Date: 20200528

File: 561-02-39090

Citation: 2020 FPSLREB 62

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

YING XU

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Xu v. Public Service Alliance of Canada

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

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

For the Complainant: Herself

For the Respondent: Christopher Schulz, grievance and adjudication officer

Decided on the basis of written submissions on August, 28, 2018.
September 9, 2018, October 4 and 11, 2018.

REASONS FOR DECISION

I. Complaint before the Board

A. Introduction

[1] On August 28, 2018, Ying Xu ("the complainant") filed a complaint under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2, "the *Act*"), alleging that the Public Service Alliance of Canada ("the respondent") breached its duty of fair representation under s. 187 of the Act.

[2] She alleged that her bargaining agent representative, Jim McDonald, represented her in bad faith, committed serious negligence, and was dishonest and misleading in how he represented her.

[3] In particular, she stated as follows:

> …
>
> *On March 27, 2018, I received a Disciplinary Termination of Employment Letter. This Disciplinary Termination letter wrote: "Further to the disciplinary hearing held on March 15, 2018, I conclude … that you have breached ESDC Code of Conduct."*
>
> ***But the meeting held on March 15, 2018 was not*** **[a]** ***Disciplinary Hearing meeting****, and it's* [a] *Disciplinary* ***Audition*** *meeting.* ***Without*** [a] *Disciplinary Hearing meeting in this Disciplinary Termination Decision Process.*
>
> *So this Disciplinary Termination letter is non- valid.*
>
> *But my union representative, Mr. Macdonalds did not mention this matter.*
>
> *It's serious negligence.*
>
> *He had dishonest conduct and misleading my case conduct.*
>
> …
>
> [*Sic* throughout]

[4] The complainant attached the disciplinary termination letter and a copy of the "Notice of Disciplinary Audition" to the complaint.

[5] The termination letter, dated March 27, 2018, reads in part as follows: "Further to the disciplinary hearing held on March 15, 2018, I conclude that you have engaged in various acts of insubordination and that you have breached *ESDC's Code of Conduct:*"

[6] After that are listed several acts of misconduct.

[7] The notice of the March 15, 2018, meeting from the grievor's supervisor to the complainant is entitled, "Notice of Disciplinary Audition", and states that the subject is "Notice of Disciplinary Audition".

[8] The opening paragraph of the notice states as follows:

> *This is further to discussions with your team leader and manager about insubordination behaviours related to taking additional time to work on non-passport related duties without getting approval from management before as well as three events of disrespectful interaction with your team leader and manager.*

[9] After that follow several allegations of misconduct.

[10] She was advised that she had the right to be accompanied by a bargaining agent representative and that a labour relations advisor would also attend the meeting, by teleconference.

[11] In her complaint, as corrective action, the complainant requested that the invalid termination be rescinded, that she be reinstated in her job, and that she be reimbursed financially.

B. The respondent's response

[12] On October 4, 2018, the respondent replied to the complaint. It submitted that at all times, it and its representatives represented the complainant in good faith and in a manner that was neither arbitrary, discriminatory, nor in bad faith.

[13] The respondent argued that the complainant has not made out a *prima facie* case and submitted that nothing in the complaint could provide the foundation for a finding that the respondent failed in its duty of fair representation.

[14] The respondent relied on the Board's decision in *Adams and Richardson v. Union of Taxation Employees*, 2009 PSLRB 124, in which the Board dismissed a complaint about how a complainant's representation was handled during the different levels of the grievance procedure.

C. The complainant's response

[15] On October 11, 2018, the complainant faxed the Board a number of documents, including the following:

- a letter dated October 15, 2012, addressed to her from Passport Canada and advising her that her tenure as a term employee was changing from a full-time specified-term appointment to a full-time indeterminate appointment effective October 13, 2012;
- a document dated October 17, 2012, in which the complainant accepted the indeterminate employment offer; and
- a job description for a CR-03 passport clerk position dated 2017-09-01.

II. Reasons for decision

[16] I am satisfied that I can decide this complaint on the basis of the written submissions filed without convening an oral hearing as provided for in section 22 of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365.

[17] Section 187 of the *Act*, the duty-of-fair-representation provision, 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 Supreme Court of Canada, in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, set out the following five principles governing a union's duty of fair representation:

1) Because of its status as the exclusive bargaining agent for a bargaining unit, the union must represent all members of the unit fairly.
2) An employee does not have an absolute right to arbitration; the union enjoys considerable discretion in that respect.
3) After carrying out a thorough investigation of a grievance, the union must exercise its discretion in good faith after considering the impact of the grievance on the employee versus the union's legitimate interests.
4) The union's representation decision must not be arbitrary, capricious, discriminatory, or wrongful.
5) The union's representation must be genuine, undertaken with integrity and competence, and without serious negligence or hostility toward the employee.

[19] What constitutes conduct on the part of the bargaining agent that is arbitrary, capricious, discriminatory, or wrongful or that constitutes serious or major negligence?

[20] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, the Supreme Court of Canada outlined the scope of the duty of fair representation as follows at paragraphs 48 to 51 in reference to the duty of fair representation set out in s. 47.2 of the Quebec *Labour Code* (C.Q.L.R., c. C-27).

> *48 This duty prohibits four types of conduct: bad faith, discrimination, arbitrary conduct and serious negligence… First, s. 47.2 prohibits acting in bad faith, which presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct ….*
>
> *49 The law also prohibits discriminatory conduct. This includes any attempt to put an individual or group at a disadvantage where this is not justified by the labour relations situation in the company. For example, an association could not refuse to process an employee's grievance, or conduct it differently, on the ground that the employee was not a member of the association, or for any other reason unrelated to labour relations with the employer.…*
>
> *50 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 manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.…*
>
> *51 The fourth element … is serious negligence. A gross error in processing a grievance may be regarded as serious negligence despite the absence of intent to harm. However, mere incompetence in processing the case will not breach the duty of representation, since s. 47.2 does not impose perfection as the standard in defining the duty of diligence assumed by the union.…*

[21] In *Adams and Stevenson*, the Board dealt with a duty-of-fair-representation complaint. The complainants believed that the respondent did not properly represent them at the upper levels of the grievance procedure. In that case, the former Public Service Labour Relations Board concluded that there was no obligation for a bargaining agent to invite employees to attend grievance hearings, to keep in touch with them, or

to consult witnesses while pursuing a grievance at the upper levels of the grievance procedure. It also concluded that if the respondent chose not to do those things, it did not mean that the respondent acted in bad faith or in a discriminatory manner.

[22] To lay a foundation to establish a violation of s. 187 of the *Act*, a complainant must make out an arguable case that the respondent acted arbitrarily, in a capricious, discriminatory or negligent manner, or in bad faith. Has the complainant provided a factual basis that if proven, could found such a case?

[23] I am not persuaded on a balance of probabilities that it has been established on a *prima facie* basis that the respondent did not meet its legal obligation when it did not argue that the complainant's termination was invalid because the notice of the disciplinary meeting was entitled "Audition" as opposed to "Hearing". Not only does the factual basis for the complaint, even if proven, not constitute arbitrary, discriminatory, or negligent conduct or conduct made in bad faith, in my view, there is no basis for an argument on the merits that the termination decision was invalid.

[24] The complainant could have been in no doubt that the disciplinary meeting of March 15, 2018, for which she was given notice and for which she was invited to bring her bargaining agent, related to her alleged misconduct and was in substance a disciplinary hearing.

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

(The Order appears on the next page)

III. Order

[26] The complaint is dismissed.

May 28, 2020.

David P. Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board