

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

YETA-YALL SAMBA

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Defendant

RE: Complaint under Section 23 of the
Public Service Staff Relations Act

Before: Evelyne Henry, Deputy Chairperson

For the complainant: Himself

For the defendant: Pascale-Sonia Roy, Counsel

Heard at Ottawa, Ontario,
February 9 and 10, 1999.

DECISION

On April 29, 1998, Yeta-Yall Samba filed a complaint under section 23 of the *Public Service Staff Relations Act* against the Professional Institute of the Public Service of Canada (PIPSC) to the effect that his bargaining agent refused to file a grievance opposing his release which took effect on March 6, 1998. This complaint was sent to the PIPSC on May 1, 1998.

On the complaint form, Mr. Samba requested that the Public Service Staff Relations Board (PSSRB) issue an order to correct the situation and to allow a grievance to be filed.

The hearing of this complaint was originally scheduled for November 23, 1998. At the request of the defendant, it was postponed to February 9 and 10, 1999. On January 19, 1999, Ms. Roy requested that the hearing be postponed until later in February or in March because her main witness was out of the country. Mr. Samba objected to the postponement and the PSSRB refused to postpone the hearing further.

A grievance was filed for Mr. Samba on May 1, 1998 by the PIPSC, which provided representation regarding the grievance at two levels of the grievance procedure. The replies at these two levels were negative and Mr. Samba referred his grievance to adjudication.

Mr. Samba testified on his own behalf but was not cross-examined immediately because the defendant requested that Michel Charette be heard because he had had to be recalled from Florida to testify given Mr. Samba's objection to a postponement of the hearing of the complaint. Since Mr. Samba had encountered transportation problems, the hearing had been delayed until 1:00 p.m. and Mr. Charette had to leave again at 6:00 p.m.

Mr. Samba accused the PIPSC of not respecting the time limits for the filing of the grievance. It was his opinion that he had been prejudiced because of this fact since the employer mentioned it in its replies at both levels of the grievance procedure. Mr. Samba did not specify the nature of this prejudice or how it might be corrected. He wanted the time limits waved and the grievance to be heard on its merits.

Mr. Samba's evidence was that Michel Paquette of the PIPSC met with him within the time limits to file the grievance but that he refused to do so after he received a

copy of the letter of "dismissal". Mr. Paquette was of the opinion that Mr. Samba could not file a grievance because he was no longer an employee.

Mr. Samba stated that he considered representing himself but that, because he did not have the means to cover all of the costs, he had "a choice between abandoning his case or having the Institute give him a hand". He went back to the PIPSC and spoke with Denis Cardinal, Mr. Paquette's supervisor.

Mr. Samba testified that, prior to speaking with Denis Cardinal, he spoke to Dennis Dumoulin of the PSSRB to find out if he had any recourse since Mr. Paquette did not want to represent him. Mr. Dumoulin provided him with a copy of the *Public Service Staff Relations Act* and explained to him the form to be filled out if he wished to file a complaint. Mr. Samba signed the complaint on April 8 but did not submit it until April 28 or 29, 1998. He spoke to Denis Cardinal between April 8 and April 28. Denis Cardinal assured him that the time limits were not important and that he would assign his file to Mr. Charette, who would contact him and would represent him. Two weeks later, Mr. Samba met with Mr. Charette and the grievance was filed on May 1, 1998 (see tab 8 in the book of documents). The hearing of the grievance at the first level of the grievance procedure took place on June 9, 1998. Mr. Samba testified that he had forgotten to withdraw his complaint. When he received the reply to his grievance (see tab 14 in the book of documents) in which the Director dismissed the grievance because of the delay, he called Denis Cardinal, who had assured him that the time limits would not be important. He learned that there was another level of the grievance procedure at the deputy minister level. Mr. Charette assured him that, at that level, if the department was at fault, the Deputy Minister would not consider the time limits and there would be a positive response.

When the Deputy Minister's reply was received (see tab 21 in the book of documents), Mr. Samba decided to reactivate his complaint. It is Mr. Samba's view that the grievance was dismissed because of the PIPSC's initial refusal to represent him. He felt that, if the time limits had been respected, the reply would have been different. Mr. Samba stated that it was not in the employer's interest to make every effort to review his case because the grievance was not filed within the time limits. Mr. Samba is convinced that the delay was a factor and that the employer did not reply to the representations made at the first or at the last level of the grievance procedure for this reason.

Mr. Samba admitted that Mr. Charette presented all of the acts relevant to the grievance, in accordance with the approach they had agreed upon during their preparation. He also admitted commenting on the grievance during both of the meetings with the employer. Mr. Samba made a comment at the last level of the grievance procedure with respect to the delay, indicating that he had filed his grievance on time with the PIPSC and that they had promised him that the time limits would not be a factor.

Mr. Samba was uncertain of the dates of his communications with the PIPSC regarding his problems and his termination, but he is certain that he had a meeting on March 5 or 6, 1998 with Mr. Paquette because he is certain that it took place within the time limits set for filing a grievance. He admitted cancelling a meeting on the morning of February 23, 1998 that had been set for that date by Mr. Paquette. He admitted telling Mr. Paquette that he was going to do something other than file a grievance by going to the Canadian Human Rights Commission. He stated that he later changed his mind and contacted Mr. Paquette by leaving a message in his voice mail box saying that he wanted to oppose the "dismissal". Mr. Samba remembered having one meeting with Mr. Paquette. He remembered and that a meeting had been cancelled prior to the meeting at which he explained his case to Mr. Paquette. Mr. Samba explained that he did not have his letter of "dismissal" in hand at that meeting and that Mr. Paquette had to take steps to obtain a copy of it.

Mr. Samba indicated that he had referred his grievance to adjudication and that the dates of May 26 and 28 had been entered on the hearing roll. He testified that he had also contacted the Canadian Human Rights Commission to file a complaint but that he was told to wait until the grievance procedure had been completed because "both could not be done at the same time".

Mr. Charette testified for the PIPSC. He is a staff relations officer and he took over the Samba file between April 24 and 26, 1998 at Denis Cardinal's request. He met with Mr. Samba on May 1, 1998 after an exchange of communications by voice messages on April 27, 1998. Mr. Charette had taken notes on all of the relevant facts with respect to Mr. Samba's file. He identified and read the notes from that meeting, which appear at tab 7 in the book of documents. Mr. Charette met with Mr. Samba again on June 2, 1998 to prepare the presentation of the grievance that was to take place on June 9, 1998. In the letter from John Bremner, staff relations advisor,

confirming the date of June 9 for the grievance hearing, the employer agreed to hear the grievance on its merits (see tab 10 in the book of documents). Mr. Charette identified his preparation notes at tabs 11 and 12 in the book of documents.

Mr. Charette stated that the grievance hearing on June 9 lasted approximately 45 minutes. He felt that there had been an agreement to disregard the time limits and that he was there to show the validity of Mr. Samba's case. Mr. Charette stated that he had agreed with Mr. Samba that he would lead the discussion: Mr. Samba would provide the background; Mr. Charette would present the arguments with respect to the unacceptable manner in which Mr. Samba's probationary period had been handled, contrary to the training program, the fact that he had never been given the chance to do the work, and the way in which the probationary period had been terminated; and then Mr. Samba would make whatever comments he wished. Mr. Charette took notes during the hearing (see tab 13 in the book of documents), which confirm his testimony.

When the negative reply at the first level of the grievance procedure was received, Mr. Charette was on holidays and his colleagues assumed responsibility for forwarding the grievance to the last level of the grievance procedure (see tabs 15 to 18 inclusive in the book of documents).

The meeting at the last level of the grievance procedure was set for October 19, 1998. An hour before, Mr. Charette met with Mr. Samba to prepare; his notes are reproduced at tab 19 in the book of documents and they show, on the first page, what was discussed during this meeting and at the hearing at the last level of the grievance procedure. During a conversation with Monique Paquin on October 26, 1998 (see notes at tab 20 in the book of documents), the latter told Mr. Charette that Mr. Samba had shown by his comments on the time limits at the grievance hearing his lack of understanding of the procedure, a similar lack of understanding to that he had shown regarding the tasks he had been given. Mr. Charette reproached Ms. Paquin for having tricked Mr. Samba.

Mr. Charette reviewed Mr. Samba's file and the reply of Deputy Minister Michel Cardinal and concluded that there was no disciplinary element that would allow the grievance to be sent to adjudication. He wrote a letter to this effect to Mr. Samba on December 14, 1998 (see tab 22 in the book of documents). The letter explained the PIPSC procedure for appealing a decision not to continue representation. He spoke to

Mr. Samba about the contents of his letter on December 23, 1998 (see tab 23 in the book of documents). Mr. Samba took advantage of this procedure and met with Georges Nadeau on January 7, 1999 (see the notes at tab 24 in the book of documents). Mr. Nadeau explained to Mr. Samba that there were no grounds to proceed to adjudication, that the PIPSC had limited resources and that it would be of no use to refer the grievance to the PSSRB because it did not have jurisdiction to hear a grievance against a release during a probationary period. At that meeting, Mr. Samba was warned that the one-year period for filing a complaint with the Canadian Human Rights Commission was about to expire and he was encouraged to file the complaint before February 19, 1999.

Under cross-examination, Mr. Charette stated that he and Mr. Samba had agreed not to raise the issue of the time limits but that, in response to a question from the employer, Mr. Samba had described all of the action he had taken including his complaint against the PIPSC. Mr. Charette testified that Deputy Minister Michel Cardinal did not contact the PIPSC and that the employer's investigation following the meeting at the last level of the grievance procedure involved departmental managers and not the PIPSC. With respect to his notes of his conversation with Ms. Paquin, Mr. Charette explained that it was he who raised the issue of the trick question that the employer had asked Mr. Samba at the meeting at the last level of the grievance procedure and that Ms. Paquin had mentioned that the complainant's responses illustrated his lack of understanding. She also questioned Mr. Samba's credibility, given that he had indicated that he had been unemployed for 5 years, when in fact he had worked during that period. Ms. Paquin allegedly told Mr. Charette that the managers had told her that Mr. Samba had difficulty understanding what they said to him.

The cross-examination of Mr. Samba took place after the testimony of Mr. Charette and ended at 5:00 p.m. Mr. Samba did not have any other witnesses to call. Ms. Roy indicated that the testimony of Mr. Paquette, her last witness, would be quite long. I decided that it was a good time to adjourn and, since two days had been set aside for the hearing, we would continue at 9:30 a.m. on February 10, 1999 at the same place. I asked Mr. Samba if he clearly understood that the following morning the PIPSC would continue presenting evidence, specifically Mr. Paquette's testimony, and that the arguments would follow, beginning with his, to which Ms. Roy would respond. Mr. Samba nodded his head in agreement.

The next morning, Mr. Samba did not appear at 9:30 a.m. I adjourned until 10:00 a.m. to determine whether Mr. Samba had called to indicate he would be late or that there was a problem. The PSSRB staff tried to reach Mr. Samba at the number appearing in the file. It was a number that connected to the voice mail of an individual other than Mr. Samba.

At 10:00 a.m., when Mr. Samba still had not arrived, Ms. Roy asked that I dismiss the complaint as frivolous, adding that Mr. Samba's conduct was vexatious. I refused Ms. Roy request and asked her to proceed with Mr. Paquette's testimony. Should Mr. Samba arrive later, I would inform him of the evidence received in his absence since the notice of hearing stated "that if you fail to attend the hearing or any continuation thereof, the presiding member of the Board may dispose of the matter on the evidence and representations placed at the hearing without further notice to you".

Mr. Paquette has been a staff relations officer with the PIPSC since 1987. He uses a book or log in which he records calls and messages received or returned, and an agenda, in which he records appointments and meetings. Mr. Paquette identified, at tab 3 in the book of documents, photocopies of extracts from his calls and messages log. He highlighted in yellow the messages or calls from Mr. Samba. He learned of Mr. Samba on February 9, 1998 and he exchanged telephone messages and conversations on numerous occasions, all of which are noted at tab 3 in the book of documents.

Mr. Paquette testified that he met with Mr. Samba for the first time on March 13, 1998 and he took notes at that meeting (see tab 6 in the book of documents). He stated that, on February 19, 1998, he set up a meeting with Mr. Samba for February 23, 1998 to discuss the latter's "dismissal" but that Mr. Samba cancelled that meeting on February 20, 1998 by means of a message left in Mr. Charette's voice mail box; he stated that he was going to do something other than file a grievance. At tab 4 in the book of documents, there is a copy of a note on an exchange of messages with Mary-Lynn Adair on this topic. This note is in Mr. Samba's file.

Mr. Paquette obtained from Mr. Samba a copy of his offer of employment letter (tab 1 in the book of documents). He also obtained a copy of the training manual for trainees (see tab 2 in the book of documents). Since Mr. Samba did not have a copy of his letter of "dismissal", Mr. Paquette contacted the Department of Public Works and

Government Services Canada to get it and he received it on March 19, 1998 (see tab 5 in the book of documents).

When he received Mr. Samba's letter of release during his probationary period, Mr. Paquette realized that it was too later to file a grievance because the termination of employment had taken effect on March 6, 1998, which meant that Mr. Samba had already ceased to be an employee. He called Mr. Samba on March 19, 1998 to tell him that the employer would send him his pay cheque in the mail and that it was too late to file a grievance. On March 20, he received a call from Mr. Samba, who told him that his "dismissal" had taken effect on February 24, 1998 and asking him what had happened to the 25 working days allowed to file a grievance. Following this call, Mr. Paquette called Mr. Samba back on March 23 to tell him that he was no longer an employee within the meaning of the *Public Service Staff Relations Act* and that the 25 days were no longer applicable because he was no longer an employee.

Mr. Paquette did not have any further contact with Mr. Samba until Denis Cardinal approached him around April 15 or 16, 1998 to tell him about a call from Mr. Samba. Denis Cardinal did not share Mr. Paquette's opinion on how to interpret the right to file a grievance following a release during a probationary period. Mr. Cardinal decided that, since Mr. Samba was from Public Works, which was Mr. Charette's portfolio, he would assign the file to Mr. Charette; perhaps through his contacts in the departments, he would be able to get an agreement to hear the grievance on its merits.

Mr. Paquette testified that, in his experience with releases during a probationary period, he had always been informed before the period of advance notice had expired and that the grievances had always been submitted prior to the termination of employment. This was the first time that he had to deal with an employee who had already been "terminated". He had interpreted the definition of employee in the *Public Service Staff Relations Act* as meaning that, when a person was no longer an employee, he or she no longer had the right to file a grievance. Following his discussions with Denis Cardinal, he changed his opinion. He had given Mr. Samba his mistaken opinion on two occasions, but Denis Cardinal and Mr. Charette worked to find a solution so that the grievance could be heard on its merits. He told himself that, if the case had merit, the delay would not penalize Mr. Samba.

ARGUMENTS

Mr. Samba was not present at the time arguments were presented and did not present any.

Ms. Roy stated that there was no point in proceeding further and that, in light of Mr. Samba's absence, the exercise that morning had been futile. According to Ms. Roy, continuing on would set a dangerous precedent. A person filed a complaint, expressed his opinions, provided little evidence and disappeared without stating what he wanted or was claiming. Because of a complaint signed on April 8 and filed on April 29, 1998, an entire process was launched. Given the process, the PSSRB had been more than fair to the complainant. The start of the hearing had been delayed to accommodate the complainant so that he could present his position and then, after confirming that he would be there the next day, he did not have the decency to show up or to notify the tribunal of his absence. The defendant asked that the complaint be dismissed solely on the grounds of abandonment.

Subject to her original position, Ms. Roy also stated that the complaint should be dismissed because there is no evidence in the record that the bargaining agent acted in bad faith or in an abusive, wilful, arbitrary or discriminatory manner.

In his opening statement and during his testimony, Mr. Samba stated that he had been prejudiced by the fact that his grievance was not submitted on time. The evidence of said prejudice is allegedly the fact that the employer dismissed his grievance while referring to the time limits in the first paragraph of the grievance reply. Mr. Samba did not consider the evidence to the effect that the employer dealt with the merits of the grievance and that it took the trouble to address the arguments presented by the bargaining agent and by Mr. Samba. Ms. Roy referred me to tab 14, which is the reply at the first level, and to tab 21, the reply of Deputy Minister Michel Cardinal. It is clear from Mr. Bremner's letter to Mr. Charette, in evidence at tab 10, that the bargaining agent had an agreement with the employer whereby the latter agreed to consider the grievance on its merits. Mr. Charette made representations with respect to the merits of the grievance, that is, the reason why the release was unfair and unjustified. Mr. Samba confirmed that he had an opportunity to present his position at the various levels of the grievance procedure and that he had taken advantage of those opportunities.

It is clear from Mr. Charette's testimony, which was not contradicted and which is supported by the notes in the file (in evidence at tabs 11, 12, 13 and 19), that Mr. Charette presented all of the facts and arguments relating to Mr. Samba's case. Accordingly, Mr. Samba definitely was represented by the bargaining agent based on the merits of the grievance. This is not a situation where the employer refused to have meetings or to consider the merits of the grievance on the grounds that it was presented outside the time limits. Therefore, there was no prejudice. The complaint is without foundation because the grievance procedure was followed and the employer considered the merits of the grievance. Further, it is known that Mr. Samba referred his grievance to adjudication and that a date for the hearing has been entered on the roll.

With respect to the corrective action sought by Mr. Samba, it is evident that he has already received it. Mr. Samba filed his complaint so that his grievance would be presented and, when the grievance was presented, he "forgot to withdraw it"; that was his testimony. The complaint should be dismissed because Mr. Samba already has the corrective action he was seeking.

Mr. Samba reinstated his complaint because he appears to hold the bargaining agent responsible for the employer's dismissal of the grievance. This is where the analysis of the status of an employee on probation becomes important. It is necessary to consider the legal position of an employee on probation with respect to his right to refer a grievance to adjudication. It is not strong; the law removes this right; he has the right to file a grievance, to be heard on the merits of the grievance and to receive a reply from the employer. His only right is to express his objections, during the grievance process, to the reasons for his release, although there is no guarantee that the employer will change its mind.

As for Mr. Paquette's initial mistake, Ms. Roy argued that it was made in good faith by the bargaining agent and that it was without consequence because, ultimately, a grievance was filed and the employer considered it on the merits.

Ms. Roy invited me to read section 28 of the *Public Service Employment Act*, and subsection 92(3) of the *Public Service Staff Relations Act*. She referred me to *Deschamps* (Board file 148-2-205) and specifically at pages 10 to 12, and to *Perreault* (Board file 166-2-26094) at pages 23, 24, 25 and 26.

REASONS FOR DECISION

Is it possible to conclude from the complainant's conduct that his complaint was frivolous or vexatious? One might be tempted to make such an assumption on hearing the complainant say of his complaint that he had "forgotten to withdraw it" when the grievance was presented and defended by the PIPSC, and when he did not know what to say when asked what he expected in the way of an order from the PSSRB given that the corrective action requested in his complaint had already been granted. Further, Mr. Samba waited until a half-hour before the hearing to indicate his transportation problems from Montréal to Ottawa and to request a postponement. It was at the suggestion of the officer of the Clerk that he decided to take the 10:00 a.m. bus and to request that the hearing be delayed because the officer of the Clerk had indicated to him that, in his absence and given the decision of the PSSRB to reject the request for postponement by the defendant - a request to which Mr. Samba objected - he ran the risk of having his complaint dismissed if he did not make an effort to attend the hearing.

When at the end of the first day of the hearing I explained to Mr. Samba that it was normal to adjourn at 5:00 p.m. when there was still quite lengthy testimony to hear, and that the hearing would continue the following day at 9:30 a.m. in the same place to hear the PIPSC's last witness and arguments, he gave no indication that he planned to be absent. At the beginning of the hearing, Mr. Samba was given an explanation of the procedure and of its various steps and of the order to be followed. Mr. Samba was assured of the tolerance of the PSSRB in the event that he confused the evidence and arguments and was told that he would have an opportunity after the testimony had been heard to present his arguments and to submit reasons why he believed that his complaint should be upheld and to explain what he expected from the PSSRB. When I asked Mr. Samba at 5:00 p.m. if he understood what would happen the next day, he nodded his head to signal that he had understood.

Mr. Samba did not appear the next day and did not communicate in any way with the PSSRB. Should this lack of basic courtesy be interpreted as an abandonment of the complaint? The notice of hearing states: "And further take notice that if you fail to attend the hearing or any continuation thereof, the presiding member of the Board may dispose of the matter on the evidence and representations placed at the hearing without further notice to you". Unfortunately, Mr. Samba's address is a post office box

and the telephone number in the file appears to no longer be valid because it corresponds to a voice mail box assigned to someone other than him. It was therefore very difficult to reach Mr. Samba quickly. It is therefore impossible for me to conclude that Mr. Samba decided to abandon his complaint. Nor can I conclude, from his testimony and his opening statement, that Mr. Samba decided to reinstate his complaint for frivolous reasons or to annoy the PIPSC. Mr. Samba did come from Montréal to state that he believed that he had suffered prejudice from the late filing of his grievance and to ask that I wave the time limits and that the employer consider the merits of his grievance. He did not present any arguments with respect to the corrective action he expected from the PSSRB, as he was told he would be asked to do once all of the evidence had been heard. That does not necessarily indicate a vexatious attitude toward the PSSRB or the PIPSC. At the very least, it might indicate that Mr. Samba did not understand the procedure. I cannot therefore grant the request from the defendant to dismiss Mr. Samba's grievance solely on the grounds of his absence from the hearing.

While Mr. Samba's complaint cannot be considered frivolous or vexatious, it does not mean that it is with foundation. Mr. Samba filed a complaint in an effort to get his bargaining agent to represent him in a grievance against his release. The corrective action that he was requesting was granted the same day that the PSSRB sent his complaint to the PIPSC. The PIPSC had already taken action to correct Mr. Paquette's mistake and the representation that Mr. Charette provided to Mr. Samba fully met his expectations, except that it did not produce the result that he wanted.

Mr. Samba asked me to wave the time limits so that the grievance could be considered on its merits. That has already happened, in that the employer heard the representations from Mr. Charette and Mr. Samba at two levels of the grievance procedure and replied to them by dismissing Mr. Samba's claims. Mr. Samba did not require the approval of his bargaining agent to file a grievance against his release, but he chose to wait for his grievance to be submitted by the PIPSC. He was entitled to ask his bargaining agent for assistance, but the employer was also entitled to invoke the time limits in its reply, even though it rejected the grievance on the merits. Mr. Samba did not provide any evidence, any indication that the employer would have dealt differently with his grievance on the merits if it had been filed within the time limits. If, in fact, the employer did not "make every effort to review his case", it was not because Mr. Samba was late but rather because there are far fewer constraints on the

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employer under the *Public Service Employment Act* when it releases an individual during a probationary period than when it terminates an employee's employment.

I must dismiss Mr. Samba's complaint because the evidence shows that he was, in fact, represented by the PIPSC with respect to his grievance and that said grievance was heard on its merits.

There remains Mr. Samba's allegation that the grievance was not filed within the time limits because of an error by the bargaining agent. It is not within the jurisdiction of the PSSRB to substitute its judgment for that of bargaining agents with respect to whether a grievance will be pursued. However, the PSSRB must ensure that the bargaining agent does not act in bad faith or in an abusive, wilful, arbitrary or discriminatory manner. Mr. Paquette's mistake was made in good faith. The internal recourse available to the bargaining agent in cases where a decision of its representatives is questionable was made available to Mr. Samba and he took advantage of it. The bargaining agent took steps to correct the mistake made and, fortunately, the mistake did not have any tangible impact for Mr. Samba.

As for the case law submitted by the defendant, it is not relevant since Mr. Samba was not complaining about the PIPSC's refusal to refer his grievance to adjudication. If that were the case, *Deschamps (supra)* would be of immense importance, but it is not.

Nor do I have to rule on the jurisdiction of the PSSRB to hear the reference to adjudication of Mr. Samba's grievance because I am only seized with his complaint to the effect that the PIPSC refused to represent him in the presentation of a grievance, a complaint that I must dismiss for the reasons given above.

**Evelyne Henry,
Deputy Chairperson.**

OTTAWA, March 15, 1999.

Certified true translation

Serge Lareau