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File: 561-02-847

Citation: 2018 FPSLREB 67

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

RANDOLPH LEACH

Complainant

and

JEAN-PIERRE FORTIN AND KIMBERLY POIRIER

Respondents

Indexed as
Leach v. Fortin

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

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondents: Amy Kishek, Grievance and Adjudication Officer

Decided on the basis of written submissions, filed May 11, July 10 and 19, September 19, October 6 and 10, 2017, and July 4, 2018.

I. Complaint before the Board

[1] The complainant, Randolph Leach, was a member of the Public Service Alliance of Canada ("PSAC") and its component, the Customs and Immigration Union ("CIU"), beginning in 2002. Starting in 2010, he held positions with his CIU local as an official steward for the Landsdowne Port of Entry, in eastern Ontario.

[2] In December 2015, he was informed that the CIU had received three complaints about him from Kimberly Poirier, Local President and two other members.

[3] In September 2016, further to an internal investigation, the CIU's National Executive Committee adopted a resolution that the complainant be removed from his capacity as an official of the CIU local. In February 2017, the PSAC's National Board of Directors suspended his PSAC membership for two years.

[4] The complainant took issue with those decisions and made a complaint with the Public Service Labour Relations and Employment Board ("PSLREB") in May 2017 under ss. 190 and 188(c) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) against the respondents, Ms. Poirier and Jean-Pierre Fortin, CIU National President. He alleges that the respondents engaged in unfair labour practices; namely, they took disciplinary action against him by applying the standards of discipline in a discriminatory manner. He maintains that, Mr. Fortin and Ms. Poirier violated CIU by-laws and the PSAC constitution with respect to administering the three complaints. He contends that Mr. Fortin interfered with the investigative committee to ensure that the report's conclusions would be arbitrary and that he exercised undue influence over the CIU National Executive so that it would not use due diligence when tasked with receiving and voting on the committee's report.

[5] 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 name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("FPSLREB"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*"). In this decision, the FPSLREB, the PSLREB, and the Public Service Labour Relations Board ("PSLRB") are referred to interchangeably as "the Board".

[6] The PSAC, on behalf of the respondents, filed a reply to the complaint on July 10, 2017, in which it argued that the Board was without jurisdiction to hear the complaint as its allegations are beyond the scope of s. 188(c) because it fails to raise any grounds that would support a finding of discrimination, within the meaning of that provision.

[7] On July 19, 2017, the complainant filed a response.

[8] On September 15, 2017, I conducted a teleconference with the parties and informed them that I would determine the issue of jurisdiction before convening a hearing on the merits of the complaint, following which I directed them to present additional submissions in writing on the definition of "discriminatory manner" within the scope of s. 188(c).

[9] In the second paragraph of the complainant's submissions dated September 19, 2017, he stated that some information remained to be disclosed, as follows:

> *I would first like to restate my reply to the Board, when I was asked if there was any other items that I would like to add to the summary that was provided by the adjudicator during the phone call on September 15th. I stated that there were no issues in the way the Investigation Committee, convened by the CIU, undertook its investigation into the matter before the Board. I believe that I can provide email correspondence between myself and the Head Investigator that show that I was not given an opportunity to consider the allegations that were directed act [sic] me, nor was I given an opportunity to offer a rebuttal to those allegations. This resulted in a violation of the rule of law that the investigation was required to uphold. I look forward to providing a more complete description of these circumstances and to forward relevant emails to the Board by way of email when the issue of Jurisdiction [sic] is resolved.*

[10] Given his statement, I determined that it would not be appropriate for me to proceed with the analysis of whether the complainant had established an arguable case that s. 188(c) was breached without affording him an opportunity to provide the information to which he referred in his submissions. I determined that once I received it and the respondents' reply, I would proceed with the analysis.

[11] On July 4, 2018, the parties were asked to provide all remaining material upon

which they would rely, to properly address the issue of whether the complaint falls within the scope of s. 188(c).

[12] On July 9, 2018, the complainant indicated that he had nothing further to add to his submissions. The respondents did not provide any additional submissions either.

[13] For the reasons that follow, I find that the term "discriminatory manner" set out in s. 188(c) does not refer solely to discrimination within the meaning of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*). Its scope is broader. However, the complainant has not established an arguable case that the respondents applied the organization's standards of discipline to him in a discriminatory manner.

II. Analysis

A. Issue I: Is the phrase "discriminatory manner" in s. 188(c) limited to discrimination based on prohibited grounds under the *CHRA*?

[14] Section 190(g) of the *Act* provides that the Board must examine and inquire into any complaint that an employee organization or any person has committed an unfair labour practice within the meaning of s. 185, including those mentioned in s. 188, which states as follows:

> *Unfair labour practices — employee organizations*
>
> ***188*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> > ***(a)*** *except with the consent of the employer, attempt, at an employee's place of employment during the employee's working hours, to persuade the employee to become, to refrain from becoming, to continue to be or to cease to be a member of an employee organization;*
> >
> > ***(b)*** *expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;*
> >
> > ***(c)*** *take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner;*
> >
> > ***(d)*** *expel or suspend an employee from membership in the employee organization, or take disciplinary action against,*

> *or impose any form of penalty on, an employee by reason of that employee having exercised any right under this Part or Part 2 or 2.1 or having refused to perform an act that is contrary to this Part or Division 1 of Part 2.1; or*
>
> ***(e)*** *discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has*
>
> ***(i)*** *testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2 or 2.1,*
>
> ***(ii)*** *made an application or filed a complaint under this Part or Division 1 of Part 2.1 or presented a grievance under Part 2 or Division 2 of Part 2.1, or*
>
> ***(iii)*** *exercised any right under this Part or Part 2 or 2.1.*

[15] Under this provision, Parliament has given the Board a very narrow jurisdiction to interfere in the internal affairs of employee organizations, as was recently noted in *Gilkinson v. Professional Institute of the Public Service of Canada*, 2018 FPSLREB 62 at para. 16. This point was also made in an earlier decision that the respondents relied on in their submissions, *Shutiak v. Union of Taxation Employees - Bannon*, 2008 PSLRB 103 at paras. 11 to 13, where it was explained that the Board's predecessor, the Public Service Staff Relations Board, had no authority to inquire into a bargaining agent's affairs. With the *PSLRA*'s coming into force in 2005 and the PSLRB's creation, an exception was created by the new s. 188, which enabled the Board to inquire into a bargaining agent's internal affairs, but only in certain limited circumstances.

[16] This new recourse did not mean that the Board could act as an appeal body over an employee organization's decision making or that it may act as a final arbiter of all disputes between members of an employee organization (see *Bremsak v. Professional Institute of the Public Service of Canada*, 2013 PSLRB 22 ("*Bremsak 2013*") at para. 495). With respect to s. 188(c), the Board's authority was extended only to when a bargaining agent takes disciplinary action or imposes any penalty against a member, in a discriminatory manner.

[17] In *Shutiak*, the Board stated that although "discriminatory" was not defined in the *PSLRA*, in its view, it referred to the prohibited grounds of discrimination set out in the *CHRA*. At paragraphs 16 and 17, the Board stated the following:

> *[16] The word "discriminatory" is not defined in the* Act *but I find that it refers to the prohibited grounds of discrimination as set out in the* Canadian Human Rights Act. *While the new* Act *does provide the Board with the jurisdiction to inquire into internal union affairs in certain circumstances, the* Act *does not go as far as to allow a member to subject every decision of a bargaining agent to the Board's scrutiny.*
>
> *[17] If it were the intention of the legislator to allow a bargaining agent member to contest internal union decisions on the basis of fairness, the words "arbitrary" or "unfair" would have been used, as was done in section 187. The use of the word "discriminatory", which has a particular legal meaning, is important and restricts the Board's inquiry to the prohibited grounds set out in the federal human rights legislation. As the complainants do not allege that the actions of their bargaining agent are in violation of their human rights, the complaint fails to make out a* prima facie *violation of section 187.*

[18] Section 187 of the *Act* states that no employee organization that is the bargaining agent for a bargaining unit 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."

[19] The respondents point out that the complainant has not made any discrimination allegations within the meaning of the *CHRA* and maintain accordingly that the grounds he raised cannot in any way support a finding that they acted in a discriminatory manner.

[20] I disagree that the scope of the phrase "discriminatory manner" in s. 188(c) is so restricted. Subsequent decisions have extended the definition beyond just discriminatory practices under the *CHRA*. For instance, the complainant referred me to a decision that was issued one year after *Shutiak — Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103 ("*Bremsak 2009*"). The Board held that this provision protects employees from distinctions made against them illegally, arbitrarily, or unreasonably. The Board stated the following at paragraphs 86 and 87:

> ***86*** *In the context of administrative justice and labour relations, a broad interpretation of discrimination within the bounds of the legislation is appropriate, and the Board must consider not only the "… result of the application of disciplinary standards but also the basis for their application and the manner in which they have been applied." Further, in* Daniel Joseph McCarthy, *[1978] 2 Can LRBR 105; cited in*

> Beaudet-Fortin [*v. Canadian Union of Postal Workers* (1997) 105 di 98] *at paragraph 84, the following was stated:*
>
> …
>
> > In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by *[human rights legislation]*; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that there is no fair and rational relationship with the decision being made ….
>
> ***87*** *In my view, those comments can be applied to considerations of discrimination under paragraph 188(*c*) of the* Act*. The goal of preventing discrimination under that provision is inclusive and is achieved by preventing bargaining agents from excluding employees from the activities of an employee organization based on attributed rather than actual abilities. The essence of the protection is to prevent illegal, arbitrary or unreasonable barriers. On the other hand, barriers or distinctions that are legally valid and genuinely based on a rule or policy that has a fair and rational relationship to the decision being made may be valid and defensible. In some cases, the treatment of an employee will be based on a valid distinction rather than prohibited discrimination, even though the distinction has a negative impact on the employee: "[n]ot every distinction is discriminatory." In addition, the employee has the burden to prove that there was discriminatory conduct by a bargaining agent.*
>
> [Emphasis added]

[21] In *Bremsak 2013*, a case involving the same employee as in *Bremsak 2009*, the Board used the same criteria to assess if she had been treated in a discriminatory manner. It found at paragraph 497 that she had "… received no discriminatory treatment, or even arbitrary or otherwise unreasonable treatment …" in the investigations involving her or in the application of a policy to her.

[22] On judicial review, the Federal Court of Appeal noted that the Board had found that the employee organization's process was neither discriminatory nor arbitrary or otherwise unreasonable and concluded that the Board had "committed no error in

finding so" (see *Bremsak v. Professional Institute of the Public Service of Canada*, 2014 FCA 11 at para. 15).

[23] In *Gilkinson*, the Board found that although "discrimination" is not defined in the *Act*, the French version of the *Act* speaks of *distinctions illicites*, or unlawful distinctions, to translate "discrimination". The Board relied on the *Black's Law Dictionary*'s definition, which defines it as "differential treatment". The *Concise Oxford Dictionary* defines the verb "discriminate" as to "make an unjust distinction in the treatment of different people". The Board went on to conclude, at para. 19, that discrimination, within the meaning of this provision, involves an illegitimate distinction based on irrelevant grounds.

[24] I share the interpretation of the term "discriminatory manner" from those decisions. Its scope is not limited to discriminatory practices as defined in the *CHRA*. I note that the *CHRA* is specifically referenced numerous times elsewhere in the *Act* (e.g., ss. 66(2), 93(2), 98(2), 210(1), and 226(2)). Had the legislator intended that the scope of this term be limited to the discriminatory practices defined in *CHRA*, it would have done so explicitly and similarly.

B. Issue II: Did the complainant establish an arguable case that the respondent violated s. 188(c) of the *Act*?

[25] Having determined the Board's very narrow jurisdiction under s. 188 (c) of the *Act*, I must now determine whether, if all the alleged facts are true, there is some indication that the respondents, or more broadly the PSAC or CIU, took disciplinary action against him or imposed a penalty on him by applying standards of discipline in a manner giving rise to illegitimate distinctions based on irrelevant grounds.

[26] The respondent contends that even if the phrase "discriminatory manner" is not limited to breaches of the *CHRA*, as I have determined, the complainant's allegations, if believed, are still on their face insufficient to establish a breach of this provision. The respondent submits that even when analyzed on that basis, the complaint does not meet the s. 188(c) exception to the general principle that the Board lacks jurisdiction to intervene in a bargaining agent's internal affairs.

[27] As was held in *Therrien*, if the Board assumes that alleged facts are true and determines that they would nonetheless be insufficient to establish that a complainant was treated in a discriminatory manner within the meaning of s. 188(c), then the

complaint must be dismissed. The complainant is considered to have failed to establish an arguable case, meaning that even if the allegations are proven, they are insufficient to establish a violation of the *Act* (see also *Bate v. Public Service Alliance of Canada*, 2016 PSLREB 27 at para. 19).

[28] However, to conduct such an analysis, complainants must have been provided with the opportunity to place all their proposed allegations before the Board. The complainant has had many occasions to present his allegations and the materials supporting them. Aside from the "concise statement" that accompanied his initial complaint dated May 11, 2017, he filed supplementary particulars on June 3, 2017, as well as submissions in reply to the respondent's objection on July 19, 2017, and September 19, 2017. On October 10, 2017, he declined to file any additional submissions on the "application for jurisdiction." On July 4, 2018, when asked to provide the Board with all remaining material he was relying on, he stated that he had nothing further to add. In my view, the complainant has had ample opportunity to describe all the facts that he alleges establish a breach of s. 188(c) of the *Act*.

[29] The complainant maintains that he was subjected to a disciplinary process between December 1, 2015, and February 10, 2017, while he was a member and steward of the CIU's St. Lawrence Branch (CIU Local 27) further to complaints made by the local president, Ms. Poirier, and two other CIU members.

[30] On December 9, 2015, he received a letter from Mr. Fortin stating that he and Ms. Poirier would review and take action with respect to the three complaints. The complainant alleges that that violated the CIU's by-laws. He claims that Ms. Poirier lied to the investigative committee.

[31] He maintains that by agreeing to administer Ms. Poirier's complaint, Mr. Fortin violated both the CIU's by-laws and the PSAC's constitution. He also alleges that Mr. Fortin violated those by-laws by participating in and selecting the investigation committee.

[32] The complainant also objects to the fact that all three complaints against him were dealt with in a single disciplinary process. He maintains that they should have been dealt with separately in that they are different from Ms. Poirier's complaint.

[33] He alleges that Mr. Fortin endeavoured to influence the investigative committee

that Mr. Fortin appointed to ensure that the report's conclusions would be arbitrary and that Mr. Fortin used his influence over the CIU National Executive to ensure that it would not use due diligence when it was tasked with receiving and voting on the committee's report.

[34] However, the complainant did not advance any allegations of illegitimate distinctions being made against him *based on irrelevant grounds*. As in *Gilkinson*, no grounds were invoked. The complainant has not alleged that the respondents took disciplinary action against him or that they imposed a penalty on him by applying the by-laws or the PSAC's constitution based on illegitimate grounds.

[35] The essence of the complainant's allegations is simply that the respondents applied the CIU's by-laws and the PSAC's constitution incorrectly and arbitrarily. Without more, there is no arguable case that disciplinary action was taken against him or a penalty was imposed on him in a *discriminatory* manner within the scope of s. 188(c). The Board has no authority to deal with the issues that he has raised.

[36] Therefore, the complaint is dismissed.

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

(The Order appears on the next page)

III. Order

[38] The complaint is dismissed.

August 16, 2018.

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board