Date: 20210616

File: 561-32-41982

Citation: 2021 FPSLREB 68

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

WILLIAM STEWART MILLAR

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Millar 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 Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Christopher Schulz, representative

Decided on the basis of written submissions, filed on August 5 and September 1, 2020.

REASONS FOR DECISION

I. Complaint before the Board

[1] On August 5, 2020, William Stewart Millar ("the complainant") complained pursuant to s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") that the Public Service Alliance of Canada (PSAC) committed an unfair labour practice within the meaning of s. 185 of the *Act* (a breach of a bargaining agent's duty of fair representation).

[2] The complainant states that he is a disabled worker who was injured on the job. He suffered an ankle injury. He states that his Workplace Safety and Insurance Board (WSIB) claim was approved.

[3] On January 19, 2015, the WSIB wrote to the complainant, advising him that it had been determined that a preinjury position was deemed suitable by a return to work specialist. The complainant disagreed. He states that his employer and the WSIB stated that the position was suitable and within his restrictions. He states that it was not. He states that he was not able to return to work and that he received Canada Pension Plan (CPP) disability benefits and a federal government disability pension for the same injuries in his WSIB file.

[4] The complainant appealed the decision.

[5] He claims that he wrote to the PSAC for assistance as a disabled member of it. He claims that the PSAC representative failed to read and understand his file information. In particular, he believes that before the WSIB, his PSAC representative failed to represent and consider his injuries and restrictions.

[6] On December 30, 2019, the WSIB wrote to the complainant and advised him that there was no basis to overturn its January 19, 2015, decision. He sought again to appeal it.

[7] He states that the PSAC did not find any evidence to support the appeal and that it declined to represent him before the "Tribunal," presumably the Workplace Safety and Insurance Appeals Tribunal.

[8] By way of corrective action, he seeks representation at the WSIB for all appeals and payment for all his out-of-pocket expenses with respect to his particular WSIB files.

II. The respondent's position

[9] The respondent states that it appears from the complaint that the complainant alleges the following:

> 1) The respondent failed to read and understand the information in his file.
> 2) The respondent failed to acknowledge the fact that a preinjury position was not suitable.
> 3) The respondent's Ontario regional health-and-safety representative failed to represent and consider the complainant's injury and restrictions while representing him at the WSIB.

[10] The complainant requested that the PSAC representative review the WSIB's decision and that she provide him with representation in her role as a health-and-safety representative. The PSAC representative met with him, communicated with him via phone and email several times, reviewed the relevant jurisprudence, and carefully reviewed and considered all the evidence pertaining to this case, and she determined that it lacked the requisite merit to proceed to the WSIB. As such, she declined to represent him.

[11] The complainant made a complaint under s. 190 of the *Act* against the respondent for failing to provide him with representation before the WSIB. He did not make a complaint under s. 190 for PSAC failing to provide representation for him at a grievance hearing or an adjudication hearing. Therefore, the respondent raises a preliminary objection that the Federal Public Sector Labour Relations and Employment Board ("the Board") is without jurisdiction, given the fact that the WSIB is not part of the grievance process. Therefore, this complaint should be dismissed.

[12] Alternatively, the respondent argues that it did not breach its duty of fair representation by declining to represent the complainant before the WSIB. Its representative took the necessary time to meet with him, review the relevant jurisprudence, and review all evidence pertaining to the issue of his injury; then, she determined not to provide representation.

[13] The respondent refers to *Cousineau v. Walker*, 2013 PSLRB 68, as having set out a well-established principle that the burden of proof in such an allegation of duty to

represent is upon the complainant, along with this quote from *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39: "… union may not process an employee's complaint in a superficial or careless matter. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary …".

[14] The respondent's position is that the PSAC representative did exactly that and that she did not act in a manner that was arbitrary, discriminatory, or in bad faith.

[15] The respondent's reply was filed on September 1, 2020. The Board sent an email message to the complainant on the same day requesting that he provide his response to respondent's objection by September 16, 2020. The complainant never responded.

III. Analysis

[16] The PSAC raises a preliminary objection that the Board does not have jurisdiction to hear and determine this complaint as the WSIB is not part of the grievance process.

[17] This is not the first time a bargaining agent has raised a preliminary objection against the Board's jurisdiction with respect to an allegation that it failed its duty of fair representation in representing its members before a worker's compensation tribunal.

[18] Perhaps the most comprehensive analysis of this issue may be found in *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3, a decision of a predecessor to the Board, the Public Service Labour Relations Board (PSLRB). The complainant in that case alleged that the bargaining agent in that case acted arbitrarily by dealing with his workers' compensation board (WCB) file negligently and that it failed to comply with its duty of fair representation.

[19] As in this case, the respondents in that case argued that the PSLRB lacked jurisdiction to hear that matter since it had no jurisdiction to deal with a complaint about representation at other tribunals, such as WCBs. Furthermore, there was no requirement in the relevant collective agreement or in the *Act* to represent the bargaining agent's members at WCB hearings. The fact that the bargaining agent assisted its members with worker's compensation claims did not transform the service into a matter covered by the *Act*. Providing such a service was an internal bargaining agent affair.

[20] The PSLRB upheld the jurisdictional objection in a lengthy decision, the summary of which may be found at paragraphs 188 to 195, as follows:

> *[188] To summarize the above, I am of the view that the duty of fair representation as set out in section 187 of the* PSLRA *relates to rights, obligations of matters set out in the* PSLRA*, that are related to the relationship between employees and their employer. In other words, the "representation" to which that section refers to [sic] is representation of employees in matters related to the collective agreement relationship or the* PSLRA*, such are [sic] representation in collective bargaining and the presentation of grievances under that* Act*.*
>
> *…*
>
> *[191] Turning to the case at hand, I see no explicit or implicit obligation in the collective agreement on the bargaining agent to represent employees before the WCB. This is not surprising since collective agreements usually deal with matters relating to the relationship of the employees or their union with the employer, not the relationship between unions and their members. As the respondents indicated, that service was given voluntarily to the complainant.*
>
> *[192] Nor do I see in the* PSLRA *any provision or indication that Parliament intended that the duty of fair representation extend to workers compensation claims before provincial workers' compensation boards. Each province has workers' compensation legislation, and there is no link between those legislative schemes and the* PSLRA*.*
>
> *[193] To accept the argument put forth by the complainant would mean that the duty of fair representation would apply to all services a union decides to offer to its members, whether or not it is obliged to offer that service and whether or not the service is related to the* PSLRA *or the collective agreement relationship. It would also mean that Parliament intended to give this Board the broad mandate to supervise the provision of representation services offered voluntarily by a union in relation to claims before workers' compensation tribunals, disciplinary matters before professional organizations, claims relating to the Canada Pension Plan, matters relating to unemployment insurance, matters before transportation tribunals, actions before courts of law, etc., all areas over which this Board has no special expertise. In my view, if Parliament had intended to give this Board such a broad jurisdiction over matters unrelated to the* PSLRA *or the collective agreement relationship, it would have given an indication to that effect. In this case, there is no such indication.*
>
> *…*
>
> *[195] The services that the union decides to offer to its members that are not linked to the* PSLRA *or the collective agreement relationship are matters between the union and its members. If the*

> *union fails to properly represent its members in those matters, there may be some relief in another forum (possibly on a contractual basis as expressed in the union's constitution), but that matter is not within the jurisdiction of this Board.*

[21] The Board adopted that decision recently, in *Abeysuriya v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 26. That case involved a complaint that a bargaining agent had failed its duty of fair representation by not providing assistance to the complainant with a staffing complaint. The Board concluded at paragraphs 43 and 44 as follows:

> *[43] The former Board's jurisprudence is consistent (*Lai, Ouellet, Elliott, Brown and Tran*) that complaints to the new Board that the bargaining organization or agent breached the duty of fair representation set out in section 187 of the* PSLRA *applies only to matters or disputes covered by either the* PSLRA *or an applicable collective agreement. The present case involves staffing matters.*
>
> *[44] As explained in the analysis, since the staffing matters raised in this complaint to not fall under either the* PSLRA *or the applicable collective agreement, I conclude that the new Board lacks the jurisdiction to examine the complaint on its merits.…*

[22] Similarly, in this case, I conclude that there is no explicit or implicit obligation for bargaining agents to represent employees before worker's compensation tribunals and that the Board lacks jurisdiction to hear this duty-of-fair-representation complaint.

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

(The Order appears on the next page)

IV. Order

[24] The complaint is dismissed.

June 16, 2021.

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