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File: 561-02-38956

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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

RICHARD MANNING

Complainant

and

DAVE CLARK, NATIONAL PRESIDENT, UNION OF CANADIAN TRANSPORT EMPLOYEES (PUBLIC SERVICE ALLIANCE OF CANADA)

Respondent

Indexed as
Manning v. Clark, Union of Canadian Transport Employees (Public Service Alliance of Canada)

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

Before: D. Butler, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Michael Scherr, counsel

For the Respondent: Pamela Sihota, Public Service Alliance of Canada

Decided on the basis of written submissions, filed July 6 and August 23, 2018.

REASONS FOR DECISION

I. Complaint before the Board

[1] On April 18, 2018, the Federal Public Sector Labour Relations and Employment Board ("the Board") received a complaint filed under ss. 190(1)(e), (f), and (g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), using Form 16, from Richard Manning ("the complainant"). In his complaint, he named Dave Clark, National President, Union of Canadian Transport Employees (UCTE), as the respondent.

[2] The Board's Registry wrote to the complainant on May 8, 2018, outlining that the subject matter of his submission appeared to be the duty of fair representation, thus comprising a complaint under s. 190(1)(g) of the *Act*. The Registry requested that he supply particulars by June 8, 2018, using a form provided by the Board for that purpose.

[3] On July 6, 2018, the complainant filed a new Form 16, again citing ss. 190(1)(e), (f), and (g) of the *Act*, and again naming Mr. Clark as the respondent. He also submitted the statement of particulars requested by the Registry and a document entitled "Chronology of Events Nov. 2013 - March 2018" and dated June 28, 2018.

[4] On July 18, 2018, the Registry wrote to the complainant, requesting clarification as to whether the complaint using the Form 16 dated July 6, 2018, was a new complaint to be substituted for the one filed on April 18, 2018. The Registry also noted that the information he had supplied was unclear in identifying which action or actions of the respondent within the required 90 days before the filing date gave rise to his complaint. The Registry asked for a "… concise statement(s), stating what action(s) of the respondent violated 190(1)(g) of the *Act,* and the date on which you knew or ought to have known about that action."

[5] On the question of whether the Form 16 of July 6, 2018, comprised a new complaint, the complainant replied as follows on August 2, 2018: "So while the information provided is exactly the same as my original application I think that the different form I submitted would constitute this complaint as a substitution for the original complaint of April 2018."

[6] With respect to the action that gave rise to his complaint, the complainant wrote further as follows:

…

> *I have provided numerous examples in my "Chronology of Events" dated June 28, 2018 that identifies arbitrary conduct by my bargaining agent. These date back to May of 2016, a month after my suspension and continue to this day.*
>
> *The latest example of arbitrary conduct by my bargaining agent or respondent deals with not providing me with closure of my case file despite requesting that information. Therefore the respondents action has not happened. Their action is that of ignoring my request for additional information on the status of my file. I have received nothing to say that their "Duty of Fair Representation" has ceased. As recently as last week I have asked for the status of my case and for assistance in obtaining Severance Pay that is owed to me.*
>
> *In my opinion, given the subjectivity of the date I "knew or ought to have known about that action" the 90 day time period started last week. There are numerous other actions since May 2016 that I knew the bargaining agent failed to; sufficiently investigate or handle my grievances and case and failed to engage in a process of rational decision-making, but the date on which I feel I knew of the bargaining agents ineptitude is stated in the first line of this paragraph.*
>
> [*Sic* throughout]

[7] In his statement of particulars, the complainant specified the nature of his complaint by ticking two options: "Grievance was not submitted through the grievance process", and "Grievance was not referred to adjudication".

[8] The complainant described the alleged arbitrary conduct as follows:

> *I was terminated for 6 lines of email I sent to a former coworker in Nov/Dec 2014. While I was in breach of Transport Canada policy, termination is much too heavy handed based on jurisprudence for other cases presented before the PSLREB. The 6 lines of email I sent were in the interest of aviation safety and provided prior safety information to a Civil Aviation Safety Advisory (CASA) being issued in early April 2015. This was not something I did on a whim. I was never kept informed of any process being followed. I provided numerous cases of jurisprudence that were far more serious than mine and waranted a harsh penalty. When I made my presentation I rarely received an answer from PSAC/UCTE. When I did receive answers they were very brief and at times cryptic in content. The investigation for my case took 13 months to complete. I have 5 pieces of correspondence that told me that it would be dealt with expeditiously. PSAC failed to question Transport Canada (TC) management about the tardiness of the investigation. On my second interview with TC security PSAC was unable to find a representative to attend the meeting. I was never informed that I*

> *should postpone the meeting. Generally speaking, PSAC/UCTE dropped the ball during the entire period of the investigation.*
>
> [*Sic* throughout]

[9] The complainant indicated that neither discriminatory nor bad-faith conduct applied in his case.

II. The respondent's reply

[10] On August 23, 2018, the Registry requested a reply to the complaint from the respondent.

[11] On behalf of the respondent, Pamela Sihota wrote as follows on September 7, 2018:

> …
>
> *1. Mr. Manning has provided two chronologies, one dated March 6, 2018, and a revised version dated April 5, 2018 (collectively the "Chronologies"). All of the allegations and events referenced in the Chronologies occurred between November 2013 and December 2017.*
>
> *2. Mr. Manning filed the Complaint on April 18, 2018.*
>
> *3. Section 190(2) of the* FPSLRA *states that "… 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." The Board has consistently ruled that it has no discretion under the* FPSLRA *to extend the 90-day limit found in section 190(2): see, for example,* Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 (CanLII), at para 55.*
>
> *4. The Complaint was filed outside of the 90-day limit.*
>
> *5. For the reasons stated above, PSAC respectfully submits that the Complaint should be dismissed without a hearing….*
>
> …

[12] On September 13, 2018, the Registry requested that the complainant reply to the respondent's position by September 27, 2018. Neither he nor his counsel replied.

[13] Thus, the respondent's position is uncontested.

III. Issue to be determined

[14] Because the complainant did not contest the respondent's objection to the timeliness of his complaint, the Board could proceed to a decision on that basis alone. However, I have decided not to take that path. Rather, given the wording in his July 6,

2018, submission, discussed later in this decision, I will assume that he contends that there is a timely issue to be determined.

[15] I have also decided that the contents of the file provide a sufficient factual basis for ruling on the complaint without convening an oral hearing. The Board's authority to decide any matter without an oral hearing is explicitly stated in s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), which reads as follows: "The Board may decide any matter before it without holding an oral hearing."

[16] Further, in its letter of May 8, 2018, the Registry forewarned the complainant that "… the Board may render its decision on the basis of the documents already on file, with no further communication to you."

[17] A complaint under s. 190(1)(g) of the *Act* alleges an unfair labour practice in the form of a contravention of s. 187, which reads as follows:

> ***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.*

[18] The time limit for filing a complaint is established under s. 190(2) of the *Act*, as follows:

> ***190 (2)*** *Subject to subsections (3) and (4), 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.*

[19] The respondent has, in effect, objected to the Board's jurisdiction to consider the complaint on the grounds that the complainant failed to file it within the 90-day period stipulated by s. 190(2) of the *Act*. As indicated in *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78, cited by the respondent in its reply, and as consistently found in other decisions of this Board and its predecessors, the 90-day time limit may not be extended.

[20] The issue of the timeliness of the complaint is fundamental. If the Board determines that it was not filed within the 90-day period provided under s. 190(2) of the *Act*, no further inquiry is required, and the complaint must be dismissed.

[21] For the reasons that follow, I accept the respondent's objection and find that the complaint is untimely.

IV. Analysis

[22] There is some added complexity in this case because the complainant filed two Form 16s, the first received by the Board on April 18, 2018, and the second on July 6, 2018. The respondent has based its reply, and its objection to timeliness, on accepting April 18, 2018, as the filing date.

[23] I must respectfully disagree. On August 2, 2018, in response to the Registry's request for clarification, the complainant indicated "… that the different form I submitted would constitute this complaint as a substitution for the original complaint of April 2018." In my view, his instruction must be respected. He plainly identifies his new Form 16, filed on July 6, 2018, as a substitute for the original Form 16, filed on April 18, 2018. He did so with clear knowledge that the *Act* specifies a 90-day time limit. The Registry's letter of May 8, 2018, was direct and unambiguous on this point, as follows:

> …
>
> *Please note that this type of complaint must be filed with the Board within 90 calendar days following the date on which the complainant became aware of, or ought to have known about, the actions giving rise to the complaint.* ***Please note that this timeline cannot be extended by the Board.***
>
> …
>
> [Emphasis in the original]

[24] The complainant's further remarks in the August 2, 2018, email impugn activities of the respondent since March 2018 and, in particular, contend that "… the 90 day time period started last week."

[25] The issue, then, is whether the complaint is timely based on the filing date of July 6, 2018. Did the event or circumstances that gave rise to it occur within the 90 days before July 6, 2018, specifically between April 7 and July 6?

[26] If I were to hold the complainant strictly to his words, the test instead would be whether there was an event or circumstances within one week of July 6, 2018, which could be viewed as the reason for his filing a complaint under s. 190(1)(g) of the *Act*. He states in his email of August 2, 2018, the following:

…

> *The latest example of arbitrary conduct by my bargaining agent or respondent deals with not providing me with closure of my case file despite requesting that information. Therefore the respondents [sic] action has not happened. Their action is that of ignoring my request for additional information on the status of my file. I have received nothing to say that their "Duty of Fair Representation" has ceased. As recently as last week I have asked for the status of my case and for assistance in obtaining Severance Pay that is owed to me.*

…

[27] At the very least, there is evidence of confusion on the complainant's part concerning the operation of the 90-day period under s. 190(2) of the *Act*. He characterizes recent events as the "latest example" of an action giving rise to his complaint, implying that there were earlier examples, but at the same time suggests that the 90-day period "started last week." Given the evident possibility that the complainant has misunderstood the operation of a complaint's 90-day time frame, I choose to focus the analysis on the full 90-day period preceding July 6, 2018, so as not to exclude something other than the "latest example" as the potential source of the complaint.

[28] Unfortunately, the confusion may not end there. The respondent referred to the "Chronologies", filed by the complainant in conjunction with his first Form 16, two versions of the history of his concerns, dated March 6 and April 5, 2018, respectively. I have examined these documents closely, assuming them to be factually accurate for this purpose. Notably, in the first version, the latest concrete event he discusses is "early June 2017". The second "revised" version, considerably more detailed than the first, contains the following important entry:

…

> *2017 Nov. 30 – Phone call from Shawn Fields cancelled Level 3 Grievance. His reason was this, there were no grounds to proceed because my termination date was backdated to April 18, 2016. He advised me that I had 25 days to submit another grievance after I was fired and I didn't do so. At no time did I have that advice from UCTE following the May 2017 termination meeting. I asked for direction moving forward and received no reply from any of my emails in the months before this decision.* ***I considered this the completion of my relationship with UCTE.***
>
> …
>
> [Emphasis added]

[29] The respondent argued that "[a]ll of the allegations and events referenced in the Chronologies occurred between November 2013 and December 2017." I find that the respondent's position is well-supported. It becomes evident from a review of the documents that the real source of the complainant's concern about the respondent's conduct was its handling of a grievance against the termination of his employment in 2016, which culminated in the respondent's decision, explained by Shawn Fields, a representative of the respondent on November 30, 2017, to cease representation on the grounds that the complainant did not file the grievance within the required time limit in 2016.

[30] The complainant confirms that the handling of the termination grievance comprises the real source of his concerns in his statement of particulars submitted on July 6, 2018. He ticked two options under section 2 ("Please indicate the nature of your complaint against the respondent(s)"), "Grievance was not submitted through the grievance process", and "Grievance was not referred to adjudication".

[31] When the complainant proceeds to describe the alleged arbitrary conduct, he again confirms that the subject matter of the complaint is the handling of the termination grievance, as follows:

> *I was terminated for 6 lines of email I sent to a former coworker in Nov/Dec 2014. While I was in breach of Transport Canada policy, termination is much too heavy handed based on jurisprudence for other cases presented before the PSLREB. The 6 lines of email I sent were in the interest of aviation safety and provided prior safety information to a Civil Aviation Safety Advisory (CASA) being issued in early April 2015. This was not something I did on a whim. I was never kept informed of any process being followed. I provided numerous cases of jurisprudence that were far more serious than mine and waranted a harsh penalty. When I made my presentation I rarely received an answer from PSAC/UCTE. When I did receive answers they were very brief and at times cryptic in content. The investigation for my case took 13 months to complete. I have 5 pieces of correspondence that told me that it would be dealt with expeditiously. PSAC failed to question Transport Canada (TC) management about the tardiness of the investigation. On my second interview with TC security PSAC was unable to find a representative to attend the meeting. I was never informed that I should postpone the meeting. Generally speaking, PSAC/UCTE dropped the ball during the entire period of the investigation.*
>
> [*Sic* throughout]

[32] The respondent's decision to cease representation, conveyed on November 30, 2017, which is the act that the complainant described as "… the completion of my relationship with UCTE", indisputably fell outside the 90-day period for a complaint filed on July 6, 2018. I must note as well that had I instead accepted April 18, 2018, as the filing date, the respondent's decision not to proceed with the complainant's grievance would still fall outside the 90-day period.

[33] From the foregoing, it is clear that the complaint is untimely. The respondent's carriage of the complainant's termination grievance indisputably ended outside the required 90-day filing period.

[34] Out of an abundance of caution, I have taken the extra step of reviewing the documents submitted by the complainant for the possibility that there was some more recent event or circumstance in his relationship with the respondent that could have given rise to a timely complaint. What does he say about more recent events?

[35] In the revised chronology the complainant submitted on July 6, 2018, with his Form 16, he omits the reference to the conversation with Mr. Fields on November 30, 2017. He also removed the statement, "I considered this the completion of my relationship with UCTE." Here is the full content of the chronology for the period following November 30, 2017:

> ***2017 Dec. 7*** *– Pre-severance report following termination finally submitted to management this date because the first one was lost within the Compensation office Ottawa some months ago.*
>
> ***2018 Jan. 19 & 25*** *– Email requesting assistance concerning Severance Pay. No reply or action from UCTE.*
>
> ***To date*** *I have received nothing to say that my file has been closed by UCTE / PSAC.*
>
> *- I have not received proper severance pay. The calculation is wrong based on previous TC information I have. UCTE never replied to email concerning this issue.*
>
> *- I was issued a T4 for income in 2017. An impossibility when [sic] I was suspended without pay in April 2016.*
>
> ***2018 Feb. 19*** *– Met with lawyer Sarah Klinger*
>
> ***2018 -March 1*** *– Met with lawyer Jennifer Cameron*
>
> ***2018 March 7*** *– Met with lawyer Michael Scherr*
>
> [Emphasis in the original]

[36] The version of the chronology dated April 5, 2018, is broadly similar:

…

> *2017 Dec. 7 – Pre-severance report following termination finally submitted to management this date because the first one was lost within the Compensation office Ottawa some months ago.*
>
> *2018 Feb. 19 – Sarah Klinger advised me to see Jennifer Cameron, Lawyer at Cook & Roberts Law Firm. I met with her on March 1, 2018*
>
> *2018 March 1 – Met with Jennifer Cameron. She advised me to contact Michael Scherr, Lawyer at Pearlman Lindholm Law Firm because my case was over the 90 day limitation period since UCTE told me there were no grounds to proceed further. I was over the limitation period by about 2 days.*
>
> *2018 March 7 – Met with Michael Scherr for consultation and to present my case. Subsequent to this meeting he advised me to file for Section 37, Duty of Fair Representation and asked Sarah Klinger to file a negligence claim with the Lawyer Insurance Fund.*

[37] I wish to make clear that I have given no weight whatsoever to the advice reported in the April 5, 2018, chronology by the lawyer Ms. Cameron that the complainant's case "… was over the 90 day limitation period …". I have also given no weight to the March 7, 2018, advice by the lawyer Mr. Scherr that the complainant should file a duty-of-fair-representation action, mistakenly referring to section 37.

[38] The other information pertaining to more recent developments is found as follows in the complainant's email of August 23, 2018:

…

> *The latest example of arbitrary conduct by my bargaining agent or respondent deals with not providing me with closure of my case file despite requesting that information. Therefore the respondents [sic] action has not happened. Their action is that of ignoring my request for additional information on the status of my file. I have received nothing to say that their "Duty of Fair Representation" has ceased. As recently as last week I have asked for the status of my case and for assistance in obtaining Severance Pay that is owed to me.*

…

[39] Based on the foregoing statements, the only possible subject of a timely complaint within the 90-day period preceding July 6, 2018, is the complainant's request for assistance from the respondent with respect to severance pay or the question of the "closure of [his] … file". Apart from the crucial fact that he identifies neither of these matters as the nature of his complaint in his statement of particulars, the references are vague, lack detail, and do not specify any dates on which the

respondent is alleged to have represented him in an arbitrary manner. To be sure, I find that there is nothing sufficient, or sufficiently detailed, in the information offered by the complainant to identify with certainty an event or circumstances that could be the subject of a complaint under s. 190(1)(g) of the *Act*. Stated differently, there is no information that identifies how the respondent might have acted arbitrarily as his representative during the 90-day period (noting again that the complainant has not alleged either discriminatory conduct or bad faith). It is not impossible that the respondent's alleged failure to respond to his inquiry or inquiries might be part of a pattern of representational behaviour that could potentially be found problematic, but certainly, the information he filed cannot remotely justify any such finding.

V. Conclusion

[40] On the basis that the only event or circumstance documented by the complainant that could have formed the basis for an arguable breach of the duty of fair representation is the respondent's handling of his termination grievance, and given that the respondent's representation of him on that matter ceased well before the 90-day filing period, whether considering the Form 16 filed on July 6, 2018, or even the Form 16 filed on April 18, 2018, the complaint must be found untimely.

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

(The Order appears on the next page)

VI. Order

[42] The complaint is dismissed.

February 11, 2020.

D. Butler,
a panel of the Federal Public Sector
Labour Relations and Employment Board