Date: 20200723

File: 561-02-39425

Citation: 2020 FPSLREB 76

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

CHRISTINE NEMISH

Complainant

and

KEVIN KING, MARY ANNE WALKER AND UNION OF NATIONAL EMPLOYEES (Public Service Alliance of Canada)

Respondents

Indexed as
Nemish v. King, Walker and Union of National 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: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Nina Ziolkowski, grievance and adjudication officer

Heard at Toronto, Ontario,
January 20, 2020.

REASONS FOR DECISION

I. Complaint before the Board

[1] On November 7, 2018, Christine Nemish ("the complainant") made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") alleging a violation of s. 187, which covers the duty of fair representation.

[2] The named respondents are the Union of National Employees ("UNE"), Mary Anne Walker (Regional Vice-President, Ontario, UNE), and Kevin King (National President, UNE). The UNE is a component of the bargaining agent, the Public Service Alliance of Canada ("PSAC"). In this decision, the PSAC will be referred to as "the respondent".

[3] The complainant alleged that the respondent failed in its duty to fairly represent her, primarily by failing to properly advise her of the time limit in which to file a grievance. The PSAC denied that it acted arbitrarily, discriminatorily, or in bad faith and asked that the complaint be dismissed without a hearing as it is untimely and, in the alternative, because the complainant did not meet the burden of proof under s. 187 of the *Act*.

[4] A hearing was held on January 20, 2020, to determine the timeliness issue.

II. Summary of the evidence

[5] The complainant was a term employee at the Federal Economic Development Agency for Southern Ontario ("FedDev"). On November 15, 2017, she advised FedDev that she was exercising a work refusal under the *Canada Labour Code* (R.S.C., 1985, c. L-2) and that she was going on sick leave, effective immediately, as she had experienced bullying and harassing behaviour from a colleague. She did not return to work until January 24, 2018.

[6] On November 16, 2017, the employer advised the complainant that it had filed a Workplace Safety and Insurance Board claim, that any leave she took would be without pay, that she would have to use any paid leave or sick leave without pay available to her, and that any continued absence would be considered sick leave without pay unless the claim was approved.

[7] The complainant and the UNE (primarily her union representative, Ms. Walker) had many discussions in the months following. The discussions covered many issues, one of which was the complainant's desire to have her November 15, 2017, to January 23, 2018, leave without pay converted to leave with pay. The merits of the duty-of-fair-representation complaint revolve around those discussions. For the purposes of this proceeding, suffice it to say that the UNE did not file a grievance on the complainant's behalf to have her leave converted.

[8] Her term at FedDev ended at the end of March 2018. On April 3, 2018, she began a new position with the Department of Veterans Affairs ("Veterans Affairs"). Her discussions with the UNE continued about her pay and other issues that arose from the leave she had taken at FedDev.

[9] On August 7, 2018, the complainant received an email from Leslie Sanderson, Labour Relations Officer, UNE, advising her that a grievance about paid leave would be untimely and that the UNE would not help her file one. Ms. Sanderson's email reads in part as follows:

> …
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> *Given that you are seeking redress from FedDev and you have left the employment of FedDev for greater than 25 business days, then according to Article 18.15 of the Programs [sic] and Administration [sic] Collective Agreement (see below) you no longer have any right to pursue a grievance or complaint against that employer. Accordingly, the UNE can no longer assist you with any claims you made previously against FedDev.*
>
> …

[10] The complainant emailed Ms. Sanderson on September 25, 2018. She questioned that decision and advised that in her view, although by then she was working at Veterans Affairs, the Treasury Board was her employer and that a grievance could still be filed.

[11] Ms. Sanderson responded the same day. She stated that to have grieved her leave-without-pay issue for the leave period that ended on January 23, 2018, the complainant would have had to file a grievance no later than February 27, 2018. She said that the UNE would not support filing an untimely grievance and reiterated that the UNE could not support a grievance as FedDev was no longer the complainant's employer.

[12] On October 1, 2018, the complainant wrote to Mr. King and to Christopher Aylward, National President, PSAC. Mr. King did not respond. Mr. Aylward responded by letter dated October 3, 2018, received by the complainant on October 5, 2018.

III. The respondent's submission

[13] The respondent submitted that the UNE advised the complainant that it would not file a grievance on her behalf on August 7, 2018. Accordingly, that is the date on which she knew, or ought to have known, of the action or circumstances giving rise to her complaint.

[14] The respondent noted that the complaint, which the complainant completed and filed, states as much. On the complaint form, which is the Board's Form 16 and is entitled "Complaint under section 190 of the Act", point 5 reads as follows: "Date on which the complainant knew of the act, omission or other matter giving rise to the complaint". In the space provided for the answer, she entered "07/08/2018".

[15] Despite her identification of the triggering date on her complaint form as August 7, 2018, the complainant filed her complaint 92 days after that date, on November 7, 2018. The respondent acknowledged that that was only 2 days past the 90-day time limit but argued that the case law is clear that the Board has no authority to extend the time limit even when a complaint is made after a delay of only 2 days. The Board's discretion is limited to determining the triggering date, which the complaint identified as August 7, 2018.

[16] The complainant sent subsequent emails to the UNE after receiving Ms. Sanderson's August 7 email in which she took issue with its position. The respondent submitted that the case law is also clear that further communication with the UNE in an attempt to change the decision did not change the triggering date or extend the time for making a complaint.

[17] Accordingly, the Board lacks jurisdiction to hear the complaint as it was not filed in a timely way.

IV. The complainant's evidence and submissions

[18] The complainant testified that she wrote August 7, 2018, as her response to question 5 on the complaint form because on that day, she received Ms. Sanderson's letter. However, she had had no previous contact with Ms. Sanderson, which led her to

question whether Ms. Sanderson had all the required information. In her view, whether she was employed at FedDev or at Veterans Affairs, her employer was the Treasury Board, and she could still grieve the leave-without-pay issue from FedDev. She felt that had Ms. Sanderson had all the facts, her conclusion would have changed, which is why she wrote to Ms. Sanderson on September 25.

[19] Ms. Sanderson replied very quickly, confirming and elaborating the UNE's position. The complainant stated that Ms. Sanderson replied, "within an hour". The complainant did not think that her case could be dismissed so quickly.

[20] This was especially so because at the relevant time, she was receiving advice from a friend and former colleague who was a national vice president of a different PSAC component. In her view, he was an experienced union representative, and what he was telling her differed from what the UNE was telling her. This strengthened her resolve that Ms. Sanderson would change her assessment once she knew or understood all the facts.

[21] Her friend and advisor then suggested that she write to Mr. King and Mr. Aylward, which she did on October 1, 2018. As with her email of September 25 to Ms. Sanderson, she did this because she felt that the UNE did not have all the facts and that it would change its decision once it did. She felt that Mr. King and Mr. Aylward could, and would, change the UNE's decision once they were provided with the facts.

[22] The complainant stated that that is why it was only when she received Mr. Aylward's reply confirming Ms. Sanderson's decision that she truly realized that the UNE would not file her grievance. Accordingly, the complainant argued that until October 5, 2018, she did not know of the circumstances of her complaint, which were that the UNE would not file a grievance on her behalf.

[23] The complainant submitted that in the legislation, action and circumstances are separate matters, and that although she was aware of Ms. Sanderson's action on August 7, she was unaware of the totality of the circumstances of her complaint until she received Mr. Aylward's response. She referred to several dictionary definitions of "action" and "circumstances" in support of her argument.

[24] She also cited a Public Service Commission investigation file, numbered 19-20-10, which dealt with a complaint of favouritism in a staffing matter. She submitted

that the impact of favouritism in that case was realized only when all the circumstances were considered as a whole. It involved an evolving timeline, and it was not clear at what point the unsuccessful candidates should have complained. She argued that the same type of scenario applied in her case, in that the events were on a continuum, the timeline evolved accordingly, and the circumstances were not apparent until October 5, 2018.

[25] The complainant also submitted that there were mitigating circumstances, including that she had started a new job on October 29, 2018, which necessitated her full focus for training and for an examination that her new manager required her to write. Furthermore, she was suffering from a concussion, which impacted her ability to focus on her complaint. She submitted a doctor's note that confirmed that she had sustained a concussion on September 5, 2018, and that she had suffered its symptoms for four months after that date.

[26] Finally, the complainant testified that the Form 16 had confused her and that she had completed it in haste on the same day she faxed it to the Board.

[27] On cross-examination, the complainant confirmed that she understood what Ms. Sanderson said in her August 7 email - that the UNE would not help her grieve - but that she felt that it reflected Ms. Sanderson's interpretation. She agreed that in her email of September 25, she pointed out something that she believed Ms. Sanderson had not considered, to try to persuade her to change the decision. Similarly, the grievor confirmed that the purpose of her emails to Mr. King and Mr. Aylward was to try to change the UNE's decision.

[28] With respect to question 5 on the complaint form, the complainant agreed that it was clearly worded and that she had answered it by providing the date of August 7, 2018, which was the date of Ms. Sanderson's first email.

[29] The respondent's counsel asked the complainant why she had rushed to complete the complaint form, as she had indicated in her testimony. She responded, among other things, that there was the pressure of the timeline.

[30] The complainant was questioned further as to why she felt pressured to complete the Form 16 and to make her complaint on November 7. If she thought that the relevant date was October 5 (when she received Mr. Aylward's response) as she

testified, then she still had a couple of months in which to make her complaint. Through the complainant's responses to a series of follow-up questions, it became clear that she had calculated the 90-day limit from Ms. Sanderson's first email of August 7, 2018, and that she had rushed to meet that deadline. However, she had miscalculated the number of days and thought she had until November 7 to make her complaint.

V. Reasons

[31] Section 190(2) of the *Act* 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."

[32] The statutory limit is mandatory, which is made clear by the language in the *Act* that states that a complaint "… must be made to the Board not later than 90 days after the date …". Given that mandatory language and the absence of any other statutory provision providing the Board with discretion, the Board has consistently held that it has no discretion under the *Act* to extend the 90-day limit in s. 190(2) (see *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55, *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20 at para. 36, *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98, and many other cases).

[33] The view that administrative tribunals lack jurisdiction to extend statutorily established time limits in the absence of legislative authority was recently confirmed in *Maclean v. Canada (Attorney General)*, 2019 FCA 277. The Appeal Division of the Social Security Tribunal held that it was without jurisdiction to extend the statutorily established one-year time limit for a complainant to apply to rescind or amend a decision. On judicial review, the Federal Court of Appeal commented as follows:

> …
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> *[6] In our view, the Appeal Division's decision was reasonable and did not give rise to a reviewable error. The application to rescind or amend was made long after the one-year limitation period established by subsection 66(2) of the Act and the statute provides no discretion to waive or amend the limitation period.*
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> …

[34] In that case, unlike this one, the delay was extremely long. However, the operative language of the Court, in my view, is that "… the statute provides no discretion to waive or amend the limitation period." That is also so under the *Act*. Section 190(2) sets the time limit, and the legislation provides the Board with no discretion to waive or amend it.

[35] However, having said that, s. 190(2) does give the Board discretion to determine when a complainant knew, or ought to have known, of the action or circumstances giving rise to the complaint.

[36] As the former Public Service Labour Relations Board (PSLRB) stated in *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90:

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> *[33] In* England v. Taylor et al.*, 2011 PSLRB 129, the Board noted that the only possible discretion when interpreting subsection 190(2) of the* PSLRA *arises when determining when the complainant knew, or ought to have known, of the circumstances giving rise to the complaint. In* Boshra v. Canadian Association of Professional Employees, *2011 FCA 98, the Federal Court of Appeal held that in order to apply subsection 190(2) to the facts of a particular case, it is necessary for the Board to determine the essential nature of the complaint and to decide when the complainant knew or ought to have known of the circumstances giving rise to it.*
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> …

[37] I do not accept the complainant's argument that she knew only of the UNE's action (Ms. Sanderson's letter) but not the totality of the circumstances (that Mr. Aylward would not change the UNE's decision). Firstly, the wording in s. 190(2) of the *Act* is disjunctive — the clock starts ticking when a complainant knows of the action **or** circumstances giving rise to his or her complaint. Furthermore, the timeline does not continue to evolve depending on what actions or circumstances occur after a decision is made and communicated.

[38] The PSLRB addressed this kind of argument in *Ennis v. Meunier-McKay*, 2012 PSLRB 30, quoting *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2010 PSLRB 7 at para. 21, as follows:

> *[21] … The period for filing a complaint cannot be extended by a complainant's attempts to convince a union to change its decision. To the extent that there is a violation of the* PSLRA*, there is no minimum or maximum standard for the degree of knowledge that a complainant must have before filing his or her complaint.*

[39] I also do not accept that the complainant's ability to file a timely complaint was compromised by the concussion she unfortunately sustained on September 5, 2018. No medical evidence was proffered to the effect that her knowledge of the action or circumstances giving rise to her complaint was compromised by this injury, and her testimony made it clear that it was not.

[40] I find that the complainant knew of the action and circumstances giving rise to her complaint on August 7, 2018. Unfortunately, Ms. Sanderson's email was not as clear as it might have been with respect to the reasoning behind the UNE's decision. However, it was nevertheless very clear on the main point, which was that the UNE would not help the complainant file a grievance.

[41] The complainant understood that, which is why she wrote to Ms. Sanderson on September 25 and to Mr. King and Mr. Aylward on October 1. She was trying to change the UNE's decision, because she understood that one had been made, and she disagreed with it. That is also why she answered question 5 on the complaint form with the date of Ms. Sanderson's email and why she rushed to complete and fax the complaint form.

[42] The complainant's testimony that she truly understood that the UNE refused to file her grievance only when she received Mr. Aylward's letter, was not credible. She had just started a new job, was in an active learning phase, and was preparing for an examination, all of which required her full attention. She could not explain why she rushed to file her complaint on November 7, when the deadline by this reckoning was two months away. Ultimately, the complainant's testimony on cross-examination made it clear that she had calculated the time from August 7, 2018, but that unfortunately she had miscalculated the number of days and thought that the 90-day deadline was November 7, 2018.

[43] It is entirely understandable that the complainant would try to provide the UNE with more information or argue for a different way to interpret the information, to try

to change its decision. However, the case law is clear that efforts of that kind do not impact the time limit.

[44] The PSLRB stated as much in *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100, as follows:

> …
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> *[47] I must then conclude that the Board does not have the option of taking the complainant's efforts to continue to work with the respondent on his case into consideration. Subsection 190 (2) of the* Act *requires timely filing even where efforts continue to resolve a problem amicably. When those efforts later succeed, a complainant can withdraw his or her complaint.*
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> …

[45] If it were otherwise, a complainant could extend the time limit indefinitely simply by sending an email expressing disagreement with a decision. A complaint must be filed within 90 days once the union has communicated a decision that the complainant wishes to challenge. Efforts to persuade the union to change the decision can then continue and, if successful, the complaint can always be withdrawn.

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

(The Order appears on the next page)

VI. Order

[47] The complaint is dismissed.

July 23, 2020.

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