Date: 20200507

File: 561-02-39209

Citation: 2020 FPSLREB 48

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

BRIGETTE WALENIUS

Complainant

and

TREASURY BOARD
(Department of Foreign Affairs, Trade and Development)

Respondent

Indexed as
Walenius v. Treasury Board (Department of Foreign Affairs, Trade and Development)

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

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Josh Alcock, counsel

Decided on the basis of written submissions, filed November 6, 2018; September 11, October 7, and November 15, 2019; and February 18, 2020.

REASONS FOR DECISION

I. Introduction

[1] The issue raised in this complaint is whether the respondent committed an unfair labour practice by not restoring the complainant's building pass in advance of a bargaining agent-sponsored breakfast function on September 11, 2018.

[2] The breakfast was sponsored by the Professional Association of Foreign Service Officers (PAFSO), which is the bargaining agent for employees in the Foreign Service (FS) bargaining unit at the Treasury Board ("the respondent"). Brigette Walenius ("the complainant"), is a member of that bargaining unit. She works at the Department of Foreign Affairs, Trade and Development, now commonly known as Global Affairs Canada ("GAC" or "the department"). The breakfast was held at 125 Sussex Drive in Ottawa, Ontario, which is where GAC is headquartered.

[3] In advance of the breakfast event, Ms. Walenius had been on medical leave for several months and was about to return to work. During her leave, the department had suspended her building access pass. She had been seeking to have it restored in advance of her return to work. The department told her that it would restore the pass only once she actually returned to work. During the course of those discussions, which took place by email, Ms. Walenius said that she would also need it restored to attend the PAFSO breakfast.

[4] PAFSO was providing Ms. Walenius with assistance on her return to work and contacted departmental representatives before the PAFSO breakfast, stating that it would consider it an unfair labour practice if her pass were not restored.

[5] The department did not restore her building pass. However, the respondent denied that it prevented her from attending the PAFSO breakfast. It took the position that Ms. Walenius could have gained access to the breakfast with a temporary or visitor's pass.

[6] PAFSO initially made this complaint on October 1, 2018. Several months of correspondence took place between the parties and the Federal Public Sector Labour Relations and Employment Board ("the Board") with respect to submissions on the complaint. In July 2019, PAFSO withdrew its representation, and at the same time, the complainant indicated that she would represent herself. She also then provided

additional details with respect to the nature of the complaint, specifying that she made it in relation to both ss. 186(1) and (2)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[7] The Board then directed that the parties complete written submissions on the complaint.

[8] In that process, the respondent took the position that Ms. Walenius does not have standing to represent herself in this complaint before the Board. It cited jurisprudence that concluded that only bargaining agents have standing to bring complaints under s. 186(1). With respect to the allegations under s. 186(2), the respondent opposed the complainant adding allegations to the complaint in July 2019, nine months after it was made, based on events that took place in June 2019.

[9] The complainant was given an opportunity to make written submissions in response to the respondent's objections.

[10] In the reasons that follow, I find that the determinative issue in this complaint is whether Ms. Walenius had the standing to bring this unfair labour practice complaint before the Board. For the reasons that follow, I find the respondent's objections well founded and conclude that she did not have that standing. Therefore, the complaint is dismissed.

[11] I note that during the course of the correspondence and submissions process, both the complainant and the respondent provided the Board with many details of her employment situation. They also reported that she has other grievances before this Board or at the internal stage of the grievance process. I am not seized of these other matters. Much of the contextual information they provided may overlap with issues raised in those other processes. With a view towards not prejudicing those other grievances, in these reasons, I report only those facts I believe necessary to render the decision in this complaint.

II. Complaint before the Board, and a summary of the evidence

[12] The complaint was received at the Board on October 1, 2018, and read as follows: "Mr. Philip Pinnington, Executive Director at GAC, refused to reinstate my building pass to permit me to attend a union function at 125 Sussex on

September 11, 2018." The complaint was made based on s. 190(1)(g) of the *Act*, which reads in part as follows:

> ***Complaints***
>
> ***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.*

[13] Section 185 of the *Act* reads as follows:

> ***Meaning of unfair labour practice***
>
> ***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).*
>
> [Emphasis in the original]

[14] At this stage, the complaint did not specify which of the specific sections listed in s. 185 that the respondent was alleged to have violated.

[15] The respondent provided its initial response to the complaint on November 6, 2018. It provided contextual and factual details related to the situation, took the position that the complaint was devoid of content, and stated that the complainant had failed to provide an arguable case of an unfair labour practice under the *Act*. It submitted that the complaint was trivial and frivolous and requested that the Board summarily dismiss it or alternatively that it decide the matter without holding an oral hearing.

[16] In accordance with normal practice, the Board then asked the complainant to provide a reply to the respondent's submissions and set a deadline of November 23, 2018. Over the course of several months, from November 2018 to June 2019, she made five requests for an extension of this deadline. Each request stated that she was waiting for documents that had been requested through the access-to-information (ATIP) process. The first two requests were made by a PAFSO staff representative; the complainant made the last three.

[17] The Board granted the first four extension requests. However, in response to the fifth one, on June 24, 2019, it directed Ms. Walenius or PAFSO to answer a few

questions about the complaint. The first question asked whether PAFSO was representing her, and if so, to confirm the representative's name. The second asked for the specific provisions of the *Act* the respondent was alleged to have violated. The third and fourth questions asked for details of the documents Ms. Walenius had sought through the ATIP process.

[18] On July 15, 2019, the complainant wrote that she would represent herself. On the same date, PAFSO wrote to the Board and confirmed that it was withdrawing its representation on the complaint.

[19] At the same time, Ms. Walenius provided additional details about her complaint and cited the two particular provisions of the *Act* that she alleged the respondent had violated. The first was s. 186(1), which prohibits employer interference in the administration of an employee organization, which was made in relation to her inability to attend the PAFSO breakfast event on September 11, 2018. The second provision cited was s. 186(2)(a), which prohibits discipline against an employee for participating in an employee organization or taking actions under the *Act*. She made the second allegation on the basis of a five-day disciplinary suspension that her employer imposed on her in June 2019.

[20] In that same correspondence, she also provided details of which documents she had sought through the ATIP request. On the basis of her answers, the Board concluded that the complainant's ATIP requests went well beyond what could be arguably relevant to the complaint. It gave her a deadline of September 11, 2019, to prepare her response to the respondent's November 6, 2018, letter.

[21] Once her response came in, the respondent provided a further reply, dated October 7, 2019.

[22] On the basis of those submissions, the following relevant facts do not appear to be in dispute:

a) Ms. Walenius is employed at GAC as a manager in the FS category.
b) In January of 2018, she commenced a leave for medical reasons.
c) In June 2018, her building access pass was suspended. As a rationale, the department stated that she had been coming into the office after hours. She was advised that if she needed to come into the office, she could make arrangements for a visitor's pass.
d) Ms. Walenius was due to return to work on September 4, 2018.

e) In late August, she asked the department to reactivate her building pass. It responded that her access would be reinstated once she returned to work. She did not return to work on September 4, as she was in discussions with the department about the return-to-work arrangements.
f) Ms. Walenius went to 125 Sussex on September 11, 2018, and her building pass did not work, after which she departed and contacted her PAFSO representative.
g) She returned to work at some point in mid-to-late October 2018.

[23] The complainant submitted that she made multiple requests over several days to have her pass restored so that she could attend the PAFSO breakfast function. She contended that the department could have sent an email to organize a visitor's pass or to reinstate her pass.

[24] The respondent submitted that Ms. Walenius did not make "multiple requests five days in advance." It submitted that the PAFSO breakfast was raised with it only on Friday, September 7, 2018, in the context of an exchange about the return to work. It contended that GAC had provided Ms. Walenius with options to access events such as the PAFSO breakfast, including requesting a temporary visitor's pass from the Commissionaires desk at 125 Sussex.

[25] Following a review of this correspondence and pursuant to s. 22 of the *Federal Public Sector and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board decided not to conduct an oral hearing. It provided the parties with the opportunity to make written arguments with respect to the complaint. The respondent provided its final arguments on November 15, 2019. Following a request for documents that the respondent said it would voluntarily fulfil, Ms. Walenius submitted her final arguments on February 18, 2020.

III. Summary of the arguments

A. For the respondent

[26] With respect to the allegation under s. 186(1) of the *Act*, the respondent argued that only a bargaining agent or its authorized representative has standing to bring a complaint. While the bargaining agent initially made the complaint in October 2018, it withdrew from the proceedings in July 2019. Without its ongoing support, the complainant could not pursue the complaint on her own. For this proposition, the respondent cited *Bernard v. Canada Revenue Agency*, 2017 PSLREB 46 ("*Bernard 2017*") at paras. 73 and 78, and *Bialy v. Heavens*, 2011 PSLRB 101 at paras. 26 to 29.

[27] Alternatively, the respondent argues that the allegations about the breakfast meeting do not rise to the level of an unfair labour practice. The collective agreement contains language on a bargaining agent's rights to use the employer's facilities to communicate with its members. Using s. 186(1) to infer a right to attend a breakfast meeting, while on sick leave, would have the effect of rendering the negotiated collective agreement provision moot. The respondent argued that the purpose of s. 186(1) is to put the parties on "equal footing" in the collective bargaining process, citing *Attorney General of Canada v. Public Service Alliance of Canada*, 2017 FCA 208 at paras. 13, 14, 16, and 17, and *Bernard v. Canada (Attorney General)*, 2014 SCC 13 at paras. 24, 25, 27, and 28. It cannot be said that reinstating the complainant's building pass to attend the PAFSO breakfast was necessary to ensure that the bargaining agent was on an equal footing with the employer, it argued.

[28] With respect to the complainant's allegation under s. 186(2)(a) of the *Act*, the respondent argued that she should not be allowed to add a new ground to the complaint based on an event that took place several months after it was made (the June 2019 disciplinary suspension). Doing so would fundamentally alter the substantive nature of the complaint, which was about the reinstatement of a building pass to attend the bargaining agent's meeting. Adding this new allegation at this late stage would be highly prejudicial to the respondent. Finally, any allegations with respect to that suspension would be better dealt with in a separate proceeding, the respondent argued. Given that a separate grievance has already been filed and that there do not appear to be any facts in common with this complaint, there is no reason to join the issues. The respondent argued that the complainant would not suffer prejudice from a decision to exclude that issue from this proceeding, as she is able to proceed with her grievance.

B. For the complainant

[29] The complainant argued that this complaint was initially made by her bargaining agent, PAFSO. It withdrew its representation from this complaint to concentrate on other grievances that the respondent's conduct forced it to handle. The respondent could not commit multiple infractions, overburden the bargaining agent, and then claim that the complainant is not entitled to represent herself.

[30] Secondly, the Board's website contained guidance for self-represented individuals, which specifically states, "Complainants wishing to file a complaint …

under section 190 of the FPSLRA may represent themselves without help from a bargaining agent or lawyer." She argued that if the Board's website is somehow wrong, then "the doctrine of expectations" applies, and she should be allowed to have the case heard on its merits.

[31] The complainant argued that the respondent's actions took place in a context in which she had spoken out internally about problems with human resources management within the department. As a result, she ended up on intermittent stress leave between May and December 2017. In January 2018, she broke her wrist and started an extended sick leave that continued throughout most of that year. In June of 2018, the department cancelled her building access pass, which she argued was initiated by a departmental labour relations officer. She had been due to return to work on September 4, 2018, and her building pass should have been restored that day. While her return was delayed as the details of her work assignment were being discussed, the department should not have delayed reactivating her pass.

[32] She also specifically asked the Director of Human Resources to reactivate her pass so that she could attend the PAFSO meeting. It would have taken only one email to the Pass Office to restore her pass or to proactively issue her a visitor's pass. She should not have been forced to request a visitor's pass from her previous manager, from whom she had been separated, for medical reasons. The respondent's actions were purposeful, which denied her participation in the bargaining agent's meeting by not restoring her access pass when it could have.

[33] With respect to her s. 186(2)(a) allegations, they could have been added only afterwards, as the events happened after the complaint had been made. On December 3, 2018, the respondent's director of human resources sent her a five-page letter accusing of her of wrongdoings, which was followed by a June 2019 letter imposing the five-day suspension. She noted that these actions were taken after the complaint was made.

[34] The complainant made no specific responses to the case law cited by the respondent with respect to s. 186(1).

[35] While acknowledging that she had filed a grievance in relation to the June 2019 five-day suspension, the complainant did not respond to the respondent's argument

that the grievance process is the more appropriate venue for challenging the suspension.

[36] The complainant also argued that the respondent did not produce all the documents relevant to this complaint and that it misled the Board by indicating that she had already received the relevant documents through the ATIP process.

IV. Reasons

[37] During the course of the submissions, the complainant alleged that the respondent had committed unfair labour practices in violation of two sections of the *Act*.

A. The allegation under s. 186(1)

[38] The first allegation is under s. 186(1) of the *Act*, which reads as follows:

> ***Unfair labour practices — employer***
>
> ***186 (1)*** *No employer, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*
>
> ***(a)*** *participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*
>
> ***(b)*** *discriminate against an employee organization.*

[39] The case law cited by the respondent is clear. In *Bernard 2017*, the Public Service Labour Relations and Employment Board (PSLREB) clearly stated that s. 186(1)(a) is designed to protect the interests of bargaining agents and that "… a complaint under this provision of the *Act*, can only be brought by the bargaining agent or a duly authorized representative" (at paragraph 73).

[40] While PAFSO made the initial complaint, it clearly withdrew its representation on July 15, 2019. From that point forward, Ms. Walenius sought to represent herself.

[41] I see no reason to depart from the findings of the PSLREB in *Bernard 2017* or of the Public Service Labour Relations Board in *Bialy*, which surveyed previous jurisprudence and found that "… only an employee organization or a duly mandated

representative may complain of a violation of the prohibitions set out in 186(1)(*a*) of the new Act" (at paragraph 16).

[42] I do note that the Board's website did contain, at the time of writing, the information for self-represented employees cited by the complainant. Specifically, in response to the question "Can I represent myself?", the site provided the answer referenced by Ms. Walenius: "Complainants wishing to file a complaint before the FPSLREB under section 190 of the *FPSLRA* may represent themselves without help from a bargaining agent or lawyer."

[43] There are seven categories of complaints ("a" to "g") that can be made under s. 190 of the *Act*, and in turn, s. 190(g) refers to s. 185, which references five different unfair labour practices, specifically, "… anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1)."

[44] The vast majority of the s. 190(g) complaints received by the Board are in relation to s. 187 (which sets out the duty of fair representation) and 188 (which sets out a number of prohibitions governing employee organizations). It is common for individuals to self-represent in those cases. The Board's guidelines to individuals seeking to self-represent on s. 190 complaints must be read in that context.

[45] The guidelines on the Board's website cannot be used to override its well-established jurisprudence with respect to s. 186(1). That said, the site should be revised to provide more precise information as to which s. 190 complaints individual employees can and cannot make.

[46] The complainant provided no specifics with respect to her argument that the "doctrine of expectations" should apply, given the content of the Board's website. I was provided with no evidence to suggest that the PAFSO withdrew its representation because of the wording on the web site. In her July 15, 2019, correspondence to the Board, she explained that PAFSO would be "focusing its attention" on her grievances.

[47] In summary, I find that Ms. Walenius did not have standing to make a complaint under s. 186(1) of the *Act*.

[48] Given this finding, I find no reason to give detailed consideration to the specifics of the case. However, I will nevertheless state that none of the 12 documents submitted by the complainant or her narrative of the facts as she reported them in her

submissions indicates an intention by the respondent to interfere in PAFSO's administration by failing to restore her building pass. The narrative and documents provided do indicate a conflict between Ms. Walenius and her employer with respect to several other issues, including the details of how her return to work was to proceed in September 2018. The complainant's inability to have her building pass restored before the September 11, 2018, breakfast meeting was clearly tied to those other conflicts. Thus, even if I am wrong about her ability to represent herself in this complaint, I would find that the respondent did not commit an unfair labour practice.

B. The allegation under s. 186(2)(a)

[49] In her correspondence to the Board of July 15, 2019, and in her subsequent submissions, the complainant also alleged a violation of s. 186(2)(a) on the basis of the suspension without pay that the employer imposed on her in June of 2019. This subsection of the *Act* reads as follows:

> ***Unfair labour practices — employer***
>
> ***186 (2)*** *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*
>
> ***(a)*** *refuse to employ or to continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> ***(i)*** *is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
>
> *(**ii)** has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2 or 2.1,*
>
> ***(iii)*** *has made an application or filed a complaint under this Part or Division 1 of Part 2.1 or presented a grievance under Part 2 or Division 2 of Part 2.1, or*
>
> **(iv)** *has exercised any right under this Part or Part 2 or 2.1 ….*

[50] The complainant argued that after she made this complaint in October 2018, in December 2018, the employer issued the five-page letter accusing her of wrongdoings, and that in June of 2019, it imposed the five-day suspension on her for those wrongdoings.

[51] The respondent argued that the Board should not permit the complainant to add allegations to her October 1, 2018, complaint because of a five-day suspension that was imposed in June of 2019. It submitted that there was no factual overlap between the events involving the building pass and those leading to the suspension and that there was no practical reason for joining the issues. It further argued that the complainant's proposal to amend the complaint would fundamentally alter its nature by introducing an entirely new element, retaliatory discipline. In any event, given that a grievance has already been submitted against the suspension, the complainant would not be prejudiced by excluding the suspension from the ambit of the current proceeding.

[52] The grievor made extensive submissions about her GAC career, her manager role, and the fact that she made allegations about the poor management of human resources at GAC. She described herself as a whistle-blower and said that her employer had threatened discipline, which led to her taking sick leave. However, she did no more than allege a connection between the filing of her October 2018 complaint and the June 2019 discipline. She did not submit either the December 2018 five-page letter or the June 2019 disciplinary letter as documents in support of her arguments.

[53] I find that there is no reason to allow the complainant to amend her complaint to include allegations that she was disciplined for making it, on the basis of discipline that was rendered eight months after it was made. There was no evidence provided that even if it were believed on its face, would support the argument that the June 2019 discipline was a retaliatory measure for making this complaint.

[54] I agree with the respondent that as Ms. Walenius has filed a grievance against the five-day suspension, she will not be prejudiced by the Board's decision to prohibit amending this complaint.

V. Conclusion

[55] I have concluded that Ms. Walenius did not have standing to proceed on her own with a complaint under s. 186(1) of the *Act*. Consistent with the Board's jurisprudence, I have determined that only bargaining agents and employee organizations are entitled to pursue such complaints.

[56] I have also concluded that Ms. Walenius cannot amend her complaint to include allegations under s. 186(2)(a) to address events that took place in June 2019.

[57] In its original (November 6, 2018) reply to the complaint, the respondent asked the Board to dismiss it as trivial or frivolous. I do not believe that such a declaration is justified under the circumstances. Based on Ms. Walenius' submissions, I believe that she genuinely was attempting to address issues she has with her employer. Under those circumstances, I think it more appropriate to simply recognize that she has a number of grievances in progress, which provide the appropriate process for addressing what appear to be the underlying sources of conflict between the parties.

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

(The Order appears on the next page)

VI. Order

[59] The complaint is dismissed.

May 7, 2020.

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