Date: 20210810

File: 561-34-42397

Citation: 2021 FPSLREB 90

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

MICHAEL FRANCIS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Francis v. Public Service Alliance of Canada

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

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Guido Miguel Delgadillo, Public Service Alliance of Canada

Decided on the basis of written submissions, filed January 29 and May 5, 2021.

REASONS FOR DECISION

I. Complaint before the Board

[1] Michael Francis ("the complainant") was employed by the Canada Revenue Agency ("the employer" or CRA). His employment status was as a determinate, or term, employee. He had been working at the CRA since January 2016, and his term had been renewed every six months. His bargaining agent is the Union of Taxation Employees (UTE), a component of the Public Service Alliance of Canada.

[2] The complainant's term employment was not renewed on October 2, 2020, when he had four years and nine months of continuous service. Effective November 1, 2020, the employer's policy on converting term employment to indeterminate employment after five years of continuous service was changed to after three years of continuous service. This change was negotiated between the CRA and UTE but did not form part of the collective agreement.

[3] On December 18, 2020, the complainant made a complaint against the UTE, alleging that it breached its duty of fair representation through negligence and bad faith by taking the following actions:

> …
>
> *1) Not negotiating in good faith to protect vulnerable contractual workers like me with close to 5 years of service from job loss;*
>
> *2) Not being transparent about the impact of the new November 1st, 2020 cut-off line on workers like myself;*
>
> *3) Not having undertaken all necessary and reasonable measures to protect me from job loss and*
>
> *4) Not filing a grievance against the employer for violating the terms and conditions of the CBA or the Canada Labor [sic] Code that stipulates, that the termination of employment must be done in writing and not over the telephone.*
>
> …

[4] After reviewing the parties' submissions, I have determined that I can decide this complaint without an oral hearing, as permitted by s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365). When deciding a complaint based on written submissions, the decision maker assumes that the information in the complaint is true. I am required to assess whether the

complainant has an arguable case that deserves an oral hearing, based solely on the allegations raised in his complaint.

[5] I have concluded that based on the events as set out by the complainant, he does not have an arguable case. Accordingly, for the reasons set out in this decision, the complaint against the UTE is dismissed.

II. Issues

[6] Section 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), the duty-of-fair-representation provision, prohibits a bargaining agent and its representatives from acting "… in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit."

[7] The first issue in this complaint is whether the bargaining agent's actions relating to the negotiation of an extension of indeterminate status to CRA term employees was arbitrary, discriminatory, or in bad faith. The second issue is whether the bargaining agent's failure to represent the complainant, including not filing a grievance related to the non-renewal of his term employment, was arbitrary, discriminatory, or in bad faith.

III. Context of the complaint

[8] The complainant had been a term employee since 2016. The CRA's policy was that individuals who had been term employees for five years would have their status converted to permanent or indeterminate.

[9] The UTE stated that the CRA had identified five employees (including the complainant) whose contracts would not be extended past July 3, 2020, from a lack of work. The UTE stated that when it was advised of this, it tried to help identify tasks that these employees could perform. The UTE noted that the complainant's term was subsequently extended to October 2, 2020.

[10] The complainant referred to a June 20, 2020, conversation between employees and a manager about alternate work. The complainant decided to stay in the mailroom. He disagreed with the bargaining agent's version of this event. I do not find this conversation relevant to the issues before me, so I do not need to resolve any differences in views of this meeting.

[11] On August 10, 2020, the complainant learned about a new agreement between the CRA and UTE that would change the waiting period to three years ("the new threshold agreement"). This policy change was to be effective on November 1, 2020. The new threshold agreement was not part of the collective agreement.

[12] The complainant contacted a UTE representative (Ms. Germain) on August 10, 2020, to inquire about the new threshold agreement. He asked about its impact on employees such as him with four years of service. Ms. Germain replied the same day and wrote that the UTE did not have all the details of the new threshold agreement and that it would be discussed at a "union conference meeting." The complainant stated that no new details of the agreement were mentioned at this conference meeting.

[13] On August 24, 2020, the complainant emailed the UTE, asking what would happen to an employee whose contract was not renewed after October 2, 2020, and what would happen to his four years and nine months of service. He did not receive a reply.

[14] In an email to Ms. Germain on September 17, 2020, the complainant told her that his employment contract would not be renewed after October 2, 2020. He also informed her that he would have been only one month short of five years of service as of November 1, 2020. Ms. Germain wrote back the same day to request information about his position and hiring date, stating that "we will keep in touch". He provided her with that information.

[15] His employment term was not renewed on October 2, 2020.

[16] The complainant emailed Ms. Germain on October 7, 2020, requesting that a grievance be filed. He copied the UTE's president, Marc Brière.

[17] Ms. Germain replied to the complainant's email on October 20, 2020. She stated that the UTE was in constant communication with the employer to find a satisfactory outcome to his situation. She also added that he would be eligible for an "administrative conversion very soon". She also told him that the end of a term contract does not constitute a ground to file a grievance unless the act of non-renewal was motivated by anything other than workload. She told him that if he had information to confirm that the end of the contract was justified by another ground, such as his age, he should "definitively" communicate with the bargaining agent. She

told him that this would not be a grievance but a human rights complaint. She advised him that the deadline for making such a complaint was one year.

[18] On October 30, 2020, he emailed Ms. Germain again and referenced another possible factor for his non-renewal. He alleged that he had discussed with the director of his work unit, the CRA's discriminatory hiring practices and that CRA managers did not appreciate it. He stated that he did not hear back from Ms. Germain.

IV. Submissions

[19] The complainant submitted that as of July 2020, the bargaining agent knew or ought to have reasonably known that term employees would be adversely affected by the new collective agreement and its implementation in November 2020 as well as the fact that many employees would lose their jobs. He stated that at the negotiating table, the bargaining agent was required to protect all its members who had already acquired the necessary three or more years of service, but that it failed to, knowingly and deliberately. He submitted that at the least, the bargaining agent should have told the employer that those employees with three or more years of service had to be included, whether or not they were renewed. He stated that this was the case whether or not work was available. The complainant stated that this failure to protect all members was a "deceitful act" by the bargaining agent and that it demonstrated that it failed to bargain in good faith.

[20] In response to the bargaining agent's statement that the new threshold agreement was not part of the collective agreement, the complainant stated that this was an admission by the bargaining agent that "… there are still secret negotiations going on …" between it and the employer. He submitted that "secret agreements" between it and the employer clearly demonstrated that the bargaining agent negotiated in bad faith by deliberately hiding details from its members. He argued that this deprived members both of their rights during a ratification vote and of their right to fair representation at the bargaining table.

[21] The bargaining agent submitted that the new threshold agreement reduced the threshold from five years to three and that had it not concluded this agreement with the CRA, the complainant would have been in the same situation as before the conclusion of the agreement.

[22] The bargaining agent submitted that it acted diligently in negotiating the new threshold agreement. It suggested that it negotiated the best outcome it could and the earliest implementation date possible. It also submitted that it made efforts to protect term employees by identifying available work for employees in the complainant's situation.

[23] The bargaining agent submitted that there is no evidence that it purposefully pushed the implementation date of the new threshold agreement past the date of the end of the complainant's term. The bargaining agent submitted that it was diligent in communicating with him.

[24] The complainant submitted that the delay contacting him in response to his emails was evidence of negligence and bad faith. He referred to the bargaining agent's inaction and its reluctance to act with diligence between September 18 and October 19, 2020, and submitted that this clearly showed a breach of the duty of fair representation.

[25] The complainant alleged that the bargaining agent did not support a grievance against the non-renewal of his term employment. The bargaining agent submitted that it could not make the CRA give him a new term contract.

[26] The complainant stated the bargaining agent should have filed a grievance because he was not informed of the non-renewal of his term in writing, which he alleged was a breach of a provision of the *Canada Labour Code* (R.S.C., 1985, c. L-2).

[27] The bargaining agent submitted that there was no right under the collective agreement or in legislative provisions requiring notice in writing of such a non-renewal. It stated that it remained open to discussing with the complainant his argument about a breach of the *Canada Labour Code*. The complainant stated that until he made his complaint, the bargaining agent had never informed him "… of this right and its availability to assist [him], which further shows how it failed in its duty to represent [him]."

V. Reasons

[28] The complainant raised two areas of complaint about his representation by the UTE: the failure to bargain an implementation date for the new threshold agreement that would protect employees in his situation, and the failure to assist him in

representation, including filing a grievance against the non-renewal of his term employment. I will address these two areas separately.

A. Negotiations

[29] Most duty-of-fair-representation complaints relate to the individual representation of members of a bargaining unit. However, in some narrow circumstances that duty does extend to bargaining on behalf of all the members of a bargaining unit. The Federal Court of Appeal recognized this as follows in *VIA Rail Canada Inc. v. Cairns*, 2001 FCA 133 at para. 54:

> *[54] … The existence of a duty of fair representation does not preclude a union from making concessions with respect to existing rights or privileges of its members in order as part of the bargaining process. What it does do, is to require that the union, in making those concessions not act in a manner that is arbitrary, discriminatory or in bad faith during the collective bargaining process.*

[30] In this case, the bargaining agent was negotiating improvements in job security for term employees, who did not lose rights but gained them. The bargaining agent did not make concessions with respect to the existing rights of its members who were in the same situation as the complainant.

[31] The duty of fair representation does not require that a bargaining agent achieve a particular outcome in collective bargaining. However, the process and results of the decisions made during bargaining must be free of improper motive. In *Cairns v. International Brotherhood of Locomotive Engineers*, 1999 CanLII 18497 at para. 113, the Canada Industrial Relations Board described the obligations of a bargaining agent in bargaining as follows:

> *113 The weighing of interests and the ultimate choices are without a doubt highly political and will inevitably be influenced by competing preferences, values and viewpoints. However, the union will be judged on whether it approached the issue objectively and acted responsibly towards all its members. It must take a reasonable view of the problem and thoughtfully assess the various and conflicting interests.*

[32] Although the complainant did not agree with the outcome of the bargaining process, he provided no allegations that would suggest an improper motive on the part of the bargaining agent.

[33] The complainant also alleged that negotiations "in secret" demonstrate a breach of the duty of fair representation. By this, I understand him to mean that the failure to include the agreement in the ratification package for the collective agreement was a breach of the bargaining agent's duty of fair representation. Bargaining agents can conclude agreements with employers to protect their members' interests without receiving the ratification of all members. I find that this was not a breach of the duty of fair representation.

B. Grievance representation

[34] The complainant alleged that the bargaining agent breached its duty of fair representation when it declined to file a grievance on his behalf. The bargaining agent told him that there were no grounds for filing a grievance. The Board's jurisprudence is clear: the Board has no jurisdiction over a non-renewal of a term contract (see *Shenouda v. Treasury Board (Department of Employment and Social Development)*, 2017 PSLREB 21). The bargaining agent did explore with the complainant whether there might be grounds for a human rights complaint. He did not provide any information to the bargaining agent that would support such a complaint.

[35] The complainant did not raise with the bargaining agent the issue of the failure to provide a notice in writing of a non-renewal of his term before making his complaint. He misunderstood the bargaining agent's stated willingness to discuss his argument about a potential breach of the *Canada Labour Code*. The bargaining agent has not accepted that such a right exists — it only expressed a willingness to discuss the issue with him. There is no obligation on a bargaining agent to raise novel and untested arguments. In this case, the complainant did not raise this concern with the bargaining agent, so there was no opportunity for it to consider the request.

[36] The complainant alleged that the bargaining agent's failure to respond to his emails for a one-month period was arbitrary, discriminatory, and in bad faith. The bargaining agent did contact him and was not ignoring his communications. I find that the delay was not inordinate and that it was not arbitrary, discriminatory, or in bad faith.

[37] The complainant's allegations, if accepted as true, do not demonstrate that the bargaining agent breached its duty of fair representation.

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

(The Order appears on the next page)

VI. Order

[39] The complaint is dismissed.

August 10, 2021.

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board