Date: 20210823

File: 561-02-895

Citation: 2021 FPSLREB 98

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

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BETWEEN

SALONI NEGI

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Negi v. Public Service Alliance of Canada

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

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

For the Complainant: Herself

For the Respondent: Michael Fisher, counsel

Heard via videoconference,
September 16 and 17 and November 17, 2020,
and January 28 and March 10 and 30, 2021.

REASONS FOR DECISION

I. Summary

[1] Saloni Negi, the complainant, alleged that her employer had treated her poorly. Many months and years after those events, she convinced her bargaining agent to grieve them as violations of the workforce adjustment appendix (WFA) of her collective agreement. She said that her employer failed to offer her every reasonable opportunity to continue her career during a workforce adjustment process.

[2] The evidence shows that the complainant declined a position through alternation, exercised her right to choose options under the WFA with a cash payment for an education allowance. She later chose to resign from the public service and elected to take a buyout, to capture the cash value of her pension, in addition to a severance payment, to begin her life anew in another country. All for which she clearly stated that she has no regrets.

[3] Her bargaining agent recognized many problems with her grievance, the least of which was that she did not want reinstatement through her WFA grievance, which is the normal remedy sought from such an action. The complainant also admitted that she voluntarily chose to resign from the public service and that she chose to withdraw her grievance, which is the subject of this complaint against her bargaining agent.

[4] The complainant sought justice, accountability, and a chance to be heard. Her quest for those things sustained her throughout the lengthy case-management hearing process of this complaint.

[5] In the end, her bargaining agent prosecuted her grievance up to and including mediation-arbitration (“med-arb”) by a member of the Federal Public Sector Labour Relations and Employment Board (“the Board”) on the first day of her scheduled grievance hearing. After an unsuccessful attempt to seek a settlement from her employer, she accepted her bargaining agent’s advice and voluntarily decided to withdraw her grievance before the second scheduled hearing day, on which the parties were to begin presenting evidence.

[6] The facts clearly establish that at every decision point in her long and unhappy employment saga going back to 2009, Ms. Negi made decisions herself which brought her to where she is today. These choices she made were the sole contributing factors

to her grievance having no chance of success and thereby causing her to choose to withdraw it. None of those choices were her bargaining agent's responsibility or fault.

[7] Given the harsh reality of Ms. Negi being solely responsible for the fate of her workplace grievance, this complaint does not make out an arguable case upon which she could have any chance of success. As such, I conclude that on a balance of probabilities, she failed to establish an arguable case that her bargaining agent breached its duty of fair representation to her and dismiss the complaint.

[8] Through nine separate case-management conference sessions, some lasting for hours, and six days of hearing, everything possible was done to ensure that the complainant received a full, fair, and well-informed process in which every detail of her case was presented.

II. Motion to dismiss the complaint

[9] Counsel for the Public Service Alliance of Canada ("the respondent" and "bargaining agent") submitted a motion to dismiss this complaint on the grounds that it does not make out an arguable case. The complainant opposed the motion.

[10] As the complainant was self-represented and had many questions and concerns about both the hearing process and the motion to dismiss, I ruled that I would hear the parties' evidence, to give every possible opportunity to have the case heard.

[11] As a part of the hearing process, I chaired the nine case-management conferences, via telephone and videoconference, to explain the hearing process and to answer the complainant's many questions about presenting her case, and to explain our hearing process.

[12] I allowed the complainant to reopen her evidence after the respondent had closed its evidence. When she reopened it, she called David Orfald to testify. At the time of the events at issue, he was a senior member of the respondent's head office. He had written an email about the grievance at issue. He was a member of the Board when this complaint was heard. His involvement in the file was not significant. However, it was important to allow the complainant to reopen her evidence to call him as a witness, especially given her stated concerns about receiving a fair hearing and exploring every possible avenue of inquiry into the handling of her grievance file.

[13] When closing arguments were set to begin for the second time, the complainant then requested to recall the respondent's witnesses. After a lengthy discussion, the complainant was unable to enunciate what new information or issues had arisen since the witnesses' testimony and her cross-examination of them. It appeared she wished to re-examine the same issues that she had already done the first time the witnesses testified. Without any new issues identified to justify her re-opening her evidence for a second time, I denied the request.

III. The complainant's submissions

[14] The complainant submitted the following:

- Her employer treated her poorly from 2009 to 2011.
- Her office and her position were identified as impacted by budget reductions in February 2009. She searched then for every possible new position but was rebuffed repeatedly by hiring managers. Her managers failed to support her in that effort.
- She received an email in February 2010, which stated that the function for which she was hired had ceased to exist, but she did not receive a letter stating that she was affected under the WFA at that time.
- She chose not to grieve during those three years as she feared retribution from her managers; instead, she chose to do her best and to seek every possible advancement opportunity within her organization and to avoid burning bridges there by not filing a grievance.
- She searched for and applied for all relevant positions at her grade and level that she thought would provide career fulfillment, but her managers were not supportive.
- She closely scrutinized an opportunity to take a new position in Edmonton, Alberta, through the WFA's alternation clause but decided that she did not like the position, and she declined the opportunity.
- On July 3, 2012, she received notice under the WFA that she was identified for lay-off.
- Finally, being out of options, she chose to file a grievance on August 6, 2012, alleging a violation of the WFA.
- Later, she elected to take the education payment option under the WFA options.
- She later chose to resign her position but argued that it was not really a resignation as it was done under duress and that accepting the education allowance was the best of several bad options.
- She said that her position was taken away from her, so in fact, there was no position for her to resign from.
- She chose to cash out the value of her pension because she was rapidly approaching the age-based deadline to do it, and she felt that she had no option, given her choice to begin life anew in a different country.
- Her representative from her bargaining agent local component said that she thought that there was a "strong case" supporting the grievance filed in 2012.

- The complainant accused that person, since deceased, of lying to the complainant about efforts being made to accelerate the employer's hearing of her grievance.
- Despite originally requesting reinstatement as a remedy in her grievance, she later directed her bargaining agent to remove the request.
- Instead, she wanted a hearing held, so that she could hold her employer accountable by speaking the truth, adding that it was about a point of principle.
- The file was referred to her bargaining agent's national representation office.
- Her local representative passed away, and later, when the respondent's national office began to work on the file, it was discovered that important documents had been lost. (I note that the testimony before me did not explain exactly which documents were lost or what they would have proved).
- Her adjudication representative said that the complainant had filed her grievance too late.
- Her grievance was untimely as a filing deadline was missed due to the incompetence of her representatives from the respondent's national office.
- Her bargaining agent made a mistake when it counted 25 working days instead of 25 calendar days.
- Before the hearing, her representative told her that had there been an ongoing pattern of harassment by her manager, it could possibly allow her to testify and grieve the actions from 2009. But she replied to the representative that she was not grieving that.
- The representative from the respondent's national office handling her file treated her badly as it went to adjudication. She complained of being yelled at constantly, of teleconferences being missed or postponed, and of being questioned repeatedly about why she resigned and how would she repay the approximately $120,000 in education and severance benefits she received from her employer if she were reinstated.
- Her adjudication representative from the respondent's national office had no strategy to win her case. He appeared to prepare for her hearing at the last minute. The complainant said that he went "berserk" in one conversation with her.
- An email from another representative, Mr. David Orfald, showed he that he did not understand her file as he wrote that she regretted her decisions, which was wrong.
- Her bargaining agent colluded with her former employer to defeat her grievance. Examples of this include that her representative seemed to agree with several concerns about her grievance outlined in a letter from her employer's legal counsel. The concerns suggested that the grievance was moot, given her decision to retire, and that the bulk of her allegations against her employer arose many months if not years before the grievance was filed.
- She was very unhappy with the delays in her grievance being heard, as she alleged that her bargaining agent continually granted her employer delays to issue a final-level decision on her grievance.
- She does not regret any of her decisions, including agreeing to withdraw her grievance; however, she felt pressured by her bargaining agent, which told her that her grievance would not be allowed, that it did not want a poor precedent set by a case decided by the Board, and that it did not want any of its staff "thrown under the bus".
- When the Board Member assigned to hear her grievance conducted the med-arb to determine whether there was a chance to settle the matter, the

complainant stated that he told her that her grievance had been filed too late and that he did not have jurisdiction to hear her case.
- A written brief was submitted pointing to 120 different instances of bad faith and arbitrary actions by her bargaining agent in its failed efforts to represent her.
- Her representative at adjudication refused her request to seek a postponement of the hearing so that she could make an access-to-information request for documents that would support her case.

IV. The respondent's submissions

[15] The respondent submitted the following:

- The complainant was affected by a downsizing of the public service, and she filed a grievance in 2012 alleging a breach of the WFA and requesting that she receive a reasonable job offer.
- She testified that she chose not to grieve during the 2009-2011, that she continued in her job as long as she could, and that later, it was easy to second-guess her earlier decision not to grieve.
- The respondent referred the grievance to adjudication after it was denied by the employer at the final level on a conditional basis, subject to a further review of the merits of proceeding.
- Upon further review, the respondent concluded that the grievance had practically no chance of success because shortly after she filed it, the complainant voluntarily elected to receive transition support as allowed under the WFA. Furthermore, she resigned her position to take the transfer value of her pension. All that rendered the grievance moot.
- Despite all that, the matter was taken forward to adjudication in hopes of achieving a settlement of the grievance before the hearing.
- After seeking such a settlement through the Board Member's assistance at the med-arb, the respondent recommended withdrawing the grievance, to which the complainant agreed.
- No discrimination was alleged. No evidence adduced before the hearing would allow a finding that the respondent handled the matter arbitrarily or in bad faith.
- The complainant wrote to the respondent's national president, Robyn Benson, on April 28, 2014. The complainant stated that she was "happy" with her decision to take the education allowance and to retire and withdraw the cash value of her pension so that she could relocate to a different country.
- She alleged nothing that was sufficient to sustain a complaint of any serious wrongdoing by the respondent.
- The complainant was not satisfied with her representation at adjudication and regretted her decision to withdraw the grievance.
- The strong advice to withdraw the grievance was based upon sound reasoning and the combined advice of several experienced professionals at the respondent's national head office.
- The complainant is misinformed with respect to her grievance having a strong chance of success, and she also has a misunderstanding of the grievance having been filed late, which did not happen.
- Despite repeated attempts to explain it to her, the grievance was not untimely. Rather, the fact that opposing counsel pointed out before

adjudication was that remedial requests are limited to the 25-day period immediately preceding a grievance's filing date.

- Despite repeated attempts to explain that to the grievor, her grievance alleging a WFA violation became moot after she decided to retire from the public service.
- Evidence was submitted that a team of four, with combined decades of experience, from the respondent's national representation office collaborated and exchanged ideas and opinions on the file when preparing for its referral to adjudication and when preparing the effort to seek a settlement at adjudication.
- The adjudication representative who was assigned the conduct of the file before the Board provided competent representation. He drew on his 14 years of experience and his 2 weeks of adjudication on average every month before the Board.
- All allegations of impolite or poor conduct or decorum by the adjudication representative in communications with the complainant were vigorously denied by the adjudication representative in testimony.
- It was noted that despite the complainant contacting the respondent's national office to complain about her representative missing a teleconference and stating that therefore she wanted a new representative, she never voiced any concerns about any such alleged poor behaviour during the entire conduct of the file.

V. The law and analysis

[16] Duty-of-fair-representation complaints are made under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The relevant portions of s. 190 state as follows:

> ***190 (1)*** *The Board must examine and inquire into any complaint made to it that*
>
> …
>
> ***(g)*** *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> ***(2)*** *… 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.*
>
> …

[17] Section 185 of the *Act* lists several unfair labour practices, including those prohibited by s. 187, which read as follows at all relevant times:

> ***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.*

[18] The Supreme Court of Canada set out the principles underlying a union's duty of fair representation in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. The Board has relied on those principles regularly to define the scope of the duty of fair representation under the *Act*. They read as follows (from *Gagnon*):

> …
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*
>
> …

[19] As noted in *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at paras. 83 and 84 (which references *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2), the test to apply in this context is whether, if all the alleged facts are true, there is an arguable case that the union failed in its duty of fair representation.

[20] The Board has recently considered the matter of the threshold of a complainant's allegations meeting the test of making out an arguable case. While it is a very low threshold, the allegations must nevertheless have an air of reality and not merely be accusations. (*Joe v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 10 at para. 42)

> *…To establish an arguable case, a complainant must demonstrate that there is substance to the complaint upon which a contravention of the* Act *can be found. It is not enough for a complainant to throw out accusations and rely on the inability of the respondents to disprove them. The Board's jurisprudence is consistent in this respect.…*

VI. Conclusion

[21] After carefully listening to six days of testimony and argument, and after carefully reviewing hundreds of pages of documentary evidence, I find that even if all the allegations and assertions of fact submitted by the complainant and as noted previously are true, there is no arguable case that the respondent failed its duty of representation to her.

[22] At every decision point in her unfortunate saga dating back to 2009, the complainant's own voluntary choices led her to the state of dissatisfaction that she recounted before me at the hearing.

[23] Every one of the decisions that the complainant admitted to making dating back to 2009 in her chronology of events served to render her grievance futile.

[24] If in fact files from 2009-2011 related to the grievance were lost, as was alleged, it occurred so long in advance of the grievance finally being filed in August 2012 that it would have had no impact. These years old concerns were untimely and could not have been included in her grievance of 2014. The complainant repeatedly stated that she chose not to grieve these matters as they arose, due to her fears of retribution from her managers.

[25] The complainant had a very strongly held but mistaken belief that her bargaining agent had missed a filing deadline for her grievance due to it confusing a 25-working-day deadline for what she said was really a 25-calendar-day deadline. I carefully reviewed all the documents in the file, and this allegation is simply not accurate.

[26] The allegation of her bargaining agent colluding with her employer and later respondent counsel responding to her grievance lack any sense of reality. The complainant testified that her bargaining agent was saying things and asking her questions that sounded like what her former managers were saying. The same vague

allegation was made in response to a letter from respondent counsel in the days leading up to the scheduled hearing of her grievance.

[27] I firstly note that the 2009-2011 concerns arising from her treatment by her managers cannot be grieved years or even months later by August 2012 when the complainant stated that she was now out of options and finally chose to grieve after her electing not to do so earlier. Secondly, the allegations of what exactly the bargaining agent colluded in was not made clear. Her dissatisfaction with her former managers focused upon their alleged lack of support for her career advancement in areas such as her seeking new positions. She presumably wished for stronger recommendations or efforts by her managers as she said she searched for new positions once her office was identified to be closed due to budget changes. Again, its not clear what conceivable role the bargaining agent could have played in such a scenario. I note again, for emphasis, that the complaint herself stated very clearly that she carefully considered and chose not to grieve any actions of her managers in this 2009-2011 timeframe.

[28] The other aspect of the collusion allegation arose when opposing counsel wrote a letter in the days preceding her adjudication date. She suggested that this letter which outlined the respondent's proposed case to defend the grievance, sounded a lot like what her own bargaining agent adjudication representative kept saying to her. She stated that this suggested to her that instead of her bargaining agent looking for strategies to win her grievance, they were siding with what her former employer was going to do to oppose her grievance.

[29] In reality, counsel representing the respondent in the grievance was setting out issues which as matters of law were the reality of the case. The complainant's own adjudication representative was indeed trying to discuss some of these same issues with her. Why did she resign her position if she wanted to pursue a WFA grievance. Why did she cash-out her pension if she wanted to return to the public service. Why did she wait to mid-2012 if she wanted to grieve actions or omissions of her managers the occurred in 2009-2011.

[30] None of these things suggest collusion. Rather, they are the harsh reality of the grim outlook her grievance faced when the facts or her situation were applied to the law. Representatives for both parties in a grievance are expected to have such

discussions in the days preceding a hearing in order to ensure each understands the other's case and to possibly discover an opportunity to settle the matter.

[31] The alleged impolite conduct of one of the respondent's representatives was not proved in a clear cogent and compelling manner in the evidence at the hearing. The alleged acts were denied by the person alleged to have done so. However, even if I accepted all the complainant's allegations on this point, it does not bring this matter within the scope of the duty of fair representation.

[32] In fact, the only aspect of her bargaining agent's conduct in this entire matter that I find even curious is that it reluctantly agreed to refer the grievance to adjudication.

[33] One witness who had worked on the grievance file at the respondent's national headquarters summarized the predicament well when she testified that "everyone who looked at the file said her resignation made the corrective action impossible." Thus, her bargaining agent referred the file to adjudication against the advice of all the staff members who had worked on it. As one witness opined, this was done possibly only due to the complainant's "strong urging".

[34] The complainant vigorously rebutted suggestions that she now regretted her decisions related to her career, her resignation from it, and her withdrawal of her WFA grievance when she was challenged that all those decisions had led her to where she was at that point.

[35] Her assertions and the related evidence adduced is insufficient to show the bargaining agent's conduct as being arbitrary, capricious, wrongful, or in bad faith; nor was it negligent in any way. There was no allegation of discriminatory conduct; nor did I find the slightest suggestion of any in the evidence.

[36] Throughout the complainant's testimony and closing submissions, it was never clear from a strict legal perspective as to what she sought as remedy through her grievance and this complaint. She repeated earlier statements confirming that she was happy with her career decisions, including her resignation, and she said that she never wanted to return to work.

[37] When asked about it, she replied that she did not care if her grievance were allowed, as she sought a chance to speak about her horrendous experience with her

employer. She said that she sought justice, accountability, and the opportunity to be heard. All this was to expose what in her opinion was the bad treatment that she had received.

[38] The hearing process and this decision at least fulfills the complainant's desire to be heard.

[39] For all these reasons, I accept the respondent's motion to dismiss the complaint.

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

(The Order appears on the next page)

VII. Order

[41] I order the complaint dismissed.

August 23, 2021.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board