested a transfer to a new supervisor. Mr. Adam initially declined it; however, in October 2008, the complainant was transferred to Mr. Dion's team.

[21] On April 29, 2009, Mr. Dion evaluated Mr. Tibilla's performance as unsatisfactory, stating that his results did not meet expectations.

[22] Mr. Adam and Mr. Dion met with Mr. Tibilla that day to discuss his evaluation. During that meeting, Mr. Adam advised the complainant that his term contract would not be extended. Mr. Tibilla's employment ended on June 30, 2009.

[23] Mr. Tibilla reported the situation to UTE on May 4, 2009.

[24] A grievance was filed on June 3, 2009, challenging the performance evaluation. It was denied at the first, second, and third levels of the grievance process.

[25] On June 9, 2010, the grievance was denied at the fourth and final level of the grievance process. Mr. Tibilla stated that he received the final-level decision at his home between June 16 and 19, 2010.

[26] He contacted Ms. Paquette, who had represented him at the fourth level of the grievance process. He advised her that he did not agree with the decision and stated that she should forward the grievance to the PSLRB. She said that she would contact her colleagues and that she would get back to him.

[27] He did not hear from her, so he sent her a letter, asking her to go to court. After that, he again did not hear anything from her. He left her a couple of messages but did not hear anything in reply.

[28] He decided that he would sue the respondent so that it would take action. When he commenced the legal action, he received a memorandum of fact and law from the respondent, together with an affidavit that stated that the respondent would not send the case to the PSLRB.

[29] He stated that he did not receive anything from the respondent and that September 23, 2012, was the effective date on which he knew of the circumstances that gave rise to his complaint.

[30] During cross-examination, Mr. Tibilla acknowledged that he brought an application in the Federal Court for the judicial review of the final-level decision, which was heard on February 10, 2011. It was denied the next day.

[31] Mr. Tibilla was shown the following letter, dated June 15, 2010, and addressed to him from Ms. Paquette, entitled, "[translation] Subject: Grievance no. 70058051 - Performance Evaluation":

> [Translation]
>
> *Mr. Tibilla:*
>
> *Please find attached a copy of the final decision on your grievance, mentioned above.*
>
> *Unfortunately, your grievance cannot be referred to the Public Service Labour Relations Board because the Board cannot change the collective agreement but can only interpret it or ask that it be applied.*

> *Therefore, we are closing your file. I am available if you require further information.*
>
> …

[32] Mr. Tibilla stated that he did not recall receiving this letter. He stated that he received the employer's response directly from the employer.

[33] He stated that after he received the response, he called Ms. Paquette. He was asked if he had a letter from the employer enclosing the final-level reply. He stated that he had received only the decision; not the reply.

[34] He acknowledged sending a letter dated June 18, 2010, to the Union of Taxation Employees entitled, "Objection to the Closure of File #09-01-0146 (Grief [*sic*] # 70058051)" that reads in part as follows:

> …
>
> *This is in reference to your letter dated 15 June 2010 concerning the above stated grievance in which a negative decision was rendered.*
>
> *May I state that I vehemently object to the closure of the above stated file in regards to my work performance evaluation for the following reasons:*
>
> …
>
> *To this end, may I request that the following actions be taken to rectify this erroneous conclusion:*
>
> *A - A revision of the decision drawn by the representatives of the Human Resources Department,*
>
> *B - Refer the case to the Commission des relations de travail de la Fonction Publique, or*
>
> *C - Refer the matter to the Federal Court where A and/or B fail.*
>
> *I hope to hear from you on or before 30th June 2010.*
>
> …
>
> [*Sic* throughout]

[35] He agreed that in this letter, he acknowledged receiving a letter from the respondent dated June 15, 2010. He said that he would have to look for it at his home.

[36] He acknowledged that after the Federal Court dismissed his application for judicial review of the decision made at the fourth level of the grievance process in February 2011, he enlisted the Ms. Paquette's help to sue the bargaining agent. He filed a statement of claim on August 21, 2012, which was dismissed on October 25, 2012, on the basis that it disclosed no reasonable cause of action.

[37] In re-examination, Mr. Tibilla testified that the June 15, 2010, letter does not change the facts with respect to when he first learned of the circumstances giving rise to the complaint.

B. For the respondent

[38] Ms. Paquette is a labour relations officer with the Union of Taxation Employees, a position she has held for 25 years. She represents grievors at the final level of the grievance process.

[39] Based on her experience, she stated that term employees are not as well protected as indeterminate employees. She explained that under the *Canada Revenue Agency Act* (S.C. 1999, c. 17), all matters related to staffing are not negotiable. Term employee contracts can be ended at any point, and term employees are considered on probation during the term of each contract. Entering into a new contract is considered starting new employment.

[40] In general, when an employee grieves a performance assessment for reasons such as comments that do not reflect the performance and in some cases comments that should not have been included in it, the bargaining agent will file a grievance. However, there is no provision in the relevant collective agreement to rely upon to challenge the content of an appraisal other than filing a grievance. Nor is there any protection under the *PSLRA*. Evaluations are covered by the employer's policy and guidelines. They are not negotiated or consulted upon with bargaining agents.

[41] If the employer does not follow its guidelines after assessing the case, then the bargaining agent may file a grievance. However, the employer's decision cannot be challenged in front of a third party. If the bargaining agent believes the employer's action was inappropriate, it will raise it through the grievance process so that the

employer will know it should follow its guidelines.

[42] Ms. Paquette presented the grievance at the final level on April 1, 2010, submitting both a written and oral argument that the employer had not followed its policy and guidelines when preparing Mr. Tibilla's performance assessment. She submitted that the assessment did not reflect his previous performance assessments. She also raised the negative impact it had on his prospects for full-time employment as the negative assessment precluded him from being considered in other pools. At the time, Mr. Tibilla had qualified for and was in a pool for an appointment to a full-time position.

[43] On May 17, 2010, the employer requested an extension of time to reply to the grievance. The same day, Ms. Paquette telephoned Mr. Tibilla to inform him of the employer's request and to obtain his approval, which she did.

[44] On June 15, 2010, she wrote a letter to Mr. Tibilla and attached the final-level reply to the grievance. She explained in the letter that the grievance was denied and that it could not be referred to the PSLRB because performance evaluations were not part of the relevant collective agreement.

[45] She explained that there was no performance assessment provision in the relevant collective agreement. It had one provision, but it was limited to process. The content of a performance assessment is not a matter that can be referred to the Board. An adjudicator would not have jurisdiction to amend the collective agreement.

[46] In her letter, she advised Mr. Tibilla that as a consequence, the respondent would close its file. She stated that she was open to discussing the matter with him.

[47] On June 22, 2010, she received the letter dated June 18, 2010, from Mr. Tibilla objecting to the respondent closing its file. She stated that her understanding was that he was not pleased that the respondent was closing its file. He requested that actions be taken, including referring the case to the PSLRB or to the Federal Court. He concluded the letter by stating that he hoped to hear from her on or before June 30, 2010.

[48] On June 24 or 25, 2010, Ms. Paquette left a telephone message for Mr. Tibilla to call her for the purpose of discussing the letter.

[49] As Mr. Tibilla had not returned her call, she left him a second telephone message to that effect on July 8, 2010. On the grievance action form, she made a note of her attempt to reach him.

[50] Mr. Tibilla did not return her call, and she did not recall any telephone conversation with him occurring after that. She did not send him another letter.

III. Summary of the arguments

A. For the respondent

[51] The complaint is barred by statute because it was filed outside the 90-day time limit. The key date is June 15, 2010, when Ms. Paquette sent the letter to the complainant notifying him that the file would be closed. In the respondent's view, that is when the 90-day clock started. The complaint was filed in November 2012, far outside the window established for filing it.

[52] In *Boshra v. Canadian Association of Professional Employees*, 2012 PSLRB 106, Adjudicator Margaret Shannon stated as follows at paragraph 33:

> *[33] In my opinion, both complaints are out of time. No request for an extension of time to file them was received, nor is it possible under the* Act*. Only grievance deadlines may be extended. It is not permissible for the complainant to pursue a complaint beyond the mandatory statutory time limits on the basis that they were not been [sic] dealt with by the Federal Court of Appeal. That discovery does not change the onus on a complainant to pursue his or her complaint in a timely fashion. It is clear that that 90-day period is mandatory, following which a complaint under section 190 must fail.*

[53] Upon a review of the facts, the complainant said that he did not receive Ms. Paquette's June 15, 2010, letter. He said that he received the final-level reply with no covering letter. It is unlikely that given her experience, Ms. Paquette would have sent the final-level reply to Mr. Tibilla without the letter, when she intended to close the file.

[54] In the complainant's letter to Ms. Paquette dated June 18, 2010, he acknowledges receiving a letter from her on June 15, 2010. In his reply, he vehemently objects to the closure of the file. Thus, at a minimum, he received a letter advising him that the file would be closed.

[55] He was objecting to the closure of the file. He wanted it referred to the PSLRB or to the Federal Court. He gave the respondent until June 30 to reply. Ms. Paquette called and left him a message on June 24 or 25 and again on July 8, 2010. There was no response.

[56] The respondent submitted that there is no reason to find Ms. Paquette's evidence not credible.

[57] The complainant engaged in one judicial review against the employer that ended in February 2011 and another lawsuit that he commenced against the respondent in September 2012, seeking redress for it allegedly mishandling his grievance, which was dismissed as disclosing no reasonable cause of action.

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

[58] Mr. Tibilla acknowledged receiving a letter on or about June 15, 2010, from the respondent. He recalled that it did not indicate any reference to the relevant collective agreement. It was not the same letter that the respondent produced in evidence dated June 15, 2010.

[59] The respondent's argument, which is that the complainant's action in the Federal Court meant that he knew that the respondent would not refer his case to the PSLRB, did not relieve the respondent of its responsibility to inform him and assist him. If it were not to send his case to the PSLRB, then it had an obligation to make a detailed analysis of the case and to inform him that it would not send it. If he did not agree with the analysis, he would have contested it.

[60] If he had wanted to send the case to the PSLRB, the respondent should have shown him how to do it, how to meet the time limit, and how to challenge the respondent's analysis. It failed to.

[61] *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79, which deals with an unfair representation complaint by a Department of Fisheries and Oceans employee against the Canadian Merchant Service Guild, is a case similar to the matter before me because the bargaining agent in that case failed to conduct a thorough investigation, to inform the complainant in that case that he could contest its decision, and to inform him of his right to refer a grievance to the former Public Service Staff Relations Board (PSSRB) or of the related time limit. The PSSRB found that these failures constituted a

breach of the duty of fair representation.

[62] In this case, the bargaining agent was always aware of the process. It was obligated to provide the complainant with basic information. When he did not hear from the bargaining agent, he had to do something to force it to listen to him.

[63] He effectively understood that the respondent was not pursuing his grievance when he received the memorandum of fact and law on September 23, 2012.

[64] The respondent argued that Ms. Paquette left him messages and that no responses were received to them. The complainant does not buy that. He did not receive messages. The case was his whole life. It was important for her to follow up with him.

IV. Reasons

[65] Subsection 190(2) of the *Act* reads as follows:

> ***Time for making complaint***
>
> ***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.*

[66] That language is mandatory, and there is no provision under the *Act* giving the Board the authority to extend the 90-day time limit.

[67] The complainant argues that the date on which he first became aware of the respondent's alleged failure to represent him fairly was September 23, 2012, when he received a memorandum of fact and law dated September 20, 2012, from the respondent stating that the grievance could not be referred to adjudication and that the employer's decision at the final level of the grievance process was binding and final.

[68] This information was contained in an affidavit in support of a motion to strike Mr. Tibilla's action that he had commenced against the respondent in the Federal Court seeking redress from the respondent for allegedly mishandling the grievance concerning the unsatisfactory performance appraisal.

[69] The respondent argues that although the complainant said he did not receive Ms. Paquette's June 15, 2010, letter, he said that he received the final-level reply with no covering letter. The respondent submits that it is unlikely that Ms. Paquette would have sent that level reply without a letter. Moreover, in the complainant's letter to Ms. Paquette dated June 18, 2010, he acknowledges receiving a letter from her on June 15 , in his reply, vehemently objecting to the closure of the file.

[70] The complainant engaged in one judicial review that ended in February 2011 and in another lawsuit against the respondent on the same issue raised in this complaint in September 2012.

[71] Having reviewed the evidence, the incontrovertible fact is that whatever view I may take of the evidence about whether he received the June 15, 2010, letter produced in evidence or some other letter dated June 15, 2010, from the employer that was not produced, the complainant confirmed that he knew as of June 18, 2010, that the respondent would close its file.

[72] Also relevant to the disposition of this matter is the fact that on his own initiative, the complainant commenced an application in the Federal Court for the judicial review of the decision made by the employer's representative at the final level of the grievance process dated June 9, 2010. That application was dismissed on February 11, 2011.

[73] The complainant then commenced an action on August 21, 2012 against the respondent for damages as a consequence of mishandling his grievance, which in essence is the same issue raised in this complaint. That action was also dismissed.

[74] Based on these facts, I am satisfied that on a balance of probabilities, the complainant knew or ought to have known of the circumstances giving rise to the complaint at the time of filing his action against the respondent. As a consequence, the complaint was filed outside the 90-day mandatory time limit prescribed in s. 190(2) of the *Act*. I am without jurisdiction to hear the complaint on its merits.

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

(The Order appears on the next page)

V. Order

[76] The complaint is dismissed.

July 21, 2017.

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