Date: 20210226

File: 561-02-38721

Citation: 2021 FPSLREB 19

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

YVON FONTAINE

Complainant

and

LESLIE ROBERTSON AND PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Indexed as
Fontaine v. Robertson

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

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondents: Kim Patenaude, counsel

Decided on the basis of written submissions, filed October 14 and 29 and November 5, 2020.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On June 26, 2018, Yvon Fontaine, the complainant, made a complaint before the Federal Public Sector Labour Relations and Employment Board ("the Board") against Leslie Robertson and the Public Service Alliance of Canada ("the Alliance" or "the respondents"). Ms. Robertson is a grievance and adjudication officer for the Alliance. In his complaint, the complainant alleged that the respondents had committed an unfair labour practice within the meaning of s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which prohibits an employee organization from acting in a manner that is arbitrary, discriminatory, or in bad faith in representing any employee who is a member of a bargaining unit for which it is the bargaining agent.

[2] The complainant is now retired. He worked for the Department of National Defence and held a position that was part of a bargaining unit for which the bargaining agent was the Alliance.

[3] The complainant filed a grievance against the Department of National Defence ("the employer") on October 11, 2005, in which he claimed that it had violated the National Joint Council (NJC) *Travel Directive* since his deployment in 1995. The grievance was dismissed at each level of the grievance procedure. The Alliance referred the grievance to adjudication in January 2011. However, on February 11, 2011, it informed the complainant in writing that it did not intend to "[translation] object to the application of the *Coallier* decision" in his grievance, meaning that it would make submissions only about the 25 days before the filing of the grievance. At the time that the grievance was referred to adjudication, the employer had already raised a timeliness objection.

[4] The hearing of the grievance was scheduled for June 22, 2018. Ms. Robertson was supposed to represent the complainant at that hearing. There were several telephone calls and emails between Ms. Robertson and the complainant during the two weeks before the hearing. On June 6, 2018, the complainant suggested several proposals to Ms. Robertson that could be submitted to the employer to resolve the grievance. The parties' documentation did not specify what Ms. Robertson presented to the employer, except that it was refused. However, the employer presented her with a

counteroffer, according to which an amount of $1100 could be paid to the complainant. The amount represented the equivalent of 25 days of meal costs and travel expenses.

[5] On June 14, 2018, Ms. Robertson informed the complainant in writing that with supporting rationale, in her view, his grievance would be dismissed by the Board, and that he would receive no compensation. She also informed him of the employer's counteroffer, which she found acceptable, and she recommended that he accept it. She also told the complainant that the Alliance could withdraw from his file and cancel the hearing and that that was what she planned to do if he refused the employer's counteroffer. She asked the complainant to get back to her before 5:00 p.m. on June 18, 2018 at the latest to find out whether the complainant would accept the counteroffer. On June 17, 2018, the complainant replied that he refused the employer's counteroffer and that Ms. Robertson had the authority to cancel the hearing if she chose to. The complainant also stated that he would attend the hearing but that if Ms. Robertson cancelled it, he had other options.

[6] On June 20, 2018, Ms. Robertson wrote back to the complainant, stating that she had tried to call him that morning. Based on the analysis of the file, she felt that the employer's counteroffer was fair and that it was better than what she could obtain at adjudication. She said she regretted that the complainant did not agree with the Alliance's point of view, but as they had discussed, the bargaining agent had the authority to resolve the grievance. Ms. Robertson informed the complainant that the Alliance would accept the employer's offer, so the hearing scheduled for June 22, 2018, would be cancelled. That same day, the complainant replied that Ms. Robertson had not had the courage to speak with him, and he asked for a date when they could meet in person.

[7] It was the June 20, 2018, decision that gave rise to the complaint, the statement of which reads as follows: "[Translation] PSAC cancelled the hearing of my grievance scheduled for June 22, 2018. It has been 13 years since my grievance was filed. Leslie Robertson's decision is arbitrary." The complainant asked the Board to add his grievance to the hearing schedule. He stated that he would represent himself at the hearing.

[8] On August 7, 2018, the complainant received by registered mail a memorandum of understanding between the respondents, the employer, and the Treasury Board. A Government of Canada cheque was included with the letter.

II. Summary of the arguments

A. For the complainant

[9] The complainant noted that he had told Ms. Robertson that the employer's offer to reimburse him for the equivalent of 25 days of meal costs and travel expenses was unacceptable. In his view, he should have been consulted about the decision to accept the offer, and he should have had a say about it.

[10] According to the complainant, a union representative does not have the right to impose his or her decisions on a member of the Alliance as the member pays dues to the Alliance.

[11] Ms. Robertson's decision to cancel the hearing was arbitrary and contrary to the *Act*. She acted in bad faith, especially since she had said that she would meet with the complainant. Ultimately, all communication took place by mail or telephone. The complainant noted that in 2011, the Alliance had referred his grievance to adjudication. He wondered why it was then withdrawn in 2018.

[12] According to the complainant, the respondents knew that his grievance would set a precedent, which was the main reason Ms. Robertson decided to cancel the hearing. He added that it was clear that the Alliance was defending the interests of the employer, and it dropped its defences. He noted that he had paid union dues for 30 years and that he should have been treated better. In his view, to be fair, the Alliance should have hired a law firm to represent him.

[13] The complainant explained why he had filed his grievance in 2005 and why he was convinced that his grievance had merit. I will not repeat the explanations because they are immaterial to determining whether the complaint has merit.

B. For the respondents

[14] The respondents claimed that they had acted reasonably, fairly, and in good faith when exercising their discretion to resolve the complainant's grievance.

[15] In 2011, the Alliance had informed the complainant that *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL), applied and that it would make submissions only about the 25 days before the filing of the grievance. The complainant did not make a complaint against the Alliance at that time.

[16] Shortly before the scheduled hearing date, Ms. Robertson tried to negotiate a settlement for the grievance with the employer. It refused the union's proposal but presented a counteroffer that, upon review, seemed to be more than the complainant could obtain through adjudication. Ms. Robertson presented the counteroffer to the complainant and recommended that he accept it. The complainant refused the counteroffer.

[17] The complainant failed to discharge his burden of proof. He did not show that the respondents had acted in an arbitrary or discriminatory manner or in bad faith. Rather, the respondents acted reasonably and fairly in exercising their discretion to resolve the grievance. Ms. Robertson took the complainant's arguments into consideration, but in light of the facts presented and case law, the decision was made to settle the matter and withdraw the grievance.

[18] The respondents referred me to the following decisions: *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13; *Cox v. Vezina*, 2007 PSLRB 100; *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100; *Ouellet v. St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107; and *Martell v. Research Council Employees' Association and Van Den Bergh*, 2011 PSLRB 141.

III. Analysis and reasons

[19] The complaint cites s. 190(1)(g) of the *Act*, which refers to s. 185. Among the unfair labour practices mentioned in s. 185, the one at s. 187 is of interest in this complaint. The provisions read as follows:

> ***190 (1)*** *The Board must examine and enquire into any complaint made to it that*
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> …
>
> ***(g)*** *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> …

> ***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).*
>
> …
>
> ***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.*
>
> [Emphasis in the original]

[20] The complaint concerns Ms. Robertson's decision not to pursue adjudication and to accept the employer's counteroffer despite the fact that the complainant had clearly expressed his disagreement, namely, whether the bargaining agent acted in a manner that was arbitrary or in bad faith in representing him. This then raises two questions. The first is to determine whether Ms. Robertson had the right to withdraw her support at adjudication, as she did. The second is to determine whether Ms. Robertson had the right to accept the employer's counteroffer as a settlement for the complainant's grievance.

[21] According to the provisions of the *Act* that follow, the decision to file a grievance and to refer it to adjudication belongs to the employee, but he or she cannot refer it if the grievance concerns the interpretation or application of the collective agreement. Otherwise, he or she must obtain the bargaining agent's agreement.

> ***208 (4)*** *An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.*
>
> …
>
> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the Royal Canadian Mounted Police Act may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
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> > ***(a)*** *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> …

> ***(2)*** *Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

[22] The complainant's grievance concerns an NJC directive, all of which are part of the collective agreement. Therefore, the grievance concerns the interpretation or application of the collective agreement. When the grievance was filed, the complainant had received the approval of the Alliance as required in s. 208(4) of the *Act*. Then in January 2011, he referred his grievance to adjudication, again with the support of the Alliance, which at the time agreed to represent him as provided in s. 209(2) of the *Act*. However, the Alliance then issued the condition that it would make submissions only about the 25-day period before the filing of the grievance.

[23] It is clear that in the days leading up to the scheduled date of the hearing, Ms. Robertson analyzed the situation and concluded rightly or wrongly that she had little chance of winning the case at adjudication. Negotiations were then initiated with the employer, which resulted in the employer's counteroffer of $1100. Ms. Robertson agreed to accept the offer, but the complainant did not. Instead of proceeding with adjudication, Ms. Robertson, on behalf of the Alliance, withdrew her support for the grievance and accepted the counteroffer on the complainant's behalf.

[24] After analyzing the file, Ms. Robertson decided to withdraw the Alliance's representation at adjudication. Nothing in what the complainant submitted to me convinces me that the decision was arbitrary or that it was in any way tainted with discrimination or even that it had been made in bad faith. None of the facts submitted by the complainant support his allegations, and it should be recalled that it was he who bore the burden of proof.

[25] The criteria for determining whether the respondents were in breach of their duty of fair representation were set out by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. The bargaining agent has the exclusive authority to act as the spokesperson for the employees in a bargaining unit. In return, it is obligated to fairly represent those employees. Employees do not have an absolute right to adjudication, and the union enjoys considerable discretion. This discretion must be exercised in good faith, objectively, and honestly after a thorough review of the grievance. The bargaining agent's decision must not be arbitrary, capricious, discriminatory, or wrongful.

[26] The Board is not an appeal mechanism against a denial of representation at adjudication. Its role is not to question the bargaining agent's decision but rather to rule, based on the evidence submitted, on the bargaining agent's decision-making process and not on the merits of its decision. The Board's role is not to decide whether Ms. Robertson's decision not to represent the complainant at adjudication was correct. Rather, the Board must decide whether the respondents acted in bad faith or in a manner that was arbitrary or discriminatory during the decision-making process that led to that decision.

[27] As the representative of the bargaining agent, Ms. Robertson was entitled to withdraw her support for adjudicating the grievance. Nothing in the facts submitted shows that her decision was arbitrary, discriminatory, or made in bad faith. On the contrary, the evidence shows that Ms. Robertson informed the complainant about the reasons she believed that his grievance would be dismissed by the Board; that he would receive no compensation; that the counteroffer was acceptable, and that she recommended accepting it; and that the Alliance could withdraw from the file and cancel the hearing if he refused the counteroffer and she intended to do that if necessary. She gave him a time limit to provide her with his response. The complainant replied within the time limit; he refused the counteroffer and, he admitted that she could cancel the hearing.

[28] That said, Ms. Robertson's decision to accept the employer's counteroffer on behalf of the complainant and against his will troubles me somewhat. It should be recalled that the complainant had clearly expressed his objection to the counteroffer. In doing so, he also stated that if Ms. Robertson cancelled the hearing, he had other options. He did not specify what his options were, but it certainly could not have involved pursuing his grievance at adjudication because he could not do that without his bargaining agent's support.

[29] According to the *Act*, it is the employee and not the bargaining agent who can file a grievance and refer an individual grievance to adjudication, as is the case in the private sector. In other words, under the federal public sector labour relations system, an individual grievance belongs to the employee, not to the bargaining agent. Previous Board decisions (*Gauthier v. Montreal Airports*, [1994] C.P.S.S.R.B. No. 34 (QL), and *Renaud v. Canadian Association of Professional Employees*, 2009 PSLRB 177), have also stated that an individual grievance belongs to the employee. It is the employee who

files and then pursues the grievance. Thus, only the employee can accept a settlement offer from the employer under the statutory rights granted in ss. 208(1)(a)(ii) and 209(1)(a) of the *Act*.

[30] On that basis, Ms. Robertson could not accept the employer's counteroffer on the complainant's behalf, given that he had clearly made it known that he found the counteroffer unacceptable. The complainant had to indicate his agreement in advance for the counteroffer to be accepted. By accepting the counteroffer without the complainant's agreement, Ms. Robertson failed in her duty of representation. She ignored the complainant's position and resolved the grievance against his clearly expressed wishes.

[31] Therefore, under the *Act*, the respondents could withdraw their support for the grievance after analyzing it and acting in good faith and without discrimination. This is what Ms. Robertson did and by doing so, she in no way breached her duty of fair representation. She also tried to negotiate an agreement with the employer. Even though she could not accept the agreement without the complainant's consent, she ultimately did so and then she acted in an arbitrary manner in her representation by imposing an agreement on the complainant. However, her decision to accept the counteroffer did not prejudice the complainant. On the contrary, the result of the decision was that the complainant received $1100 from the employer. Otherwise, he would have received nothing.

[32] Although I find that the respondents acted in a manner that was arbitrary by accepting the counteroffer, I find that there are no other appropriate corrective actions to be ordered for this complaint.

[33] As well, I allow the complaint in part. In his complaint, the complainant denounced the fact that his hearing had been cancelled, and he asked that the Board schedule a hearing to adjudicate his grievance. Yet, the *Act* allowed the respondents not to pursue the grievance at adjudication. I have already found that by doing so, they did not breach their duty of representation. Since their support is essential for pursuing a grievance at adjudication, the Board obviously cannot proceed with an adjudication hearing of the grievance without the bargaining agent's support.

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

(The Order appears on the next page)

IV. Order

[35] The complaint is allowed in part.

[36] I declare that the respondents violated s. 187 of the *Act* by accepting the employer's settlement offer without the complainant's consent.

February 26, 2021.

FPSLREB Translation

Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board