Date: 20210423

File: 561-02-42275

Citation: 2021 FPSLREB 47

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

ÉRIC FRÉMY

Complainant

and

ROYAL CANADIAN MOUNTED POLICE

Respondent

Indexed as
Frémy v. Royal Canadian Mounted Police

In the matter of a complaint made 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 Respondent: Valérie Taitt and Noémie Fillion, Treasury Board of Canada Secretariat

Decided on the basis of written submissions, filed December 21, 2020, and February 7, March 10 and March 25, and April 6, 2021.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On November 10, 2020, Éric Frémy ("the complainant") made an unfair-labour-practice complaint within the meaning of s. 185 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), in which he alleged that his employer, the Royal Canadian Mounted Police ("the respondent" or "RCMP"), violated s. 190(1)(g) of the *Act*.

[2] Specifically, the complainant alleged that the RCMP and some persons in authority retaliated against him because he made a complaint and filed a grievance under the *Act* that violated some provisions of s. 186(2) of the *Act*. The provisions prohibit an employer, a person acting on the employer's behalf, or a person occupying a managerial or confidential position from doing so.

[3] The complainant filed substantial documentation that recounted several problems that he maintained he experienced with his employer over the years. According to the documentation, the complainant joined the RCMP in 2009. Although he was a unilingual francophone, he was first assigned to a post in British Columbia due to an impending need for francophone resources for the 2010 Olympic Winter Games. In 2013, after several language-related problems, he made a complaint with the Office of the Commissioner of Official Languages. Several events followed, which the complainant claimed led to his forced resignation in December 2013. He later requested that his resignation be cancelled and that he be reinstated. The process will end up in the Federal Court and then in the Federal Court of Appeal. Ultimately, on March 14, 2019, the complainant was reinstated retroactive to his departure date.

[4] According to the complainant, several disputes arose after his reinstatement, including difficulties obtaining proof of employment to confirm his status, salary, seniority, and his correct salary range.

[5] The complainant filed a grievance on July 30, 2019, about promotions he felt he should have received. In the weeks that followed, disagreements also arose about assignments and the training he needed. According to the complainant, the employer wanted him to take the cadet training that he took when he was first hired in 2009. He categorically refused. He filed a second grievance on December 1, 2019.

[6] In the documentation that he submitted, the complainant explained how management's decisions and actions after his grievances were filed constituted retaliation. Among other things, an employer representative who heard one of his grievances allegedly informed him that he would not receive a promotion or a salary increase if he did not agree to be reinstated as a cadet and take the field training program again. As well, during discussions about one of his grievances, another employer representative allegedly told the complainant that he did not have the authority to find him a position. It was clear to the complainant that there were interactions between the employer's representatives to force him to unwillingly agree to be reinstated as a cadet.

[7] As necessary, I will return to the details of the employer's actions that led to the complainant's belief that he was the subject of unlawful practices, after I deal with the respondent's objections.

[8] First, the respondent argued that the complainant did not meet the criteria set out in s. 186(2)(a)(iii) of the *Act*. It also claimed that the complaint was made after the time limit expired as prescribed in s. 190(2) of the *Act*.

[9] On February 16, 2021, I informed the parties that I would deal with both of the employer's objections based on the parties' written submissions and according to a timetable that was provided to them. I also informed the parties that a final decision on the objections would be made on the basis of the submissions and the documents that were already in the file.

II. Summary of the employer's arguments on its objections

[10] The two grievances the complainant referred to were filed with the Office for the Coordination of Grievances and Appeals in accordance with Part III of the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10; "the *RCMP Act*"). Those grievances do not meet the criteria in s. 186(2)(a)(iii) of the *Act*; that section refers solely to grievances filed under the *Act*.

[11] According to the employer, for the complaint to be heard, the complainant's grievances should have related to the application or interpretation of a collective agreement, which is not the case. Therefore, the Board should declare that it has no jurisdiction to rule on the complaint.

[12] Section 238.24 of the *Act* is clear: an employee who is an RCMP member is entitled to file an individual grievance within the meaning of the *Act* only if the grievance is about the interpretation or application of a collective agreement or an arbitral award. That argument is also confirmed by s. 31(1.01) of the *RCMP Act*, which is along the same lines.

[13] The employer also pointed out that s. 31(5) of the *RCMP Act* stipulates that no retaliation measures can be taken against an RCMP member who presents a grievance under that *Act*. Therefore, the complainant could have filed his grievance under the *RCMP Act* if he wanted to challenge the retaliatory measures against him.

[14] The employer also argued that the complaint was made after the 90-day time limit set out in s. 190(2) of the *Act* expired.

[15] According to the employer, the complainant was aware of management's decisions about his promotions and his reinstatement well before the 90 days leading up to the date on which he made his complaint. His two grievances were dated July 30, 2019, and December 1, 2019, which were several months before he made his complaint. However, there were no new facts or information in the 90 days leading up to the date on which the complaint was made.

[16] In its previous decisions, the Federal Public Sector Labour Relations and Employment Board ("the Board") repeatedly stated that the 90-day time limit set out in s. 190(2) of the *Act* is mandatory. The Board cannot exercise any discretion to extend the compulsory time limit.

[17] The employer disagreed with the complainant's statement that he supposedly was aware of the issues that gave rise to his October 7, 2020, complaint. According to the employer, the complainant was aware of the issues in 2019.

[18] The employer referred me to the following decisions: *Gibbins v. Canada Revenue Agency*, 2015 PSLREB 17; *Baun v. Statistics Survey Operations*, 2018 FPSLREB 54; *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90; *Boshra v. Canadian Association of Public Employees*, 2011 FCA 98; *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20; *Panula v. Canada Revenue Agency*, 2008 PSLRB 4; *Scott v. Public Service Alliance of Canada*, 2013 PSLRB 72; and *Beaulieu v. Royal Canadian Mounted Police*, 2017 FPSLREB 45.

III. Summary of the complainant's arguments on the employer's objections

[19] In response to the employer's objections, the complainant presented several pages of background information about his issues with the employer and the merits of his unfair-labour-practice complaint against the RCMP. I will not repeat those statements, because they will not help me to deal with the employer's two objections.

[20] The complainant claimed that he was a victim of retaliation after he filed his two grievances under the *RCMP Act*. The first grievance dealt directly with the completion of a training program and the complainant's pay level and rank. The second grievance disputed management's decision to cancel his participation in the lateral recruitment program in which he was already enrolled.

[21] Although both grievances were filed under the *RCMP Act*, the *Act* does not explicitly state that an RCMP member cannot make an unfair-labour-practice complaint. According to the complainant, an RCMP member cannot make a complaint with the Board because the grievance must first go through the RCMP's internal process. However, after the internal process, an RCMP member has the recourse of adjudication before the Board.

[22] According to the complainant, he could make an unfair-labour-practice complaint because the practice in question resulted from the two grievances he filed, which were referred to an RCMP adjudicator.

[23] Section 31(5) of the *RCMP Act* is incomplete and provides no recourse for retaliation cases. Therefore, an RCMP member must be able to make an unfair-labour-practice complaint under the *Act*. It would be unreasonable to exclude RCMP members from recourse that is available to all other federal employees. As well, nothing in the *Act* or the *RCMP Act* prohibits individuals from making an unfair-labour-practice complaint with the Board.

[24] The complainant pointed out that he is an employee within the meaning of the *Act* (see the Supreme Court of Canada ruling in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1. Therefore, he has the right to make a complaint under the *Act*.

[25] According to the complainant, under s. 238.25(1) of the *Act*, an RCMP member can ask the Board to review an individual grievance filed under the *RCMP Act* if the

employee is not satisfied with the decision at the final level. Therefore, it would be logical for the Board to be able to review an unfair-labour-practice complaint that resulted from a grievance filed under the *RCMP Act*.

[26] According to the complainant, there is no provision on unfair labour practices in the *RCMP Act*. It would be unreasonable not to grant recourse to RCMP members who file grievances under that *Act*.

[27] The complainant categorically rejected the respondent's position on time limits.

[28] According to the complainant, the unfair labour practice occurred after his grievances were filed. It stemmed from RCMP management's manipulation to force him to abandon his grievances. An unfair labour practice does not involve actions taken openly; rather, it is the result of an obscure and pernicious process that is carried out in a deliberate manner.

[29] The respondent cannot claim that the complainant was immediately aware of an unfair labour practice because the whole issue was disguised. Only the complainant can establish when he was aware of the practice.

[30] The complainant referred me to the following decisions: *Panula*; *Quadrini v. Canada Revenue Agency* 2008 PSLRB 37; and *Choinière Lapointe v. Correctional Service of Canada,* 2019 FPSLREB 68.

IV. Reasons

[31] I will first deal with the objection to the Board's jurisdiction to deal with the complaint. If necessary, I will review the objection related to the 90-day time limit to make a complaint.

[32] Briefly, the employer objected to the Board's jurisdiction to deal with the complaint on the grounds that the complainant does not meet the criteria set out in s. 186(2)(a)(iii) of the *Act*. To deal with the first objection, the following excerpts from the *Act* are of particular interest:

…

> ***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).*

…

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:*

…

(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 of Part 2 or 2.1;*

…

208 (1) *Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*

a) *by the interpretation or application, in respect of the employee, of*

(i) *a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*

(ii) *a provision of a collective agreement or an arbitral award; or*

b) *as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

…

Part 2.1

Provisions Unique to the Royal Canadian Mounted Police

…

238.02 (1) *In the event of an inconsistency between a provision of this Part and a provision of Part 1 or 2, the provision of this Part prevails to the extent of the inconsistency.*

…

> ***(2)*** *Without limiting the generality of subsection (1), section 58, subsections 208(1) and 209(1) and (2) and section 209.1 are inconsistent with this Part.*
>
> …
>
> ***238.24*** *Subject to subsections 208(2) to (7), an employee who is an RCMP member is entitled to present an individual grievance only if they feel aggrieved by the interpretation or application, in respect of the employee, of a provision of a collective agreement or arbitral award.*
>
> [Emphasis in original]

[33] Both parties stated in their arguments that the grievances referred to in the complaint were filed in accordance with the grievance procedure set out in the *RCMP Act*. Therefore, they are not grievances that relate to the interpretation or application of a collective agreement or an arbitral award.

[34] Some provisions in Part III of the *RCMP Act* are of particular interest in this case as follows:

> …
>
> ***31(1)*** *Subject to subsections (1.01) to (3), if a member is aggrieved by a decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.*
>
> …
>
> ***(1.01)*** *A grievance that relates to the interpretation or application, in respect of a member, of a provision of a collective agreement or arbitral award must be presented under the Federal Public Sector Labour Relations Act.*
>
> …
>
> ***31(5)*** *No member shall be disciplined or otherwise penalized in relation to employment or any term of employment in the Force for exercising the right under this Part to present a grievance..*
>
> …

[35] According to the parties' arguments, both of the complainant's grievances were filed in accordance with the *RCMP Act*, namely, s. 31(1) of that *Act*. These grievances are not related to the interpretation or application of a collective agreement or an

arbitral award. According to section 31(1.01) of the *RCMP Act*, such grievances should be filed under the *Act*; they were not. This could not have been the case, because there is no collective agreement between the bargaining agent representing the complainant, who is an RCMP member, and the RCMP.

[36] In addition, the provisions of the *RCMP Act* are compatible with the provisions of the *Act* that relate to the limited right of RCMP members to file grievances. While an employee who is not a member of the RCMP can file a grievance about almost anything related to their conditions of employment (see ss. 208(1)(a) and (b) of the *Act*), s. 238.24 of the *Act* limits the right of RCMP members to file grievances that are related to the interpretation or application of a collective agreement or an arbitral award. However, RCMP members have an additional recourse under section 31(1) of the *RCMP Act*; that is, they can file a grievance if they are aggrieved by a decision, act, or omission in the administration of the affairs of the RCMP. There is no doubt that it was this recourse that the complainant used when he filed his two grievances.

[37] Given that the complainant's two grievances were not filed under the *Act*, and specifically under Part 2, which deals with grievances, I agree with the respondent's objection that as the complainant did not meet the criteria set out in section 186(2)(a)(iii) of the *Act*, the Board cannot deal with the unfair-labour-practice complaint. When he filed his two grievances, the complainant did not exercise his rights under the *Act*; rather he exercised them under the *RCMP Act*. Therefore, I have no jurisdiction to consider his complaint.

[38] Section 31(5) of the *RCMP Act* provides that a member who files a grievance under that *Act* shall not be disciplined or otherwise penalized in relation to his or her employment or his or her term of employment in the RCMP. The Board cannot rule on the retaliation mentioned in the provision, which does not fall under its jurisdiction. Furthermore, it is not my role to advise the complainant on the recourse that may exist to ensure compliance with that provision in the *RCMP Act*.

[39] I agree with the complainant that nothing in the *Act* or the *RCMP Act* prevents an RCMP member from making an unfair-labour-practice complaint. That is not the issue. Rather, the issue is whether the unfair labour practice follows the exercise of a right to make a complaint as provided under the *Act*. For example, if an RCMP member suffered retaliatory measures as a result of his or her involvement in the National

Police Federation, he or she would be perfectly entitled to make a complaint under the *Act*.

[40] In response to the complainant's arguments, I will add that for now, an employee who is a member of the RCMP cannot file a grievance that could potentially be referred to the Board for adjudication, because there is no signed collective agreement or imposed arbitral award. A grievance filed under the *RCMP Act* cannot under any circumstances be referred to the Board because it does not relate to the application of a collective agreement or an arbitral award. A grievance procedure related to a collective agreement or an arbitral award and the RCMP's internal grievance procedure are two totally distinct processes that are parallel and do not intersect.

[41] The case law submitted by the parties mainly concerns respecting time limits and the reversal of the burden of proof. The decisions are not very helpful in dealing with the first objection, except for paragraph 87 of *Gibbins*, in which the adjudicator dismissed a complaint on the grounds that it had nothing to do with exercising a right granted in Part 1 or Part 2 of the *Act*.

[42] There is no need to deal with the employer's second objection because as I agreed with the first objection, I have already established that I have no jurisdiction to deal with the complaint.

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

(The Order appears on the next page)

V. Order

[44] The complaint is dismissed.

April 23, 2021.

FPSLREB Translation

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