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Files: 561-02-39631 to 39633

Citation: 2019 FPSLREB 87

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

MICHEL BOUDREAULT

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Boudreault v. Public Service Alliance of Canada

In the matter of complaints filed under section 190 of the *Federal Public Sector Labour Relations Act*

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Christine Dutka, Public Service Alliance of Canada

Decided on the basis of written submissions
filed March 5, 14, 15, and 19, 2019.

(FPSLREB Translation)

I. Complaints before the Board

[1] Michel Boudreault, the complainant, made three complaints against his bargaining agent, the Public Service Alliance of Canada (PSAC or "the respondent"). In its response, the respondent asked that they be dismissed without a hearing. The complainant had the opportunity to respond to the respondent's arguments and to demonstrate why he felt that the Federal Public Sector Labour Relations and Employment Board ("the Board") should hear his complaints.

[2] After considering the parties' arguments and the documentation on record (essentially, their correspondence), I find that the complaints have no chance of success before the Board. Even assuming that all the facts that the complainant alleged are true, there is no arguable case that the respondent acted in an arbitrary or discriminatory manner or in bad faith in representing him. Therefore, the complaints are dismissed.

II. Background

[3] The complainant filed two complaints on December 20, 2018, and a third on January 4, 2019.

[4] The complainant worked for Employment and Social Development Canada (ESDC). He was part of a bargaining unit represented by the PSAC. The component that represents the interests of ESDC employees is the Canada Employment and Immigration Union (CEIU).

A. The first complaint (561-02-39631)

[5] The first complaint was about the bargaining agent's refusal to take a grievance to the third level of the grievance process that it felt would not succeed.

[6] The grievance, filed on June 6, 2018, challenged the employer's decision to require that the complainant meet with an investigator on September 29, 2017, and that he complete documents about a harassment complaint that had been filed against him. He alleged that he was on sick leave when he was supposed to meet with the

investigator. As remedy, he sought damages for the days on which the employer did not respect the sick leave prescribed by the physician.

[7] The CEIU represented the complainant in the context of his grievance up to the second level of the grievance process. In the letter indicating the CEIU's decision to not represent him at the third level of the process, the CEIU's representative, Genadi Voinerchuk, wrote that the employer's decision to dismiss the grievance was founded. The grievance was filed well past the deadline set out in the collective agreement, and the cited collective agreement provisions did not apply. The provisions in question were article 22, on the employer's general obligation to make reasonable efforts to ensure health and safety at work, and article 35, on sick leave. Instead, according to Mr. Voinerchuk, the issue involved occupational health and safety standards, and the letter noted that the complainant submitted an application for that purpose to the Commission des normes d'emploi et de santé et sécurité du travail du Québec (CNESST).

[8] The letter concluded as follows:

> [Translation]
>
> *We have had several telephone conversations about this grievance in recent months. In them, I told you that I disagreed with filing the grievance given the interpretation of the collective agreement, but it was important for me to allow you to express yourself to your employer and to give your employer an opportunity to examine your arguments and respond to you.*
>
> *My view is that with the 2nd-level response, you received the explanations and information that had been sought.*
>
> *I understand that this decision is not what you expected and hoped for, but pursuing the matter would lead only to an illusion of recourse and access to corrective measures that would not materialize.*

B. The second complaint (561-02-39632)

[9] The second complaint was about the CEIU's refusal to file the complainant's grievance about a heatwave's effect on his working conditions in summer 2018. He had been working at home since 2017. He argued that the employer should have taken

steps to offer him air-conditioned working conditions. The heatwave forced him to take days off, for which he sought reimbursement.

[10] The grievance was dated August 30, 2018. The CEIU received it on September 6, 2018. On September 20, 2018, after acknowledging that the complainant had already advised him of the situation and of his intent to file a grievance, Mr. Voinerchuk explained to him as follows why the CEIU did not intend to support his grievance:

> [Translation]
>
> *The recommended path was the internal complaint process if you felt that the employer had breached the Canada Labour Code and to make a claim with the CNESST if you had reasons to believe that you had been a victim of a workplace accident or occupational illness.*

[11] Noting that the grievance did not cite any collective agreement provision, Mr. Voinerchuk added, “[translation] … you have the opportunity to file the grievance yourself, as it is yours.”

C. The third complaint (561-02-39633)

[12] The third complaint, filed on January 4, 2019, was related to the refusal to support his grievance of January 4, 2018. In that grievance, the complainant asked that the employer proceed with his harassment complaint, which was deemed without merit, close the investigation into a harassment complaint against him, and transfer him to another department for the remainder of the harassment investigation.

[13] On April 24, 2018, a CEIU representative, Sami Oueini, wrote the following to the complainant:

> [Translation]
>
> *Just to let you know, as we discussed by phone, we will not pursue the grievance of January 4, 2018; instead, we recommend moving ahead with a complaint to the Canadian Human Rights Commission.*

[14] On August 21, 2018, after a preliminary investigation, the Canadian Human Rights Commission (CHRC) informed the complainant that it would not proceed with an in-depth review of his complaint.

III. Summary of the arguments

A. For the respondent

[15] The respondent responded to the three complaints. It first objected based on the time limit. According to it, they were filed after the expiry of the strict 90-day time limit set out in the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[16] As for the first complaint, the respondent argued that in July 2018, the complainant knew that it would proceed no further than the second level of the grievance process. For the other two complaints, it argued that he knew well before the 90-day period ended that it would not support the grievances.

B. For the complainant

[17] The complainant responded to the respondent's arguments in two successive letters on March 14 and 15, 2019. Essentially, he repeated the contents of his complaints and submitted that the CEIU did not help him, particularly with respecting his time off work, protecting his right to healthy working conditions during the heatwave, and requiring that the employer conduct an in-depth investigation of his harassment complaint. He felt that he had to be able to present his arguments to the Board to obtain the desired remedies. He wrote the following in his response:

> [Translation]
>
> … *I would like the union to be forced to present and support my grievances, reimburse me for legal costs incurred, and finally, pay me financial compensation for the reasons set out in the documents I filed.*

[18] The complainant alleged that the CEIU did not support him in his efforts with the CNESST after advising him to contact it. In his documents, he included an email from Mr. Voinerchuk, dated December 4, 2018, which reads as follows:

> [Translation]
>
> *With this, I inform you that I will withdraw my name from the attached originating document [claim with the CNESST].*

> *In our communications, you were advised how to proceed with representation for a CNESST claim. Neither I nor any other CEIU representative has the jurisdiction to represent you before the Tribunal administratif du travail. I recommend that you contact PSAC-Quebec about it.*
>
> *In the meantime, I must advise you that I will contact the appropriate authority to withdraw my representation and that of the CEIU for this file.*

[19] He reiterated his grievance about the obligation to meet with the investigator while he was on sick leave and said that it caused him significant harm and prejudice.

[20] He argued that contrary to what the CEIU suggested, there was no true negotiation with the employer about the end of employment. He resigned from his position on September 7, 2018.

IV. Analysis

A. The respondent's timeliness objection

[21] The respondent raised a general objection to the Board's jurisdiction to hear the complaints based on the strict time limit set out in s. 190(2) of the *Act*, which reads as follows:

> *… a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[22] For the first complaint, filed on December 20, 2018, the correspondence that the respondent adduced did not clearly establish that in fact an exchange about non-representation occurred after the second level of the grievance process for the grievance filed in June 2018. I consider the November 27, 2018, letter the starting point of the complainant's knowledge. Therefore, the first complaint was filed within the required time.

[23] For the second complaint, filed on December 20, 2018, it appears clear that Mr. Voinerchuk contacted the complainant on September 20, 2018, to advise him that there would be no representation for the heatwave grievance. He responded on

September 21 to express his disagreement. I find that the complaint was filed within the 90 days.

[24] For the third complaint, filed on January 4, 2019, on April 24, 2018, the complainant knew that the respondent would not support his grievance of January 4, 2018, against the employer's decision to not follow up on his harassment complaint. The CEIU recommended that he make a complaint with the CHRC, which he did. On August 21, 2018, the CHRC declined to deal with it.

[25] The complaint against the respondent was based on its refusal to provide representation for his grievance and on its failure to review the CHRC's decision. Whether April 24, 2018, or August 21, 2018, is considered the date, the complaint is out of time. The Board has no jurisdiction to deal with it as the 90-day time limit under the *Act* is strict.

B. Do the two complaints dated December 20, 2018, have a chance to succeed?

[26] When the Board summarily dismisses a complaint, it must hold all the facts as proven. This does not mean that it adopts the complainant's interpretation or point of view. Rather, the facts are held as proven.

[27] I find that in fact, the respondent refused to support certain steps that the complainant wanted to take.

[28] The parties agreed to the following facts. First, the CEIU refused to take the grievance of June 6, 2018, to the third level of the grievance process. As it was based on collective agreement provisions, the complainant could not have pursued it on his own.

[29] Second, the CEIU refused to file the grievance of September 6, 2018, about the heatwave's effects. The complainant could have filed it himself or made a complaint under the *Canada Labour Code* (R.S.C., 1985, c. L-2).

[30] Finally, the CEIU refused to file the grievance on the harassment complaints, which were the complainant's and the one filed against him. He did not make a complaint about the negotiation of the end of employment.

[31] The complaints were filed with the Board under the following sections of the *Act*:

…

> *190(1) The Board must examine and inquire into any complaint made to it that*
>
> …
>
> ***(g)*** *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> …
>
> ***185*** *In this Division,* **unfair labour practice** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> …
>
> ***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.*
>
> …
>
> [Emphasis in the original]

[32] As noted consistently in the Board's jurisprudence, it will not rely on a complainant's dissatisfaction when determining whether an employee organization breached s. 187 of the *Act* (*Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20). The union has no obligation to represent a bargaining unit member as long as it seriously and diligently analyzes the situation. This principle is expressed well in the following passage from *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52:

> *[44] … It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (*Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in* Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.):*
>
> …

> 42. When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of [the duty of fair representation].
>
> …

[33] The complaint cannot be a mechanism to have the Board hear the complainant's grievances (*Berberi v. Public Service Alliance of Canada*, 2017 PSLREB 49). Instead, it must be determined whether the organization acted in an arbitrary or discriminatory manner or in bad faith. He did not demonstrate that the respondent (through one of its components, the CEIU) acted contrary to the *Act*.

[34] As for the first complaint, Mr. Voinerchuk clearly explained why the CEIU would not take the grievance to the third level. The CEIU supported the grievance up to the second level, despite an analysis that found in the employer's favour. The explanation provided for not continuing to the third level was reasonable and was certainly not arbitrary, discriminatory, or tainted by bad faith.

[35] Similarly, for the complaint about the heatwave grievance, Mr. Voinerchuk told the complainant that it was more of a complaint about healthiness than a collective agreement issue. Mr. Voinerchuk added that the complainant could file the grievance himself, which he did not do. I do not see anything arbitrary, discriminatory, or in bad faith in the fact that the CEIU chose not to support the grievance. It was not required to, after reviewing the complainant's position. Once again, the CEIU's refusal to represent him in this grievance did not prevent him from filing a grievance or making a complaint. Mr. Voinerchuk referred to the possibility of appealing to the CNESST. When he pointed out that he did not have the jurisdiction to represent the complainant

before the CNESST (the complainant had added Mr. Voinerchuk's name without telling him), he stated that the complainant could ask for help from PSAC-Quebec. The fact that the CEIU indicates jurisdiction limits for representing members before provincial bodies is not arbitrary conduct.

[36] The bargaining agent must represent its members fairly, genuinely, with integrity and competence, and without hostility towards them (*Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509 at 527). As the Board has often held, this does not mean that the bargaining agent must follow instructions from its members on filing a grievance every time a member wants to. Bargaining agents have limited resources, and the Board certainly cannot dictate to them how to use those resources. Based on the facts to which the parties agreed, I am satisfied that the respondent and the CEIU fulfilled their obligations toward the complainant. Although he was not satisfied with the services offered, it does not mean that the respondent's actions were arbitrary, discriminatory, or made in bad faith.

[37] I find that the complaints filed on December 20, 2018, have no chance of success and that the complaint filed on January 4, 2019, is out of time. Therefore, the Board cannot hear it.

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

(The Order appears on the next page)

V. Order

[39] Complaints 561-02-39631 and 561-02-39632 are dismissed.

[40] Complaint 561-02-39633 is out of time. Therefore, it is dismissed for lack of jurisdiction.

September 6, 2019.

FPSLREB Translation

Marie-Claire Perrault,

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