Date: 20211026

Files: 561-34-41749 and 41802

Citation: 2021 FPSLREB 117

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 FRAGOMELE

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA, UNION OF TAXATION EMPLOYEES, AND DAVID GIRARD, COSIMO CRUPI, CHRIS HEYWOOD, TRACY MARCOTTE, AND KYLE PHARAND

Respondents

Indexed as
Fragomele v. Public Service Alliance of Canada

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

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondents: Abudi Awaysheh, Public Service Alliance of Canada, Union of Taxation Employees

Decided on the basis of written submissions, filed April 29 and 30, July 23, and August 12, 2020.

REASONS FOR DECISION

I. Introduction: complaints of an unfair labour practice (a breach of the duty of fair representation)

[1] Two files are before me. Both allege that the bargaining agent for Michael Fragomele ("the complainant"), the Public Service Alliance of Canada ("PSAC"), specifically Local 00042 of its Union of Taxation Employees ("UTE") component, and some officials of those two organizations, committed an unfair labour practice within the meaning of ss. 185 and 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). In essence, in both complaints, the complainant alleged that the respondents (the PSAC, the UTE, David Girard, Cosimo Crupi, Chris Heywood, Tracy Marcotte, and Kyle Pharand; along with another individual he identified in his written submissions) acted in bad faith or in an arbitrary fashion by failing to agree to represent him in his proposed grievances against his employer, the Canada Revenue Agency (CRA).

[2] The parties' facts, issues, submissions, and arguments were set out in their extensive filings. The respondents asked that both complaints be determined based on the written submissions. The complainant also requested that a decision be made on the written submissions for complaint 561-34-41802; however, for complaint 561-34-41749, he requested the opportunity to elaborate on his arguments by way of an oral hearing. This panel of the Federal Public Sector Labour Relations and Employment Board ("the Board") has determined that both complaints can be determined on the basis of the written materials alone, as permitted by s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365). The facts and circumstances giving rise to the complaints are not in dispute. In consideration of the parties' submissions, I find that the complainant has not presented an arguable case that the respondents acted arbitrarily or in bad faith. Therefore, the complaints are dismissed.

II. The two complaints

[3] On April 29, 2020, Mr. Fragomele made a Form 16 complaint against Mr. Girard, Mr. Crupi, Mr. Heywood, Ms. Marcotte, and Mr. Pharand pursuant to s. 190(1)(g) of the *Act*. He included with it a brief laying out the circumstances that gave rise to this complaint. The 35-page brief consisted of a number of long emails between him and several bargaining agent representatives, together with his detailed submissions.

[4] Section 190(1)(g) of the *Act* deals with alleged unfair labour practices within the meaning of s. 185. Mr. Fragomele alleged that a decision of the named individuals (who were officials of UTE, Local 00042) not to represent him in a grievance about the educational requirements in certain past appointment processes "… was both arbitrary, and in bad faith." He stated that he first knew of the employer's practice on January 29, 2020 (note that he stated "2030" on the complaint form, in error). As corrective action, he sought an order that he be represented and that they be held accountable "for any timeliness issues." He also recommended that a fine of $1000 be applied to PSAC (UTE Local 00042) "… and $1 to each representative named."

[5] On April 30, 2020, Mr. Fragomele made a second Form 16 complaint, pursuant to s. 190(1)(g) of the *Act*. This time the named individuals were Mr. Crupi and Ms. Marcotte. He alleged that the bargaining agent's decision to not represent him with respect to the payment of shift premiums was made in bad faith. He became aware of the circumstances that gave rise to this complaint on March 5, 2020. By way of particulars, he stated that he had "presented to parties how the employer was in contravention of the collective agreement", adding that the named respondents "represented other members, whilst I was excluded." As corrective action, he sought an order that "… the bargaining agent should have to recind [*sic*] the grievance…". He also recommended that a fine of $1000.00 be applied to PSAC (UTE Local 00042) "… and $1 to each representative named."

III. The facts and the parties' arguments

[6] Mr. Fragomele filed two chronologies, both dated April 29, 2020.

[7] In one, he set out the following chronology of events, which I quote in full:

> …
>
> *1) February 2019 – the complainant discovered that the employer was in contravention of several Articles of the Collective Agreement in regard to Hours of Work, specifically shift / weekend premiums. This information was brought to the Local 00042 President*
>
> *2) March 2019 – the complainant asked Cosimo Cruipi [sic] the Regional Vice President (RVP) for UTE, for a follow up in regard to the observation of the contravention. The complainant was informed by the RVP that it was in abeyance, and for the complainant not to take any action.*

> *3) Summer 2019 – correspondence with Local 00042 executive stated that the National body was reviewing and would be dealing with the issue.*
>
> *4) Fall 2019 – The complainant requested a follow up with the Local 00042 President and was informed that there was a grievance at third level pending a decision.*
>
> *5) March 2020 – After the strike vote, in which the RVP was present, I again requested a follow up in regard to the status of the complaint presented over a year earlier. At this time the RVP informed me that five members were in a group grievance and they were awaiting results.*
>
> …

[8] He explained that when he reviewed several proposals that the bargaining agent and the employer put forward during collective bargaining, he became concerned that the employer had been violating the collective agreement provisions dealing with shift workers and overtime. The collective agreement was between the PSAC and the CRA for the Program Delivery and Administrative Services Group and expired on October 31, 2016 ("the collective agreement"). He went on as follows:

> …
>
> *I believe that this bargaining agent has shown gross negligence in its representation for this grievance. First, the contravention of the collective agreement is one that affects all members. Yet, the bargaining agent has chosen to only represent a select few. Second, the bargaining agent specifically informed the complainant to not take any action until advised to do so by the Local executive. Thirdly, even though there were multiple exchanges between the complainant and the bargaining agent the complainant was excluded from participating in the grievance. These actions align almost perfectly with the Supreme Court's declaration 5 in Canadian Merchant Service Guild at page 527.*

[9] In the second chronology, Mr. Fragomele set out the following, which I quote in full:

> …
>
> *1) Fall 2016 employer has a selection process, in which it clearly indicates that in order to apply a candidate must meet the employers [sic] minimum education standard as set out in its staffing program, which it is legislated to have per the Canada Revenue Agency Act 47(2)(b)(ii).*
>
> *2) Winter/Spring 2017 successful candidates are chosen from the selection process.*

> *3) Winter 2019 the complainant is informed by one of the successful candidates that they did not meet the education requirements in order to apply.*
>
> *4) Winter 2019 the complainant engages in informal discussions with management in regard to the screening of education requirements for the previous selection process.*
>
> *5) Winter 2020 the informal discussions with management conclude.*
>
> *6) Winter 2020 the complainant approaches the bargaining agent for representation, and to file a formal grievance.*
>
> …

[10] Further detail with respect to the two chronologies can be gleaned from the email correspondence that Mr. Fragomele attached to his complaints.

[11] With respect to the shift premiums issue, on February 27, 2019, Mr. Fragomele emailed Mr. Crupi, the UTE's regional vice president for northern and eastern Ontario. He explained that he had brought to Ms. Marcotte's attention his concern that the employer was in apparent breach of the relevant collective agreement by "negating" (which I take to mean "ignoring") several provisions related to shift workers. He wanted the wrong corrected and believed that back pay was owed "… to all employees who have worked shift [*sic*], whether or not they are currently employed at CRA sudbury [*sic*] TC."

[12] Mr. Crupi replied on March 6, 2019. He said that he and Ms. Marcotte were working on the issue but that they needed direction from the UTE's head office. He asked that no action be taken "unless requested by your local."

[13] With respect to the educational requirements issue, the bargaining agent met with Mr. Fragomele on January 24, 2020, to discuss his concerns. As Mr. Heywood, the second vice president of UTE Local 00042, recorded in an email dated January 27, 2020, Mr. Fragomele's concern was expressed as follows:

> …
>
> *You are arguing that you were "excluded from several selection processes for both acting and permanent appointments (at a higher substantive level, SP-5, SP-6, MG-3) based on not meeting the education requirements, while I was an SP-4. However, as the employer did include other employees whom also did not meet the education requirements per the Staffing Program my exclusion was inconsistent with the managements position of educational*

> *requirements, and would be considered arbitrary. Therefore, as all employees that were considered to have met the education requirements were provided acting, and permanent appointments, I, too, should have received such acting, and/or permanent appointment at said time. As such, I am requesting retroactive recompense at the rate of pay (SP-5) I would have been entitled to had I not been arbitrarily treated, and provided the same opportunity as my colleagues who received acting, and/or permanent employment. Or, a mutually acceptable agreement in order to make me whole."*
>
> …
>
> [*Sic* throughout]

[14] Mr. Heywood went on to note that at a meeting on January 24, 2020, Mr. Fragomele confirmed that he had not applied because he knew that his educational background did not meet the educational requirements. Only later, after he learned that some of the screened-in applicants also did not meet those requirements, did he complain.

[15] Mr. Heywood then noted that the original postings had expirations of November 18, 2016, and September 7, 2018, respectively. That being the case, any objection would be untimely. In any event, since the concern related to the implementation of staffing procedures, a complaint did not require the bargaining agent's support, so Mr. Fragomele still had the option to pursue the matter on his own.

[16] Mr. Fragomele responded in an email on January 27, 2020. He argued that under the *Act*, a bargaining unit member could not file a grievance without the bargaining agent's representation. He argued that that did not mean that the bargaining agent had to agree with the grievance, only that it was "… just the agent in which the grievance is filed through …." He added that it was "false" to suggest that he was prepared to pursue his complaint on his own. He asked the bargaining agent to reconsider its decision.

[17] On January 29, 2020, Mr. Girard, a UTE labour relations officer, emailed Mr. Crupi. He had reviewed the correspondence. He confirmed Mr. Heywood's position. He pointed out that a bargaining unit member did not need the bargaining agent's support to file a grievance if it did not relate to the interpretation or application of the collective agreement. He noted that Mr. Fragomele had not applied for the position and, that in order to get the remedies he was looking for, he would have had to have

been a successful candidate. He indicated that the chances of success with such a grievance would be “extremely low”.

[18] He added that there was a timeliness issue. The collective agreement provided that a grievance had to be filed within 25 days of the date on which the grievor first became aware of the matter giving rise to it. Mr. Girard understood that Mr. Fragomele became concerned about the issue by March 2019. He did not file a grievance or ask for an extension of time to file one. He explained that the jurisprudence on this issue is that ongoing conversations with the employer do not extend the right to file a grievance.

[19] Mr. Fragomele responded to the timeliness objection in an email to the Board on May 13, 2020. He argued that if an extension of time was necessary, it ought to be granted, and he set out the following factors in support of his position:

- He had originally sought representation from the bargaining agent in February 2020. It chose to not represent him. He made a complaint about that decision (Board file no. 561-34-41749) regarding a failure to represent. He argued that this served as a distraction to the complaint in Board file no. 561-34-41749 and that it delayed him receiving assistance as to how to make a complaint.
- Since the bargaining agent did not represent him, he sought the assistance of outside counsel later in February 2020. In early March 2020, he discovered that the course of action that his counsel had recommended was incorrect, jurisdictionally speaking. He was, as he said, “back to square one,” except that it had cost him, financially speaking.
- On March 17, 2020, he was informed that the office would be closed and that he was not to report to work. He had not returned to the office as of his email of May 2020. He noted that key emails and information related to corporate policies were available only on the employer's internal networks, which he said he was not able to access from home. Only on May 13, 2020, did he receive access to equipment that would allow him to work from home and to access the employer's network.

[20] On July 23, 2020, the respondents filed a response to the complaint related to the shift premiums.

[21] In their statement of facts, they stated the following, in part:

> …
>
> *3. The Complaint [sic] is a shift worker who works in the Afternoons in the Sudbury TSO. His Complaint concerns the provision of a shift premium for overtime for the Complainant on Saturday March 30, 2019 and Sunday March 31, 2019, in which he worked 13h and 10h respectfully, and in which he*

> *says he received $2.25/hour as a shift premium rather than $7/hour in contravention of Articles 25 and 27.*
>
> *4. The Respondent submits that the Board dismiss this Complaint based on written submissions for any of the following reasons:*
>
> *a. The Board does not have jurisdiction to hear this matter, as the Complainant is beyond the 90 day limitation to file a complaint pursuant to the* Act*.*
>
> *b. The Complainant's complaint asking for a $7 shift premium is not supported by the language of the collective agreement.*
>
> *c. The Complainant has not advanced evidence to support an allegation that the Respondent committed an unfair labour practice within the meaning of section 185 of the* Act*.*
>
> …

[22] The respondents then set out the three issues they submitted were before the Board, as follows:

> …
>
> *a) Is the Complainant beyond the 90 day limitation to file a complaint pursuant to the* Act*?*
>
> *b) Is the Complainant eligible to receive the $7 premium?*
>
> *c) Has the Complainant advanced evidence to support an allegation that the Respondent committed an unfair labour practice within the meaning of section 185 of the* Act*?*
>
> …

[23] The respondents cited jurisprudence about a bargaining agent's duty of good faith and fair representation, as laid down in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39; *Adams v. Union of Taxation Employees*, 2009 PSLRB 124; *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20; *Bastasic v. Public Service Alliance of Canada*, 2019 FPSLREB 12; *Bergeron v. Public Service Alliance of Canada*, 2019 FPSLREB 48; and *Boudreault v. Public Service Alliance of Canada*, 2019 FPSLREB 87.

[24] The respondents' submissions on the timeliness issue are somewhat muddled in that the respondents indicated the date of the complaint as being March 5, 2020 and relied on events that they stated took place after the complaint was made in file no. 561-34-41802. Those dates must be typos, inasmuch as the respondents' argument is

that that complaint was made 231 days after Mr. Fragomele became aware of the events that gave rise to it.

[25] Turning to the entitlement issue, the respondents submitted that the collective agreement did not entitle Mr. Fragomele to the $7-per-hour premium. Finally, they submitted that he had submitted no evidence to support his bare allegations that they had acted in an arbitrary manner or in bad faith. They concluded by stating that they seek a decision based on written submissions and a dismissal of this complaint.

[26] On August 12, 2020, Mr. Fragomele filed detailed counterarguments to the arguments raised by the respondents With respect to the complaint pertaining to the shift premiums, he argued that they acted in bad faith and arbitrarily throughout their decision-making process. The bad faith stems from informing the complainant not to take any action regarding the matter. Yet, the UTE represented five other members with respect to the issue. In doing so, the complainant claims that he and the members at large were denied fair representation for a matter that equally concerns them. Similarly, the complainant claims that the respondents' actions were arbitrary because it used him to gather information about the issue, but then excluded him from the grievance process. On the respondents' claims about timeliness, he argued that his complaint was timely because it dated from March 5, 2020, when he learned that the bargaining agent was representing the five other members.

[27] On the complaint related to the educational requirements, the complainant argued that it was timely because it dated from the bargaining agent's refusal to represent him on January 30, 2020 and not from the time when the staffing actions took place in 2016 or 2017. The complainant alleges that the respondents' decision-making process in not representing him in the proposed grievance was done arbitrarily and in bad faith. He claims that the respondents' submissions do not to support that they made an informed and reasoned decision. According to the complainant, the respondents did not negate the merits of the grievance, or how the grievance would negatively impact other members of the bargaining unit. Nor did the respondents provide the complainant with a defined alternative course of action, other than to say that the support of the bargaining agent was not required.

[28] On this last issue and the respondents' argument that he did not need the approval or representation from the bargaining agent to pursue the grievance, the

complainant pointed to clause 18.10 of the collective agreement, which reads as follows: "An employee may be assisted and/or represented by the Alliance when presenting a grievance at any level. The Alliance shall have the right to consult with the Employer with respect to a grievance at each or any level of the grievance procedure."

[29] Mr. Fragomele submitted that that clause should be interpreted to mean that the word "may" refers to the complainant, not the bargaining agent, and therefore that "… the right to decide on representation, based on this Article, rests with Complainant only. The ability of the Complainant to self-represent is an immaterial fact."

[30] He went on to say that he had submitted evidence in the form of case law defining the meanings of "arbitrary" and "bad faith", as well as the collective agreement and documents about the grievance-handling process. He argued that the bargaining agent had not submitted any evidence to support its decision-making process. He argued that the fact that he had the right to represent himself was irrelevant.

[31] In his counterarguments for both complaints, he submitted in conclusion that the Board should do the following:

> …
>
> *i. Make an order under subsection 192(1) that the Board's decision be posted on the websites of the PSAC, and UTE, and made publicly available to the members of Local 00042 by means of the Union Board on the employer's premises, and posting to their Facebook group (as the Local does not have a website).*
>
> *ii. Grant an Order under Section 192(1)(d).*
>
> *iii. Take into consideration the maximum allowable penalty under Section 202(1), namely Public Service Alliance of Canada (PSAC), Union of Taxation Employees (UTE), and Local 00042.*
>
> *iv. Take into consideration a penalty allowable under Section 202(1), in an amount not greater than $1 for all other respondents….*
>
> …

IV. Analysis and decision

[32] A bargaining agent's control over the representation of employees in a bargaining unit carries with it the obligation to exercise that power fairly, in good faith, and not in an arbitrary or discriminatory fashion (see s. 187 of the *Act*). A decision not to pursue a grievance on behalf of a bargaining unit member must be made only after closely considering the facts of the case and the significance of the grievance for the member balanced against the bargaining agent's legitimate interests. The decision need not, in hindsight, be the correct one, but it must be rational and considered when it is made (see *Canadian Merchant Service Guild* at p. 527).

[33] The fact that a member seeking representation is not satisfied with the decision or the reasons upon which it was based, or does not agree with it or them, is not in itself evidence of bad faith, negligence, or any breach of the bargaining agent's duty of fair representation. As the Board noted in *Bergeron*, at para. 100, "… dissatisfaction is not a criterion that the Board uses to find that a breach of representation occurred", and in *Boudreault*, at para. 36, as follows:

> *[36] The bargaining agent must represent its members fairly, genuinely, with integrity and competence, and without hostility towards them (*Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509 at 527). As the Board has often held, this does not mean that the bargaining agent must follow instructions from its members on filing a grievance every time a member wants to. Bargaining agents have limited resources, and the Board certainly cannot dictate to them how to use those resources. Based on the facts to which the parties agreed, I am satisfied that the respondent and the CEIU fulfilled their obligations toward the complainant. Although he was not satisfied with the services offered, it does not mean that the respondent's actions were arbitrary, discriminatory, or made in bad faith.*

[34] With that jurisprudence in mind, it is clear to me that what Mr. Fragomele considered bad faith or arbitrary was nothing of the kind. He did not point to any arbitrary or bad faith conduct or decision making by the respondents. In his complaints and submissions, he had to present an arguable case of bad faith or arbitrary conduct or decision making. Again, the facts and circumstances giving rise to the complaints are not in dispute. Even if I were to accept that the complaints were timely, I find that the submissions made by the complainant fail to demonstrate any arguable case of arbitrary or bad faith conduct on behalf of the respondents.

[35] His complaint with respect to the bargaining agent's decision not to represent him in pursuing a grievance about the failure of candidates to meet the educational requirements in certain appointment processes rests solely in his argument that their analysis, reasons, and interpretation of the facts, issues, and contractual and statutory provisions were wrong and that his reasoning is to be preferred.

[36] But that is evidence only of a difference of opinion. It is not evidence of bad faith. The respondents were under no obligation to agree with his opinion or interpretation. They were entitled to refuse to follow his desired course of action. They were even entitled, in hindsight, to be wrong. Their only obligation was to reach their decision after making a fair, rational, and considered analysis of the facts and issues.

[37] Mr. Fragomele's submissions demonstrate the respondents acting in furtherance of that obligation.

[38] First, it was reasonable for them to come to the view that a grievance filed in 2020 about employer actions in 2016 or 2017 would more than likely be dismissed on timeliness grounds alone.

[39] Second, the complainant's proposed grievance was based on an interpretation of the collective agreement that the respondents did not share. That is not evidence of bad faith. It is evidence only of the different conclusions that reasonable people can reach when interpreting contractual provisions.

[40] Third, a decision by the respondents to refrain from taking on the proposed grievance did not deny the complainant a personal right to pursue the grievance. While Mr. Fragomele recognized that he could file a grievance on his own, if he wished, he dismissed that possibility on the grounds that it was "immaterial" or "irrelevant", given his interpretation of the collective agreement. In his view, the right to decide on representation rests with him only and, therefore, the bargaining agent's lack of assistance should be considered as acting in bad faith. However, again, the complainant's opinion that the respondents' reasoning was wrong, or that they failed to accept his interpretation and his reasoning, is not sufficient on its own to establish a breach of the duty of fair representation.

[41] All this points only to a rational and reasoned consideration of the issues and of whether it would be appropriate for the respondents to take up the complainant's grievance.

[42] In the second complaint, the complainant claimed the bargaining agent excluded him and other members and denied them fair representation on the matter of shift premiums, when it decided to pursue a group grievance for only five members. While the complainant may not agree and is dissatisfied with how the bargaining agent went about addressing this issue, there is nothing to suggest that his alleged exclusion from the group of grievance was based on some improper purpose. Further, the exchanges between the complainant and bargaining agent suggest that the bargaining agent was alive to the issue and had considered it. Nothing in the complainant's submissions leads me to believe that the respondents' conduct was arbitrary or in bad faith with respect to dealing with the complainant's specific concerns about the shift premiums.

[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 in file no. 561-34-41749 made under s. 190(1)(g) of the *Act* is dismissed.

[45] The complaint in file no. 561-34-41802 made under s. 190(1)(g) of the *Act* is dismissed.

October 26, 2021.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board