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Citation: 2021 FPSLREB 127

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

K. JOY THEAKER

Complainant

and

UNION OF SOLICITOR GENERAL EMPLOYEES AND PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Indexed as
Theaker v. Union of Solicitor General Employees

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: Herself

For the Respondents: Leslie Robertson, Public Service Alliance of Canada

Decided on the basis of written submissions, filed March 27, June 6, and August 7 and 8, 2018.

REASONS FOR DECISION

I. Complaint before the Board

[1] On March 27, 2018, K. Joy Theaker ("the complainant") made a complaint against the respondents, the Union of Solicitor General Employees (USGE) and the Public Service Alliance of Canada (PSAC or "the bargaining agent"). The complainant alleged that the respondents breached their duty of fair representation.

[2] The complainant was employed with the Department of Justice (DOJ or "the department").

[3] The complaint was made under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which requires that the Board examine and inquire into any complaints that an employee organization has committed an unfair labour practice. The alleged unfair labour practice in this complaint is set out in s. 187 of the *Act* as follows:

> ***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.*

[4] The respondents requested that the complaint be dismissed without a hearing as none of the alleged facts, even if true, are examples of the respondents failing to meet their duty of fair representation. The complainant submitted that refusing a hearing of her complaint would deny her right to natural justice.

[5] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) provides that the Board "… may decide any matter before it without holding an oral hearing." In *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98, the Federal Court of Appeal held that the duty of procedural fairness did not require the predecessor Board to hold oral hearings before deciding every complaint.

[6] I am satisfied that I can decide this complaint based on the written submissions filed, without convening an oral hearing.

[7] Normally, when relying on written submissions to decide the issue raised by the respondents, 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 would justify an oral hearing, based solely on the allegations raised in her complaint. However, this does not mean that the underlying alleged facts that the complainant relied on to support the allegations are true. I express no opinion on the truth of some of the underlying facts in this complaint.

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

[9] The *Act* requires that complaints be made within 90 days of the alleged breach of the duty of fair representation. The complainant's requested remedies include, in part, some for events that occurred more than 90 days before her complaint was made. I have not considered these events in coming to this decision on her complaint.

II. Reasons

[10] The complainant has the burden of proof in a complaint made under s. 187 of the *Act*. That burden of proof requires the complainant to present evidence sufficient to establish that the respondents failed to meet their duty of fair representation (see *Ouellet v. St-Georges*, 2009 PSLRB 107). The Board's duty-of-fair-representation decisions allow bargaining agents substantial latitude in their decisions on representation of their members. As noted in *Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128: "[t]he bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high".

[11] The Board has adopted what is called an "arguable-case analysis" when the respondent to a duty-of-fair-representation complaint objects to a full hearing of the complaint (see, for example, *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28). This analysis is often done on the assumption that all the allegations in the complaint are true (see *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119). The test is then whether the complainant has an arguable case that the respondent acted in bad faith or in a manner that was arbitrary or discriminatory. I have largely adopted this

approach in determining whether a dismissal of the complaint without a hearing is appropriate.

[12] The complainant provided a detailed complaint with seven headings that I have summarized in this section. I have carefully considered the full complaint in coming to my decision.

[13] The events relevant to the complaint relate to the complainant receiving a notice under the workforce adjustment (WFA) provisions in her collective agreement in 2015 and to her position that the Department of Justice failed to accommodate her disability.

[14] Throughout her complaint and reply, the complainant references criminal interference by a named individual. I have addressed this under her last allegation.

A. Allowing the employer five months to provide a grievance reply

[15] The third-level grievance hearing of one of the complainant's grievances was held on July 17, 2018. The department asked for information from her before responding. She states that she provided all the requested information by September 18, 2017. Her position is that the employer should have responded to the grievance within 30 days of September 18, 2017 (the time limit for a reply set out in her collective agreement).

[16] The complainant states that in an email from her bargaining agent dated December 28, 2017, a representative stated that a reply was expected by early January 2018. She states that the third-level reply was received on January 31, 2018.

[17] The complainant alleges that the respondents were arbitrary and discriminatory and that they acted in bad faith by not requiring the employer to meet the time limit for filing a grievance reply.

[18] The respondents submitted that the employer's grievance reply was delayed because it was waiting for copies of her written submissions.

[19] Time limits for filing grievances and for replies by the employer are set out in the relevant collective agreement. It is common for the employer and the bargaining agent to agree to extensions of time to reply to grievances. In this case, the reply was not excessively delayed. In any event, there is no requirement that a bargaining agent

wait for a reply before being able to refer a grievance to adjudication. The complainant has not alleged any consequence that arose out of the employer's failure to reply within 30 days. Also, the requirement that an employer reply within the time limits is an employer responsibility and not the respondents' responsibility.

[20] The complainant also alleges that the grievance reply was faxed without her consent to a copy centre, which resulted in an expense that "it has refused to cover." It is not clear from her submission if she expected the employer or the respondents to cover this cost. However, not reimbursing someone for sent faxes is not arbitrary, discriminatory, or in bad faith.

[21] Therefore, the complainant does not have an arguable case under the first allegation.

B. Discussions with the employer about the complainant's settlement intentions

[22] The complainant alleged that the respondents changed the context of information provided to the employer concerning the settlement of her grievances and that they refused to correct the inaccurate information despite the concerns she expressed to the USGE.

[23] The respondents submitted that the complainant told the USGE that she was interested in settling her grievances, which the USGE communicated to the employer. It also communicated that she wanted to wait to receive the employer's reply before making an offer to settle the grievances. The respondents submitted that they did not communicate inaccurate information to the employer.

[24] The complainant does not dispute that she was interested in discussing a settlement. She disputes the way that information was conveyed. She provides the following quote from an email that the USGE representative sent to the employer on December 20, 2017: "Joy has not provide [*sic*] a dollar amount for a settlement and wishes simply to have the final level reply provided so that she may move on." On December 28, 2017, the complainant advised the USGE that the email did not reflect her letter to the USGE of December 18, 2017, as follows: "… as l have always stated, I am interested in settlement discussions, but do not wish for that to delay the grievance/adjudication process." She provided the following excerpt from that letter:

…

> *I am being told that DOJ* [Department of Justice] *wants me to put forth a "settlement" yet Dominique is in agreement that that … is likely only "stall tactics".*
>
> ***Further to my telephone conversation with Dominique last Friday, this will confirm that I continue to be interested in settling my claims with DOJ, however, that should not DELAY a final level response which is long overdue.***
>
> …
>
> [Emphasis in the original]

[25] In her reply submissions, the complainant also states that someone (presumably at the USGE) had suggested that she wanted to use a referral to adjudication of her grievances as "leverage" and that this was not true. She also stated that the USGE had requested mediation for her grievances but that it had not asked her if she was interested in mediation.

[26] The complainant had expressed an interest in settling her grievances but did not want to delay the grievance process. The USGE's communication was consistent with that position. In addition, if a grievor is interested in a settlement, it is common to also convey an interest in mediation as a means of reaching one. Mediation is voluntary, and if the complainant ultimately decided not to participate in it, she was not bound by the USGE's request. The reference to using referrals to adjudication as leverage is an opinion and does not rise to the level of being arbitrary, discriminatory, or made in bad faith.

[27] I find that the USGE's communication to the employer about a settlement and mediation was not arbitrary, discriminatory, or in bad faith.

C. Recommending that grievances not be referred to adjudication, and obtaining her written submissions

[28] This general allegation by the complainant has two separate allegations under it. The first is that the USGE recommended to PSAC that three of her grievances not be referred to adjudication. The grievance numbers she referred to correspond with grievances that have been referred to the Board. Those grievances have not yet been scheduled for a hearing.

[29] Therefore, this part of the allegation is no longer valid as the respondents referred her grievances to adjudication.

[30] The second allegation is that the respondents obtained a copy of the complainant's written submissions to the employer from the employer without her knowledge or consent. She states that this was a breach of her privacy.

[31] In her complaint, the complainant quotes from a fax she sent to a USGE representative, as follows: "Please provide info on your referral to adjudication, etc.… Why haven't you asked for my submissions." In her reply submissions, she states that "[o]nly after [she] began initiating the Complaint process …" did the USGE obtain her written submissions. She also notes that it returned the submissions to her, at her request.

[32] The complainant alleges that the respondents breached her privacy. It was reasonable for the USGE to obtain her written submissions when she asked it why it had not asked for them. If she was seeking or expecting representation on these grievances, then she can be assumed to have waived any privacy rights, since the USGE would be representing her on them. In any event, obtaining written submissions from a grievance process is not acting arbitrarily, discriminatorily, or in bad faith. I find that this allegation, if proven, could not constitute a breach of the respondents' duty of fair representation.

D. Providing inaccurate advice related to medical and dental benefits

[33] The complainant alleges that the respondents provided inaccurate advice about the discontinuance of medical and dental benefits under a layoff notice. She also alleges that the USGE told her that she should apply for medical retirement if she wanted to retain medical and dental benefits.

[34] The respondents stated that the complainant did not receive a layoff notice and that she was not laid off. She disagrees and states that the grievances referred to adjudication support her position that she was laid off. She submitted that by stating otherwise, the respondents acted arbitrarily, discriminatorily, and in bad faith.

[35] In this case, on the assumption that the advice provided was inaccurate, the complainant has not demonstrated the consequences of this advice or how the respondents acted arbitrarily, discriminatorily, or in bad faith. Bargaining agents can be wrong in their interpretations of collective agreements: *McFarlane v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 27. Any such interpretation must

be found to have been made in an arbitrary or discriminatory manner, or in bad faith, to support a finding of a breach of the duty of fair representation. I also note that the grievances referred to adjudication relate to the complainant's rights under the WFA.

[36] This allegation, if true, would not support a finding of a breach of the duty of fair representation.

E. Advice that a WFA notice was not a termination

[37] The complainant alleged that the local USGE president continually told her that her WFA notice was not a "termination" but was rather a "lay-off". She referred to a provision in her collective agreement that provides a definition of "lay-off" as meaning "… the termination of an employee's employment because of lack of work or because of the discontinuance of a function."

[38] The respondents state that to their knowledge, the complainant was not laid off. The USGE representative advised her that if she were no longer employed, she would no longer receive medical benefits, and recommended that she apply for medical retirement, as she had identified that maintaining her medical benefits was her priority.

[39] In her reply submissions, the complainant states that the respondents appear to have acknowledged that the layoff notice was a form of disguised discipline through the referral to adjudication of her grievances, and "… therefore it was inappropriate to suggest to [her] that the 'WFA Notice' was not a 'termination'…". She states that to say that it was not a termination is to act arbitrarily, discriminatorily, and in bad faith.

[40] This is an argument about the proper interpretation of the WFA layoff provisions. The grievances have been referred to adjudication, so the distinction between "lay-off" and "termination" is no longer an issue. A difference in opinion that does not result in any consequences for a grievor is not arbitrary, discriminatory, or in bad faith.

[41] I find that assuming it is true, this allegation would not support a finding of a breach of the duty of fair representation.

F. Refusing to file a grievance against a forced medical retirement

[42] The complainant alleges that the respondents refused to file a grievance against her being forced to apply for medical retirement so that she could retain medical benefits. She states in her complaint that in February 2018, she sent the USGE draft grievances about the loss of medical and dental benefits and criminal interference (the issue of criminal interference is addressed in the next section). She followed up with the USGE on March 2, 2018; it told her that the "… subject matter of these does not fall under our mandated responsibilities."

[43] The respondents stated that the complainant was not forced to apply for medical retirement. The USGE advised her to do it as a way of continuing to receive medical benefits.

[44] The respondents' position on the issue of the grievor's medical retirement is not arbitrary, discriminatory or made in bad faith – it was a statement of fact. If she wanted to maintain her medical and dental benefits, retirement was her only option. I also note that the complainant has grievances pending before the Board related to her layoff under the WFA. The respondents continue to represent her on them. The issue of her medical retirement is indirectly at play in these grievances since her decision about medical retirement was based on the employer's WFA actions.

[45] Therefore, I find that this allegation, if true, could not support a finding of a breach of the duty of fair representation.

G. Refusing to file a grievance related to ongoing criminal interference

[46] The complainant alleges that there is ongoing criminal interference with her employment dispute. Her complaint contains extensive submissions about a named individual, who she alleges is engaged in nefarious activities, including stalking her and hacking into computer systems. Some of the allegations relate to events in 2009 and 2011 and are not within the 90-day period before this complaint was made. In addition, she alleges that this individual is a "rogue" element who is not employed by the respondents or the federal government.

[47] The respondents submit that the grievance process is not the correct forum to raise concerns about individuals or organizations that are not parties to the collective agreement.

[48] In her reply submissions, the complainant suggests that she is requesting an investigation into her allegations of hacking.

[49] The complainant also requested an investigation of criminal interference and hacking in a motion before the Federal Court; see *Theaker v. Canada (Justice)*, 2018 FC 662. The Court dismissed the motion, stating that it "… is not the role of the Court to direct criminal investigations."

[50] The allegations raised in the complaint about criminal interference are outside the scope of the labour relations regime for the federal public sector. As the Court noted in dismissing her motion, the appropriate avenue for complaints of alleged criminal activity is to the responsible police service. Bargaining agents are not obligated to file grievances related to alleged criminal matters. Accordingly, this allegation does not support a finding of a breach of the duty of fair representation.

III. Requested remedies

[51] The requested remedies in a duty-of-fair-representation complaint can help when assessing whether the complaint relates to a bargaining agent's statutory duty to represent the complainant fairly; see *Burns*, at para. 77.

[52] The complainant requested 11 remedies in her complaint. Two relate to events outside the time limit for making a complaint; therefore, I have not considered them. The rest of the requested remedies can be grouped into 3 categories: requesting correct advice about her rights under the WFA, support for filing grievances, and damages.

[53] The request for correct advice about her rights under the WFA focuses on her entitlement to medical and dental benefits. The respondents have provided advice or information to the complainant and have stated that they continue to. I have already concluded that she has not demonstrated that the advice was arbitrary, discriminatory, or made in bad faith.

[54] The complainant requested that the respondents be required to file and support her in two grievances. The first one relates to what she has called a forced retirement. The respondents have undertaken to "consider and evaluate all grievances proposed" by the complainant, in accordance with their duty of fair representation. I have already

addressed the allegation of a forced-retirement grievance and have found that it did not amount to a breach of the duty of fair representation.

[55] The second grievance for which she requested support from the respondents is related to criminal interference. I have already addressed the criminal interference allegation. The respondents have no obligation to file a grievance that does not arise out of the collective agreement. Related to this request is also a requested remedy that the respondents confirm that they do not support criminal activities against their members and that they support privacy rights. This remedy is also not available through the complaint process.

[56] The remaining requested remedies focus on damages for losses, expenses, pain and suffering, psychological damages due to the respondents' negligence and unfair representation, and compensation for reckless and wilful discrimination. She also requested that she be "made whole". The respondents submit that there is no basis for granting any damages because there has been no breach of the duty of fair representation.

[57] I agree that damages would flow only from a finding of a breach of the duty of fair representation. However, I also note that the broad request for damages also relates to her dispute with the employer, to a significant degree. There are grievances before the Board, which are the appropriate forum for requesting damages related to the complainant's employment.

[58] The complainant also demanded that the making of her complaint not prejudice her in her dealings with the respondents in the future. The duty of fair representation is ongoing, and the respondents continue to represent her in her grievances.

[59] The complainant also requested that her grievances before the Board be "fast-tracked". This request relates to the grievances before the Board and cannot be addressed through the complaint process.

IV. Conclusion

[60] For this complaint to make an arguable case that would justify a full hearing of the allegations, the complainant was required to put forward the factual foundation supporting that the respondents acted in a manner that was arbitrary, discriminatory, or in bad faith. I find that she offered no such foundation. Based solely on the facts

alleged in the complaint, I am unable to find a foundation of arbitrary conduct, discriminatory treatment, or bad faith on the part of the respondents sufficient to establish a violation of s. 187 of the *Act*.

[61] I have concluded that on the basis of the parties' written submissions, some of the allegations in the complaint are untimely, and those that are timely do not put forward an arguable case of violation of the duty of fair representation set out in s. 187 of the *Act*.

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

(The Order appears on the next page)

V. Order

[63] The complaint is dismissed.

November 19, 2021.

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