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Citation: 2020 FPSLREB 40

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

GHANI OSMAN

Complainant

and

CANADA EMPLOYMENT AND IMMIGRATION UNION

Respondent

Indexed as
Osman v. Canada Employment and Immigration Union

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: Himself

For the Respondent: Sherrill Robinson-Wilson, Public Service Alliance of Canada

Decided on the basis of written submissions, filed July 20 and September 17 and 18, 2018.

REASONS FOR DECISION

I. Complaint before the Board

[1] On April 19, 2018, the Federal Public Sector Labour Relations and Employment Board ("the Board") received a complaint filed under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), using Form 16, from Ghani Osman ("the complainant"). The complaint named the Canada Employment and Immigration Union (CEIU) as the respondent. The CEIU is one of the constituent components of the Public Service Alliance of Canada, the complainant's bargaining agent.

[2] This complaint under s. 190(1)(g) of the *Act* alleges an unfair labour practice in the form of a contravention of s. 187, known as the duty-of-fair-representation provision, 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.*

[3] The complainant attached a statement to his Form 16 in which he alleged that the CEIU had acted in an arbitrary and discriminatory fashion "by withdrawing their representation". The representation he sought from the respondent concerned an application for judicial review of the Board's decision in *Osman v. Deputy Head (Department of Employment and Social Development)*, 2018 FPSLREB 15 ("*Osman*"), dated February 26, 2018. In *Osman*, the Board considered the grievor's argument that the employer misrepresented a term of a settlement agreement, namely what a letter of reference was to contain. The Board ruled that there was no misrepresentation because the grievor was provided a draft of the letter of reference before signing. The Board concluded that the settlement was final and binding and that there were no grounds for the Board to reopen the matter.

[4] The complainant, through private counsel, filed an application for judicial review of *Osman*. In *Osman v. Canada (Attorney General)*, 2019 FCA 72, his application was dismissed. I quote from the brief 11-paragraph decision, as follows:

…

> *[9] In its decision, the Board noted that the only point of disagreement had to do with the reference letter. It was reasonable for the Board to conclude that the applicant was "fully informed as to the terms of settlement" (Board's decision at para. 16) and therefore there was no misrepresentation. Indeed, although the applicant states that he was misled regarding the contents of the reference letter, it was reasonable for the Board to find that the fact that the applicant had a copy of the said reference letter when he signed the amended settlement agreement barred him from later claiming that the letter was inadequate. It was thus open to the Board to conclude that the terms of the settlement agreement had been properly executed and that there were no grounds to reopen the grievance which was withdrawn by the applicant.*
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> …

[5] In the matter now before the Board, the complainant seeks corrective action for the respondent's alleged breach of s 187 of the *Act* — that is, its decision not to support an application for judicial review of *Osman* — in the form of compensation for legal fees and mental distress damages (both amounts unspecified).

[6] On July 4, 2018, a vice-chairperson of the Board directed that the complaint be determined on the basis of written submissions, as requested by the respondent. I note that in an email to the Board's Registry dated August 7, 2019, the complainant stated that he did not object to the respondent's request to deal with the matter in writing. He added a further comment as follows: "Whether the Board chooses to have a hearing or not in deciding this matter, I'm okay with that, and I'll move forward."

[7] On July 9, 2018, the Board's Registry notified the parties of the dates for their submissions. The Board received the complainant's arguments on July 20, 2018, the respondent's reply on September 17, 2018, and the complainant's rebuttal on September 18, 2018.

[8] The Board's vice-chairperson assigned the file to me in February 2020. I have reviewed the parties' submissions as well as the documents on file and have reconfirmed that its contents provide enough information for ruling on the complaint without convening an oral hearing.

[9] The Board's authority to decide any matter without an oral hearing is 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."

[10] For the reasons that follow, I find that the complainant has failed to establish that, if believed, the allegations that he raises constitute an arguable case that the respondent has failed to observe the prohibitions in s. 187 of the *Act* and I dismiss the complaint.

II. Written submissions

A. By the complainant

[11] For the sake of efficiency, I have set out the main text of the complainant's submission in full, as follows:

> *1. On November 30th 2016 a Memorandum of Settlement ("MOS") had been signed by Management, myself and the Union.*
>
> *2. On December 1st 2016 the Employer acknowledged the signing of the contract and sends me a Letter of Reference to fulfill clause 6 of the MOS. I did not review the letter at the time it was sent to me, I assumed it was correct, and relied on the representations made by management during our negotiation.*
>
> *3. After I made request to change my work location from Ottawa to Toronto, the Employer signed an amendment to this contract of December 6th 2016, and I signed it on December 14th 2016.*
>
> *4. On February 2017, I secured an interview as a Labour Relations Consultant, and noticed for the first time the Letter of Reference issued by the Employer was incorrect. I contacted Mr. Ian Thompson who I did not hear back from. Mr. Thompson had a relationship with Mr. Culverhouse as he told me he had worked with Mr. Culverhouse for many years, and the language he used against my faith is expression of speech according to him.*
>
> *5. On March 14th 2017, I contacted Ms. Nadine Labelle to request the letter the parties contractually agreed on. And on April 5th 2017, Ms. Labelle responds to my email by acknowledging the Letter sent on December 1st 2016 contained incorrect information, and issued a second letter.*
>
> *6. I contacted Mr. Chris Sloan a CEIU representative from Ontario Region for assistance. I shared with him that obtaining a reference would had greatly helped me to move on with my career. The employer failure to provide the letter had negative impact on me as I was not able to use the incorrect letter for an important interview I had. I had lost confidence as result and lost the position. Mr. Sloan was unhelpful, so I hired Ms. Samantha Kompa who had showed empathy.*
>
> *7. I contacted the Board review if the parties had reached a final and binding agreement following the misrepresentation made by the Employer.*

8. On December 15th 2017 the Employer submitted false information to the Board and strongly argued that I had the Letter of Reference prior to the signing the Original MOS on December 6th 2016.

9. I was not given an opportunity to be heard on facts, and the decision maker ruled the case based on that false information without any evidence. See Para 16 of Osman V. Deputy Head (Department of Employment and Social Development Canada).

10. On February 28th, 2018 I had teleconference discussion with Mr. Ram Sivapalan to discuss a separate grievance issue that I filed February 2nd 2018 relating to discipline (grievance #4840), and which I later withdrew. On that same call, I've requested for Mr. Sivapalan and the Union help in appealing the Adjudicator decision arrived at February 26th 2018 and provided the facts he was already aware of that the Reference Letter is factually incorrect and which is an essential term of the agreement for me. Mr. Sivapalan without any justification/reasoning declined and only stated the Union position "is that it is not interested in reopening this matter" and he considered the Settlement to be fully implemented, but yet offered to help me get a corrected Reference Letter from the Employer. I elected to go ahead with Judicial Review; I refuse to affirm the contract after becoming aware of the misrepresentation.

11. On email dated April 17th 2018 Mr. Sivapalan confirmed the Union position he advised me on February 28th 2018 the Settlement Agreement is "fully implemented by all parties" despite not having an essential term of the agreement which induced me into the contract not delivered to me.

Argument

12. An essential term of a contract cannot be ignored and undelivered without recourse. The union simply do not want to reopen the grievance despite the issue causing a loss of employment, and expects me to continue to use a letter that is incorrect. I elected to commence an application for judicial review of the Board decision; I respectfully declined to affirm the contract after becoming aware of the misrepresentation. The case law provides that a party who affirms a contract after becoming aware of the nature of the misrepresentation loses the right to rescind: ***See:*** *Samson V. Lockwood (1998), 40 O.R. (3d) 161, 110 O.A.C. 301. The law expects you to take action and not sit on your rights, and that's exactly what I did.*

13.The employer had the duty of reasonable care in prpeparing the letter of reference when they agreed to provide a letter of reference. It is reasonable to assume that agreeing to provide a Letter of Reference implies agreeing to provide one which contains accurate information. Pasimanik v. Central Epicure Food Products, *2009 HRTO 1727 at Para 12.*

14. However, the decision maker in my case faulted me for not checking the letter for its accuracy. As a general proposition there

> *is no requirement on the representee to investigate the truth of the representation "even if sources are available from which he or she can be informed"* Opron Construction Co. Ltd. V. Alberta (1994), 151 AR 241 at Para 560, ***see also*** *Jessel M.R. in the case of Redgrave v. Hurd (1881) 20 Ch. D. 1(C.A.) at 13: If a man is induced to enter into a contract by false representation it is not sufficient to answer him to say: "*If you had used due diligence you would have found out that the statement was untrue/ You had the means afforded you of discovering its falsity, and I did not choose to avail yourself of them*".*
>
> *15. Given the importance of such matter to me and which had substantial consequences affecting my livelihood, the union is unable to come up with a valid reason as to why they decided that they wouldn't challenge the employer clear false information they submitted to the Board. It is important to note that the Attorney General of Canada declined to submit their Affidavit to support their case at the Federal Court of Appeal. It is fair to conclude that the union decision is baseless and arbitray when their actions certainly cannot be defensible in law, consider what the Court provided in Noel v. Societe D'Energie de la Biae James, [2001] 2 S.C.R. 207 (S.C.C.):*
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> > *"The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless matter. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary."*
>
> *16. The Union has not done any examination relating to the merits of misrepresentation other than to tell me that they do not wish to reopen the grievance. My Career is at a standstill as I am having great difficulty in securing a position related to my field due lack of employment reference. I believe that I am being punished for speaking up against hate in the workplace, and my union is endorsing the actions of the employer for failing to adequately represent me and that action is discriminatory based on my religion.*
>
> *17. The Union actions amount to a flagrant negligence given the clear evidence that was before them, and allowing the Employer to get a pass for misleading the Board makes them liable.*
> Archambault v. Public Service Alliance of Canada, *2002 PSSRB 56).*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

B. By the respondent

[12] The respondent's submission outlines as follows its contacts with the complainant about the letter of reference:

…

8. At various points in time in 2017 and 2018, the complainant sought assistance to address his concerns with the letter via the Canada Employment and Immigration Union (CEIU), which is a component union of the PSAC.

9. First, the complainant sought assistance from CEIU National Union Representative, Mr. Chris Sloan. In September 2017. Mr. Sloan assessed the concerns raised by the complainant and verbally advised the complainant that, although he did not view the amended letter of reference as a breach of the settlement, he understood the complainant was dissatisfied with the letter. Mr. Sloan suggested a few alternate avenues to approach the employer to see if there was a way to informally address the complainant's dissatisfaction with the letter.

10. Dissatisfied with Mr. Sloan's assessment of the matter regarding the letter and settlement, the complainant elected to hire his own private lawyer for assistance. In September 2017, he filed a complaint against the employer alleging that he signed the MoS based on a misrepresentation by the employer and arguing that the MoS was therefore invalid.

11. In addition, the complainant filed a s. 190 complaint against Mr. Sloan and the respondent in November 2017. That complaint was later withdrawn by the complainant.

12. In February 2018, the complaint [sic] again raised the issue of the reference letter with his new CEIU National Union Representative, Mr. Ram Sivalapan. Mr. Sivalapan had been assigned to him in November 2017 and had been assisting him with other grievance-related matters. Mr. Sivalapan reviewed the facts of the settlement and discussed the complainant's concerns about the reference letter. After giving the matter full consideration, Mr Sivalapan's assessment was that the employer's letter satisfied the settlement and therefore the MoS of December 2016 had been fully implemented. However, understanding the complainant was not happy, Mr. Sivalapan offered to continue to represent the complainant and suggested using other legitimate means to address his concerns with the employer, including his dissatisfaction with the letter of reference.

13. On February 26, 2018, the Board issued a decision regarding the complaint that the complainant had filed in September 2017 against the employer. In its decision the Board held that there had not been any misrepresentation by the employer in terms of the MoS and that the settlement was final and binding.

…

[13] The respondent canvassed the applicable case law on the duty of fair representation and cited the following decisions: *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44; *Ouellet v. Luce St-Georges*, 2009 PSLRB 107; *Tsai v. Canada*

Employment and Immigration Union, 2011 PSLRB 78; *Nowen v. UCCO-SACC-CSN*, 2003 PSSRB 98; and *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52.

[14] The respondent summarized the thrust of the case law on the duty of fair representation as follows:

1) the bargaining agent is allowed "a fair amount of discretion" in deciding whether, and how, to represent an employee as long as that discretion is not exercised in bad faith or in a manner that is arbitrary or discriminatory;
2) an employee does not have an absolute right to representation and do not have the final say in determining how the bargaining agent discharges its obligations;
3) bargaining agents often must make decisions with which an employee may disagree; and
4) the fact that an employee disagrees with, or does not accept, the bargaining agent's decision does not constitute evidence of arbitrary, discriminatory, or bad faith conduct.

[15] As for the respondent's representation of the complainant, it submitted as follows:

> …
>
> *It is the respondent's position that this present complaint is about an individual employee in the bargaining unit disagreeing with the bargaining agent's strategy in carrying out its representational obligations. In using its discretion to handle all aspects of the complainant's file in this case, including whether to support his appeal of the negotiated settlement, the respondent respectfully submits that it acted within the discretion allowed to a bargaining agent. Therefore, it did not act in a manner that amounts to bad faith or is arbitrary or discriminatory and therefore did not violate its duty of fair representation under the FPSLRA.*
>
> …
>
> *… the respondent respectfully submits that its actions in representing the complainant in matters relating to his settlement with the employer were not carried out in bad faith, in an arbitrary or in a discriminatory manner. The respondent submits that Mr. Sivalapan, just like Mr. Sloan before him, made every attempt to assist the complainant with his concerns regarding the implementation of the December 2016 settlement with his Employer. In the case of both representatives of the respondent, serious consideration was given to the merits of all the complainant's concerns regarding the employer's letter of reference, an assessment was made, the assessment was clearly communicated to the complainant (verbally and in writing) and other avenues of resolution were offered to address the complainant's concerns.*
>
> *It is therefore the respondent's respectful submission that the respondent met its duty of fair representation in this matter by*

> *providing reasoned and competent representation to the complainant. The respondent's decision not to represent him with an appeal of the settlement, which PSAC considered to be fully implemented, does not warrant a finding that the complainant was not fully and diligently represented and in manner, that was arbitrary, discriminatory or in bad faith.*
>
> …
>
> *The standard of care which the respondent must meet in this case is one of acting without arbitrariness, discrimination or bad faith. There is no evidence to support the complainant's assertions that the union's decision was "baseless and arbitrary" or that its actions amount to "flagrant negligence". Furthermore, contrary to the assertions of the complainant in his written submissions, the respondent's actions are defensible in law….*
>
> …

C. Complainant's rebuttal

[16] In my view, the complainant's rebuttal contains no submissions relevant to the respondent's alleged violation of s. 187 of the *Act*. As it focusses exclusively on the status of the settlement agreement and its amendment and does not address the allegations of arbitrariness and discrimination in any substantive fashion, I see no need to summarize it.

III. Reasons

[17] I must state first what this decision is **not** about. Although the complainant focusses a substantial part of his argument on his contention, obviously passionately held, that the letter of reference did not satisfy the requirements of his December 2016 settlement with the employer, that contention is not before me. This proceeding is also not a review of the Board's determination in *Osman*, a decision that found no grounds to reopen the settlement agreement, which it ruled was final and binding. The review of that decision was in the hands of the Federal Court of Appeal; the complainant pursued that review. The Court rejected his arguments. The issue of the sufficiency of the letter of reference is thus closed for the purpose of this decision.

[18] The determination to be made is straightforward: has the complainant established that, if believed, the allegations that he raises constitute an arguable case that the respondent has failed to observe the prohibitions in s. 187 of the *Act*? At this stage of the proceedings, and for the purpose of my analysis only, I must presume that the complainant would be able to prove his allegations. By the plain wording of s. 187,

the test is whether the complainant's allegations constitute and arguable case that Mr. Sivalapan's decision was arbitrary, or was discriminatory.

[19] While it does not determine the matter, I find it interesting that the complainant filed, but then withdrew, an earlier duty-of-fair-representation complaint when Mr. Sloan, his previous CEIU representative, determined that the letter of reference complied with the settlement agreement. If the complainant formed the opinion in the fall of 2017 that he should not proceed with that complaint and formally withdrew it, why then did he make a new complaint in April 2018 against Mr. Sivalapan, who essentially made the same determination as Mr. Sloan?

[20] Other than to allege that Mr. Sivalapan's determination was flagrantly negligent, baseless, arbitrary, and discriminatory, it is my view that in his submissions, the complainant has not offered anything that would constitute an arguable case of a breach of s. 187 of the *Act*.

[21] The complainant's case rests essentially on his disagreement with Mr. Sivalapan's decision.

[22] The case law clearly stands for the proposition that the fact that an employee disagrees with a decision made by his or her bargaining agent does not in itself prove a breach of s. 187 of the *Act*. A bargaining agent retains substantial discretion in deciding whether, and how best, to represent a member provided that it observes the fundamental principles established by the Supreme Court of Canada as follows in *Canadian Merchant Service Guild*, at page 527, and as reflected throughout the Board's case law:

> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory of wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[23] The complainant's allegation is that Mr. Sivalapan's assessment that the bargaining agent could not support a judicial review application of *Osman*, as had Mr. Sloan before him, was arbitrary because it "cannot be defensible in law". The complainant, however, offered no details of how Mr. Sivalapan came to that assessment and he alleged no facts that suggest anything untoward. The complainant's allegations suggest that he was not prepared to live with any option other than proceeding to judicial review. His allegations also suggest that other avenues to pursue his concerns about the letter of reference were not acceptable to him.

[24] On learning that the bargaining agent disagreed with his view of the settlement agreement and the letter of reference, the complainant insisted on challenging *Osman* before the Federal Court of Appeal, employing private counsel, as was his right. The fact that the representations of his private counsel subsequently failed before the Federal Court of Appeal provides after-the-fact confirmation that the complainant has no arguable case that Mr. Sivalapan's determination was arbitrary because it "cannot be defensible in law".

[25] As stated in *Sayeed*, at para. 37, the duty of fair representation "…does not mean that members of the bargaining agent have an absolute right to representation or that they have the final say with respect to the manner in which the bargaining agent carries out its obligations in their cases."

[26] The complainant was certainly entitled to his opinion in February 2018 that the Board's decision in *Osman* was wrong when he discussed it with Mr. Sivalapan. What he was not entitled to was Mr. Sivalapan's agreement to refer the matter to the Federal Court of Appeal. Mr. Sivalapan, on behalf of the bargaining agent, was bound to consider the available options, make a reasoned decision, and communicate that decision to the complainant.

[27] Further, the complainant's allegation that Mr. Sivalapan's assessment that the bargaining agent could not support a judicial review application of *Osman* was the result of discrimination based on the complainant's faith appears to be a bald allegation thrown in for good measure. In fact, the complainant allegations offer no light whatsoever on how he came to believe that Mr. Sivalapan's assessment was tainted by discrimination. In light of the fact that the Federal Court of Appeal

dismissed the complainant's judicial review application, I cannot in good conscience find that the complaint raises an arguable case of discrimination in this case.

[28] Absent an arguable case that Mr. Sivalapan acted arbitrarily or discriminatorily in his assessment that the bargaining agent could not support a judicial review application of *Osman*, in breach of s. 187 of the *Act*, this complaint has no chance of success and ought to be dismissed summarily.

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

(The Order appears on the next page)

IV. Order

[30] The complaint is dismissed.

April 22, 2020.

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