File: 125-2-88

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ANDREW REEKIE

Applicant

and

KEN THOMSON

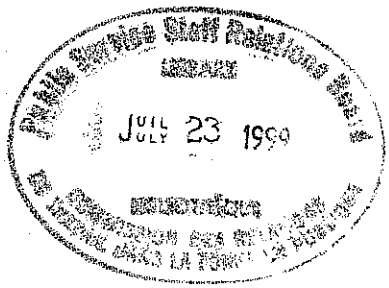
Respondent

RE: Request for review under section 27 of the Public Service Staff Relations Act

Before: J. Barry Turner, Board Member

For the Applicant: Himself

For the Respondent: J. Raymond Dionne



(Decided without an oral hearing)

On December 22, 1998, the Board found that it was without jurisdiction to entertain a complaint filed by Mr. Reekie under section 23 of the *Public Services Staff Relations Act* (*PSSRA*), to the effect that the employer had violated subsections 8(1) and 9(1) of the *PSSRA*, because this right was restricted to employee organizations, as defined in the *PSSRA* (Board file 161-2-855).

On January 20, 1999, Mr. Andrew Reekie's representative applied to the Board, under section 27 of the *PSSRA*, for a review of that decision, alleging that it was "illogical, unreasonable and contrary to the principles of natural justice." He submitted that Mr. Reekie had a direct interest in his complaint, that he had a right to file it and that the Board was duty-bound to investigate it. This application read as follows:

. . .

> *Mr. Reekie has asked for advice and council* [sic] *in respect to the above noted file.*
>
> *Mr. Reekie is making application for a judicial review of the decision, but I have pointed out to him that he can apply for a Board review of the decision under Section 27 of the Act, and Mr. Reekie is making such application under Board Regulation 8 (4) herewith:*
>
> > *27. (1) Subject to subsection (2), the Board may review, rescind, amend, alter or vary any decision or order made by it, or may re-hear any application before making an order in respect thereof.*
> >
> > *(2) Any rights acquired by virtue of any decision or order that is reviewed, rescinded, amended, altered or varied pursuant to subsection (1) shall not be altered or extinguished with effect from a day earlier than the day on which the review, rescission, amendment, alteration or variation is made.*
>
> *We submit that Sections 8, 9 and 10 of the Act are clearly marked as prohibitions. We further submit that to attempt to extrapolate 'rights' for the parties prohibited from specific actions by this section of the Act is illogical, unreasonable and contrary to the principles of natural justice.*
>
> *The right to lodge a complaint for a transgression of Sections 8, 9 or 10 lies in Section 23. The language of Section 23 of the Act is clear and unambiguous. There is no limitation or restriction whatever in respect to whom may make a*

complaint to the Board. Allowing Mr. Turner's decision to stand will effectively remove rights of complaint that Mr. Reekie enjoys under the Act, and will remove the rights of the quarter million employees covered by the Act.

The common law requirement that a complainant have an interest in the subject of a complaint is met in Mr. Reekie's case. As an employee, he has a direct interest in representation when his employer calls him to task for alleged behaviour that may result in disciplinary action. Whether his union is of the opinion that he was granted access to adequate representation or not, or chooses to ignore his complaints is irrelevant. Mr. Reekie enjoys the right to file a complaint under Section 23 and the Board is duty bound to investigate that complaint.

*We submit that Section 23 of the Act clearly requires the Board to examine and inquire into **any** complaint made to it in respect to failure to observe prohibitions under sections, 8, 9 or 10 of the Act. Mr. Newman's attempt to avoid an investigation into this matter cannot be allowed to deter the Board from its mandate under Section 23.*

> *23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(a) to observe any prohibition contained in section 8, 9 or 10;*

We respectfully point out that that the prohibitions under Sections 8, 9 and 10 are taken most seriously as illustrated under Section 24 of the Act:

> *24. (1) Where any order of the Board made under section 23 directs some action to be taken and the order is not complied with within the period specified in it for the taking of that action, the Board shall forward to the Minister through whom it reports to Parliament a copy of its order, a report of the circumstances and all documents relevant thereto.*
>
> *(2) The Minister shall cause the copy of the order, the report and the relevant documents referred to in subsection (1) to be laid before Parliament within fifteen days after receipt thereof by the Minister or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting.*

The powers of the Board to conduct the examination and inquiry mandated under Section 23 are articulated under Section 25 of the Act:

> *25. The Board has, in relation to the hearing or determination of any proceeding before it, power*
>
> *(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board deems requisite to the full investigation and consideration of matters within its jurisdiction, in the same manner and to the same extent as a superior court of record;*
>
> *(b) to administer oaths and solemn affirmations;*
>
> *(c) to receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it sees fit, whether admissible in a court of law or not and, without limiting the generality of the foregoing, to refuse to accept any evidence that is not presented in the form and within the time prescribed;*
>
> *(d) to require the employer to post and keep posted in appropriate places any notices that the Board deems necessary to bring to the attention of any employees any matter or proceeding before the Board;*
>
> *(e) subject to such limitations as the Governor in Council in the interests of defence or security may prescribe, to enter any premises of the employer where work is being or has been done by employees and to inspect and view any work, material, machinery, appliances or articles therein and to interrogate any person respecting any matter;*
>
> *(f) to enter on the premises of the employer for the purpose of conducting representation votes during working hours; and*
>
> *(g) to authorize any person to do anything that the Board may do under paragraphs (b) to (f) and to require the person to report to the Board thereon.*

> *We submit that the Board failed to carry out its mandate to adequately examine and inquire into Mr. Reekie's complaint as required under the Act. We further submit that in the event that the Board chooses to refuse to consider Mr. Reekie's request for a review of his complaint, we will have no alternative but to proceed with our application to the Federal Court for a judicial review and a Writ [sic] Mandamus requiring the Board to carry out its mandate under the Act.*
>
> *Thank you for your consideration of our position. We await your further advice on this matter.*
>
> . . .
>
> [Emphasis in the original]

The respondent objected to the application on February 12, 1999. He pointed out that Mr. Reekie was attempting to re-argue his case, and submitted that Mr. Reekie "has provided no change of circumstances, no new evidence, no compelling reasons nor any novel insight which had not already been considered or disposed of by the Board." His objection stated that:

> . . .
>
> *I have carefully examined Mr. Feldsted's letter of January 20, 1999 in which he claims to act as the representative of Mr. Reekie in his application for review pursuant to section 27 of the Act against Mr. Turner's decision (file no [sic] # 161-2-855).*
>
> *The employer is opposed to this application for the following reasons:*
>
> 1. *Mr. Reekie is trying to reargue a decision of the Board by resorting to section 27 to have his case's deficiencies rectified;*
>
> 2. *The complainant has provided no change of circumstances, no new evidence, no compelling reasons nor any novel insight which had not already been considered or disposed of by the Board;*
>
> 3. *Mr. Reekie had ample opportunity to submit representations, formulate arguments and call evidence at the original hearing;*
>
> 4. *In the circumstances, the employer invites the Board to exercise its power of review carefully and*

> *judiciously and to dismiss the application without a hearing.*
>
> *In view of the above, the employer alleges that Mr. Turner's decision to decline jurisdiction in file 161-2-855 should be maintained. However, the employer reserves the right to submit additional arguments, if necessary.*
>
> *Should additional information be required, please communicate with me. . . .*
>
> . . .

The Board then informed the parties that it intended to deal with this application by way of written submissions. Mr. Reekie responded personally, by providing the Board with its written submissions on March 3, 1999, in which he re-stated the argument put forward by his representative:

> . . .
>
> *I submit that Sections 8, 9 and 10 of the Act are clearly marked as prohibitions. I further submit that to attempt to extrapolate 'rights' for the parties prohibited from specific actions by this section of the Act is illogical, unreasonable and contrary to the principles of natural justice.*
>
> *When talking of natural justice this is part of what is involved, Mr. Turner's decision infringes on my right to have a complaint under section 23 of the Act heard. This restriction on the right to complain under section 23 of the Act is not contained in legislation. This restriction on the right to complain under section 23 of the Act is not contained in precedent.*
>
> *This restriction is an invention and proposal of the Employer (or in my case the employer's representative) which has been affirmed by Mr. Turner. This is a precedent that cannot be allowed to stand as it infringes on an employee's right to be heard without support to make this restriction to legislation and thus violates the principles of natural justice.*
>
> *The right to lodge a complaint for a transgression of Sections 8, 9 or 10 lies in Section 23. The language of Section 23 of the Act is clear and unambiguous. There is no limitation or restriction whatever in respect to whom may make a complaint to the Board. Allowing Mr. Turner's decision to stand will effectively remove rights of complaint that I enjoy under the Act, and will remove the rights of the quarter million employees covered by the Act.*

Further, Mr. Turner's decision ignores the possibility that it can be the employee organization (union) itself that fails to comply with the prohibitions under Sections 8, 9 or 10 of the Act. Accepting Mr. Turner's decision would mean that only the union would be empowered to complain against itself which defies all reason and fundamentally change the prohibitions under Section 8 (1).

I submit that there is an onus on the union as well as on the employer to comply with the prohibitions under the Act as well as a right for an employee to file a complaint against either party that fails to observe the prohibitions.

The act itself deals directly with the participation of employees and provides for the rights of individuals. One of the "lawful activities" provided to myself and all individuals employed by the Federal Government of Canada is to be allowed to file a complaint as an individual under section 23 of the Act.

> *6. Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which he is a member.*

The right to have a union representative during a disciplinary hearing is included within my rights according to section 6 of the Act.

The common law requirement that a complainant have an interest in the subject of a complaint is met in my case. As an employee, I have a direct interest in representation when my employer calls me to task for alleged behaviour that may result in disciplinary action. Whether my union is of the opinion that I was granted access to adequate representation or not, or chooses to ignore my complaint is irrelevant. I still enjoy the right to file a complaint under Section 23 and the Board is duty bound to investigate that complaint.

*I submit that Section 23 of the Act clearly requires the Board to examine and inquire into **any** complaint made to it in respect to failure to observe prohibitions under sections 8, 9 or 10 of the Act. Mr. Newman's attempt to avoid an investigation into this matter cannot be allowed to deter the Board from its mandate under Section 23:*

> *23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*

> *(a) to observe any prohibition contained in section 8, 9 or 10;*

The precedent has been established by the Public Service Staff Relations Board with Yvon Tarte's decision in Wendy Evans and Treasury Board (File: 166-2-25641) with relations to the denial of representation during a discipline hearing. The following is a quote from Mr. Tarte's decision from page 9:

> *"Arbitrator Burkett in Re Hickeson-Langs Supply Co. and Teamsters Union, Local 419 (1985), 19 L.A.C. (3d) 379 properly described union representational rights as "contractual due process". He states at page 392:*
>
> > *"These safeguards are in the nature of a contractual due process. While it may seem unfair to the employer to have its actions found to have been null and void, the due process provisions are central to the representation provided under the collective agreement and, in our view, there is no other way to give real meaning to them.""*

Just as in the Evans case, my rights to union representation were denied to me by Mr. Thomson. The following quote from my Harassment Complaint Report from page 7 will confirm this:

> *"The union representative indicated that during the Disciplinary Hearing the Respondent informed her that she could not speak. The union representative stated that she was not afforded the opportunity to speak upon the Complainant's behalf in any way during that meeting."*

The right that I enjoy to representation during a discipline hearing is further granted to me and all employees of the Correctional Service of Canada in a document entitled A Guide to the Staff Disciplinary Process from page 25 of this document.

"Disciplinary Interview/Hearing

> *b. the employee may be represented and should be informed of this at the time the interview is arranged"*

In conclusion, for the reasons above, I believe that Mr. Turner's decision should be overturned. The board has

> *jurisdiction so that this matter should proceed to a hearing of facts or such other process as the Board may deem appropriate.*
>
> . . .
>
> [Emphasis in the original]

The respondent filed his written submissions with the Board on March 24, 1999, which read:

> . . .
>
> *I have received a copy of the written submissions forward [sic] by Mr. Reekie challenging and rebutting Mr. Turner's decision (File no [sic] 161-2-855).*
>
> *Having examined Mr. Reekie's comments, the employer contends that the complainant is attempting to reopen his case to inquire into the basis and substance of Mr. Turner's decision. Also, I submit that Mr. Reekie's submissions in his letter of March 3, 1999, do not constitute, under any circumstances, new evidence which was not available for presentation at the hearing held in Winnipeg on December 2, 1998.*
>
> *In view of the principles developed by the Board in its decisions (File nos [sic] 125-2-3, 20, 41, 50, 63, 65, 77 and 83) dealing with a request for review under section 27 of the Act, the employer requests the Board to dismiss Mr. Reekie's application and to maintain unaltered Mr. Turner's decision.*
>
> . . .

Section 27 of the *PSSRA* provides that the Board has the authority to review and change its decisions. Subsection 27(1), the only provision of the *PSSRA* relevant to the present application, reads as follows:

> ***27.** (1) Subject to subsection (2), the Board may review, rescind, amend, alter or vary any decision or order made by it, or may re-hear any application before making an order in respect thereof.*

This Board has now had the occasion to interpret section 27 of the *PSSRA* (formerly known as section 25) on many occasions, and the following oft-cited passage of *Public Service Alliance of Canada and Treasury Board* (Board File 125-2-41, decision dated December 18, 1985) is reflective of the Board's traditional approach in this regard:

> *In the Board's view, section 25* [now section 27] *was not designed to enable an unsuccessful party to reargue the merits of its case. The purpose of section 25 was rather to enable the Board to reconsider a decision either in the light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists. It would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of.*

This approach is still the one the Board generally follows and I accept it.

Having considered Mr. Reekie's submissions in this matter, I find that he is not alleging a change in circumstances. Neither is he attempting to present new evidence or arguments that could not reasonably have been presented at the original hearing. Finally, he has not convinced me of the existence of any other compelling reason for review. In essence, he is alleging that the Board erred in law when it dismissed his complaint under section 23 of the *PSSRA* for lack or jurisdiction. If that is the case, then his remedy more properly lies in another forum.

For all these reasons, this application under section 27 of the *PSSRA* is dismissed.

J. Barry Turner,
Board Member.

OTTAWA, July 21, 1999.