Date: 20190201

File: 561-34-00772

Citation: 2019 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

NADA BASTASIC

Complainant

and

PUBLIS SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Bastasic v. Public Service Alliance of Canada

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

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Abdalla Ali Al-Baalawy, counsel

For the Respondents: Douglas Hill, Public Service Alliance of Canada

Heard at Toronto, Ontario,
November 14 and 15, 2018.

REASONS FOR DECISION

Introduction

[1] The complainant, Nada Bastasic, was employed by the Canada Revenue Agency ("the employer") as a long-serving administrative assistant when she was placed on sick leave and prohibited from entering her workplace. Her union, the Union of Taxation Employees ("the union"), a component of the Public Service Alliance of Canada ("the respondent"), grieved this matter on February 20, 2014. When the grievance was rejected at the final level of the grievance process, the union advised her that it would not refer the matter to adjudication as it opined that a favourable outcome would not be obtained.

[2] In this matter, the complainant alleges that the respondent failed in its discharge of the duty of fair representation it owes its members. She also alleges that she was not properly informed of what her employer required for her to return to work and that her grievance was not handled competently.

[3] For the reasons that shall be explained later in this decision, the complaint is dismissed. The complainant did not adduce evidence establishing on a balance of probabilities that the union failed in its duty to represent her by acting in bad faith, in an arbitrary or discriminatory manner. In fact, the evidence showed that the respondent acted in good faith by supporting her and by giving her the relevant information throughout the process of her grievance and that it provided a rational justification for its decision to decline to refer it to adjudication.

Authority

[4] The complaint was filed on November 10, 2015 and an amended complaint was filed on November 13, 2015. The complainant alleges that the union engaged in an unfair labour practice, pursuant to s. 190(1)(g) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2, (*FPSLRA*). According to s. 185, an "unfair labour practice" includes the following prohibition, set out in s. 187: "No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, 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."

[5] I received preliminary objections from the respondent that some of the allegations made by the complainant were untimely. Given these objections, Counsel for the complainant agreed that the only issue properly before me in the hearing was the matter of the respondent's decision not to refer the grievance at issue to adjudication.

[6] 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 *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *FPSLRA*.

Facts

[7] The complainant began her career with the employer in 1988 and worked as an administrative assistant. On January 10, 2014, she was advised in writing that she was being placed on sick leave and was prohibited from entering her workplace due to her "troubling behaviour in the workplace". The employer advised her and her union representative that she would have to undergo an independent medical assessment to consider her fitness to return to work and to determine any necessary workplace accommodations before she would be allowed to return to work. She testified at the hearing that as of then, she had still not returned to work.

[8] The union grieved the employer's decision to remove the complainant from the workplace and alleged that it had violated article 19, the no-discrimination article, of the *Agreement between the Canada Revenue Agency and the Public Service Alliance of Canada (Program Delivery and Administrative Services).*

[9] The grievance was pursued to the final level. The employer rejected it. At that point, the respondent wrote to the complainant on August 11, 2015, advised her that "based on the wording of the *Reply* and the facts of your case, it is our strong opinion an adjudicator at the *Public Service Labour Relations and Employment Board* would not rule in our favour", and closed her file.

Issue

[10] Did the respondent fail in its duty of fair representation to the complainant in not referring her grievance to adjudication?

[11] The complainant testified that as early as December 23, 2013, before she received the official written notice from the employer, the union contacted her to discuss the fact that the employer had required her to undergo a fitness-to-work assessment. She then stated that after this conversation, she telephoned the offices of her local president, the union's president, and the PSAC's national president to explain her plight and to seek assistance.

[12] The complainant then testified that after making these calls, she received a call on January 27, 2014, from Ken Bye of her union local, who informed her that he had been assigned to work on her file and that he wished to speak with her to offer his assistance in dealing with her problem with the employer.

[13] The complainant explained that they met on January 30, 2014, at a public venue in downtown Toronto, where she said Mr. Bye had her sign four or five forms. She testified that she did not remember exactly but that she thought the forms contained blank pages. She stated that they met for "maybe one hour" and that he told her that he would make a presentation for her grievance. She further testified that he "told her nothing" about the grievance process and the details of her case. She added that they did not discuss strategy or how he would present her grievance.

[14] When she was asked about it, the complainant testified that Mr. Bye made no mention of seeking a settlement of her grievance; nor was she aware of whether he did anything to investigate the circumstances surrounding the employer's decision to remove her from the workplace and to put her on medical leave. She stated that in her view, Mr. Bye simply accepted the employer's version of events and did not seek to question it or to independently verify facts about alleged incidents that the employer had cited.

[15] When she was asked about the employer's requirement that she undergo a fitness-to-work assessment by a physician, the complainant testified that she told Mr. Bye that "the employer was wrong". She added that Mr. Bye promoted the need for

her to undergo this assessment as in her words, he “took the word of the union office” and “didn’t believe” her.

[16] The employer gave the complainant a copy of the first-level reply to her grievance. She testified about some details of the alleged security incidents that the employer cited in the decision to remove her from the workplace. One involved an interaction with and concerns raised by a fellow employee and UTE member who was a director in union local 00013. The complainant testified that it involved her speaking with a co-worker outside a pub one evening. She stated that the co-worker gave her phone number to her.

[17] When the complainant was asked in examination-in-chief if she had spoken to Mr. Bye about this incident, the complainant replied that she had not. She added that he did tell her of an issue about a co-worker ducking into a pub one evening to avoid speaking to the complainant on the sidewalk but that they did not discuss the details.

[18] In her examination-in-chief, the complainant was asked to comment upon some meeting minutes from her union’s local executive council dated September 18, 2012, which documented that the union had extended a loan to the same person whom the complainant was alleged to have had an incident with outside a pub. That person had been injured in a train accident while travelling home from a union meeting and was unable to work. A $2,600.00 loan was authorized to help her pay the expenses that had arisen from her injuries and that were not covered by insurance pending an expected cash settlement related to the accident.

[19] Counsel for the complainant argued that this loan to the co-worker who alleged that an incident had occurred involving the complainant showed something untoward and discriminatory as the union was loyal to its own and did not require an independent medical assessment (IME) of this injured person but did tell the complainant that she should submit to an IME, as the employer had requested.

[20] I find that the fact that the injured co-worker received a loan from the union in 2012 without undergoing an IME has no relevance to the matter before me.

[21] The complainant also drew attention to an email dated June 19, 2013 that she

received from her union local. This email addressed a matter of a workplace accommodation issue that is unrelated to the matter before me. In this email, the union local advises the complainant that representation on this matter is being withdrawn due to her unwillingness to work or cooperate with any of the representatives that the local can provide.

[22] Counsel for the complainant argued that this email and refusal to provide continued representation on that issue was evidence of a bias and bad faith towards the complainant. I find this email to be insufficient evidence for me to make a finding of bias or bad faith towards the complainant.

[23] The complaint testified that Mr. Bye never explained the matter of the employer's request for her to undergo an IME. Her counsel argued that this was a significant error on the part of the union local in how it handled her case. However, Mr. Bye testified that the employer told the complainant that she could have her own family physician perform the IME and that he also asked her if she had her own physician that she would prefer to perform the IME. Mr. Bye testified that the complainant just became irritated when the issue of her having an IME performed was discussed. Given this testimony, I conclude that the complainant was aware that she could choose her own physician to perform an IME and that this issue was not improperly handled by her local union or the respondent.

[24] I also note that the complainant drew attention to the fact that the first-level reply stated among other things that "no information was provided by your representative to support your allegation of discrimination."

[25] The complainant further testified that Mr. Bye did not discuss any details of or preparation for the second or third-level grievance hearings and that she had just left it with him, as she had just suffered a death in the family and had not been able to participate in the hearings. She added that she was not aware that Erik Gagné, who was a grievance expert at the respondent's national headquarters, had conducted her fourth-level presentation, that she could have attended it, and that the union could conduct her grievance hearings without her knowledge or presence.

[26] The employer's final-level grievance reply, dated July 21, 2015, states that to that

date, the complainant had not consented to undergo a fitness-to-work evaluation and that there was no evidence to support her discrimination allegation. The grievance was rejected.

[27] In cross-examination, the complainant admitted that in fact she had discussed the alleged security incidents with Mr. Bye and that she had told him that they had never happened. In later questioning, she stated that the two incidents had been fabricated. When confronted with her testimony-in-chief that she had never discussed the incidents with Mr. Bye, she then admitted that she had discussed them with him.

[28] When asked in cross-examination why she did not attend any of the four grievance hearings conducted by her union, the complainant gave a long and detailed reply about family members with health problems who needed her constant assistance, which caused her to miss the hearings.

[29] When she was told in cross-examination that Mr. Bye was expected to testify that his first meeting with her had run from 11:50 a.m. to 3:15 p.m. rather than the one hour she had stated, the complainant said that it had seemed that the meeting did not last that long. When she was challenged in cross-examination on her statement that she and Mr. Bye did not discuss her grievance, she stated that it was more that she had not understood the issues in the grievance and that in her opinion, the union should have launched an investigation into the two alleged security incidents which she had previously testified did not happen and that were fabrications.

[30] In cross-examination, the complainant acknowledged that she wrote a letter to Mr. Bye on April 15, 2014, thanking him for his assistance in dealing with the employer on several of her issues unrelated to the grievance.

[31] The complainant also acknowledged in cross-examination that she had received the employer's written replies for the first three levels. She also testified that she read each one and that she did not speak to Mr. Bye about the grievance after reading any of them.

[32] The complainant was asked in cross-examination if it was true that at their first meeting, she had sought Mr. Bye's assistance pursuing insurance benefits from

Sun Life. She said that she had done so. When she was shown the grievance form dated February 20, 2014, and was asked if it was true that she had been shown this completed form on that date and that she then signed it on that date, she replied that that was possible.

[33] When she was shown Mr. Bye's notes from March 17, 2014, summarizing a one-hour phone call with the complainant, she acknowledged that he had called her, that they had discussed some work issues, and that he told her that the grievance had been heard and rejected.

[34] The complainant was also shown notes taken by Mr. Bye that confirmed details of their lengthy phone call on April 8, 2014, in which they discussed the upcoming second-level hearing. She confirmed participating in this call and acknowledged that she instructed him to proceed to have the grievance heard a second time.

[35] In all, the complainant was presented with notes documenting 31 calls to her from Mr. Bye to discuss his assistance with the grievance and with several other matters for which she had sought his help. She did not deny receiving his calls to discuss her employment issues.

[36] And finally, the complainant acknowledged an email that she was shown that she had sent to Mr. Bye on November 27, 2015. In it, she asks if she "… might be able to get current forms for the purpose of attending a third party medical assessment", and she asked if he might be able to bring these forms to her to expedite the process.

[37] In response to the allegations, Mr. Bye testified about and submitted dozens of pages of notes that he took during his months of helping the complainant, to document their many hours of meetings and calls. He testified that she had required him to phone her late in the evening as she said she was too busy all day to speak with him. His notes indicate that she had sometimes been verbally abusive to him.

[38] Mr. Bye testified that after spending many hours speaking with the complainant and trying to obtain information to prepare his presentation of her grievance, he was left with the clear impression that she had many old issues with her employer, which she spoke of. He testified that it was not clear what exactly had led to removing her from the

workplace; nor was it clear in her mind what exactly she wished to present in her grievance.

[39] I observed that the complainant's examination-in-chief was consistent with this testimony of Mr. Bye, as she spoke of many problems with her employer and denied that any incidents took place that could have resulted in her being removed from the workplace.

[40] Mr. Bye testified at great length about the many detailed conversations he had with the complainant in which he described the process of preparing and presenting her grievance to the employer. He repeatedly sought information from her on the events that took place and what the employer did, which he would address in the presentation of the grievance. Mr. Bye acknowledged that he recommended the complainant undergo an IME and he also stated that he was aware that the complainant had denied her employer's request to approve their contacting her own physician to request information about her ability to return to work.

[41] Mr. Gagné described the work he did to review the file and prepare the best possible presentation of the grievance at the final level. He also described and confirmed the evidence that showed that after careful deliberation, the respondent concluded that the grievance would not be successful if it were referred to the Board for adjudication.

[42] Counsel for the complainant submitted that the union had a duty to investigate the matters that led to removing the complainant from the workplace and that the respondent failed to properly discharge this duty.

[43] I note the decision of this Board in *Cousineau v. Walker and PSAC*, 2013 PSLRB 68, which provides a thorough examination of the well-established principle that the burden of proof in such an allegation of duty to represent is upon the complainant. In examining the meaning of "arbitrary", it has been found that the "… union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary …" (citing *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39).

[44] At paragraphs 32 and 33, *Cousineau* adds as follows:

> ***32*** *… the respondents demonstrated that the circumstances of the complainant's case were investigated, that its merits were properly considered and that a reasoned decision was made as to whether to pursue* [a grievance] *on her behalf. The respondents did not demonstrate an uncaring or cavalier attitude toward the complainant's interests; nor was it established that the respondents acted out of improper motives or out of personal hostility or that it or its representatives distinguished between members of the bargaining unit based on illegal, arbitrary or unreasonable grounds.*
>
> ***33*** *The complainant disagreed with* [the union's] *interpretation of certain* CHRA *provisions … but that is not enough to establish arbitrariness….*

[45] The respondent cited the Board's decision in *Ouellet v. Luce St-Georges*, 2009 PSLRB 107, in which it found as follows at paragraph 30:

…

> ***30*** *… the Board's role is not to examine on appeal the bargaining agent's decision of whether to file a grievance or to refer it to adjudication but rather to evaluate the manner in which it handled the grievance. In other words, the Board rules on the bargaining agent's decision-making process and not on the merits of a grievance or complaint*.…

…

[46] I find on the evidence that the respondent acted promptly, thoroughly, and professionally. It did the best it could under the very difficult circumstances the complainant created by not being forthright to it with all the true and relevant details about the events that led to her being removed from the workplace.

[47] I find the evidence establishes that the complainant was aware of the employer's request for her to undergo an IME and that her union did not misinform her in any way about this. I also reject the notion that her union failed to seek a settlement of her grievance given the fact that an IME was required for her to be considered to return to work.

[48] While the Supreme Court of Canada in *Noël* has recognized the need for a bargaining agent to investigate the matters that are the subject of a complaint, it is not reasonable to expect such an investigation to overcome the complainant's failure to provide a full and accurate disclosure of the relevant facts. Such a disclosure must be the starting point for efforts by the union to prepare a grievance. Without it, the union cannot be later faulted for failing to launch an investigation to overcome such a faulty foundation for the grievance file to be built.

[49] I conclude that the complainant failed to meet her burden of proof to show that the respondent acted in bad faith, arbitrary or discriminatory manner in its handling of her grievance.

Request for anonymization

[50] The complainant requested that this decision be anonymized and the files sealed in order to avoid the disclosure of her personal information. Counsel stated that this was necessary to avoid the complainant being stigmatized. The respondent did not oppose this request.

[51] Counsel for the complainant cited this Board's decision in *McKinnon v. Deputy Head (Department of National Defence),* 2016 PSLREB 32 which considered the Supreme Court of Canada *"Dagenais/Mentuck"* test regarding whether restrictions should be placed upon the open court principle, as follows at paragraph 44:

…

> *(a) such an order is necessary in order to prevent a serious risk to an important interest…in the context of litigation because reasonable alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the …order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open accessible court hearings.*

…

[52] The complainant had her physician submit letters to the Board in support of her

many requests to postpone the hearing of this matter. These letters contain no information relevant to the disposition of the hearing and are ordered sealed. Although the public has the right to open and accessible court proceedings, in this case, the privacy of the complainant prevails. For the public to have access to the complainant's medical information would pose a serious risk to her privacy. For all other information in this decision, such as the related exhibits tendered as evidence at the hearing, and the documents on the Board's record, including the name of the complainant in this decision, I find no compelling reasons to order that this information could pose a serious risk to the complainant were it made public as it does not outweigh the well-established open court principle. Complainants before this Board are aware of this Board's *Policy on Openness and Privacy*.

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

Order

[54] The complaint is dismissed.

February 1, 2019.

Bryan R. Gray,
a panel of the Federal Public Sector Labour Relations and Employment Board