Date: 20211217

File: 561-02-38756

Citation: 2021 FPSLREB 139

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

MICHEL POTHIER

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Pothier v. Public Service Alliance of Canada

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

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Kim Patenaude, counsel

Decided on the basis of documents on file and written submissions, filed October 8 and 22 and November 5, 2021.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On June 21, 2018, Michel Pothier ("the complainant") made a complaint against the Public Service Alliance of Canada ("the respondent"), alleging that it committed unfair labour practices within the meaning of s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). He alleged that the respondent breached its duty of fair representation, thus violating s. 187 of the *Act*.

[2] Sections 4, 8, and 9 of the complaint form read as follows:

> [Translation]
>
> *Since I filed my grievances in 2004, my employer has acted in bad faith, abused its authority, failed to adhere to classification standards, and failed to honour its agreements. I have been robbed and have suffered reprisals. My union acted and is still acting in a manner that is arbitrary and discriminatory and in bad faith in terms of representation. It has done nothing to ensure that the agreements are honoured. It did not follow procedure for my harassment grievance and is doing nothing about my workplace violence complaint, etc.*
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> …
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> *Since filing my grievances, I have asked my union several times to do its job properly. I have even already made a complaint against it. After more than 15 years of requests, my problems with classification, threats, harassment, and reprisals have still not been settled. My questions are not being answered, and I am being lied to.*
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> …
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> *The union refused to provide me with classification training. I negotiated agreements without knowing my rights. I finally received the training but after finalizing my agreements. Obviously, my union has known since the beginning that my duties did not correspond to the classification standard and that in the end, the PSAC should never have been my union. My union deliberately concealed that fact from me.*

[3] According to the information alleged in section 5 of the complaint form, the complainant reportedly became aware of the action, inaction, or situation giving rise to the complaint on June 21, 2018.

[4] On August 1, 2018, in its first response to the complaint, the respondent denied that it had breached its duty of fair representation. It also asked that the complaint be summarily dismissed because apparently, it was filed outside the 90-day time limit set out at s. 190(2) of the *Act*. It asked that the time-limit issue be dealt with summarily, based on the parties' written submissions.

[5] The Board had already scheduled a hearing for the complaint from January 25 to 28, 2022. However, shortly after being assigned the file, I decided to deal with the question of the 90-day time limit based on the documents already on file and on the parties' written submissions. They were notified of this on September 16, 2021. The notice set out the following:

> [Translation]
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> …
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> *Based on what is already in the file and on the parties' written submissions, the Board could conclude that the complaint was made outside the 90-day time limit. In that event, it would dismiss the complaint and close the file. If the Board finds that the complaint was not made outside the 90-day time limit, it will hear the complaint on the dates scheduled in January 2022.*
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> …

[6] Therefore, this decision is only about the summary-dismissal request based on the alleged failure to observe the 90-day time limit set out at s. 190(2) of the *Act*.

II. Summary of facts alleged to support the complaint

[7] I will not reproduce everything submitted to me. I will summarize the facts based on what the complainant submitted and add the respondent's remarks as necessary. This approach will enable me to better grasp the essence of the complaint and to deal with the respondent's objection.

[8] The complainant believes that his job description is incomplete and that his position is incorrectly classified. He blames this on his employer, Natural Resources Canada ("the employer"). He also blames the respondent for poorly representing him throughout the long fight to fairly recognize his work and to obtain a new classification of his position.

[9] Since November 1997, the complainant has held a position at the EG-05 group and level that was staffed for an indeterminate period. In February 2004, he filed job-discrimination and classification grievances. He then asked the respondent to provide him with classification training that according to him, he had been denied for a long time. Only in December 2014 did the respondent arrange a classification training session in which he was able to participate.

[10] In April 2004, the complainant filed a grievance, alleging that he was a victim of harassment and discrimination on the employer's part after he filed his February 2004 grievance. According to him, the respondent did nothing at the time to remedy the situation.

[11] In an August 2006 settlement agreement between the complainant and the employer, it was agreed that a consultant would write a new job description reflecting the complainant's duties. Yet, according to him, the consultant did not consult him and produced an inaccurate job description, full of errors. The employer then redid the work, which was inconsistent with the August 2006 agreement. According to the complainant, the respondent did nothing to ensure that the agreement was honoured.

[12] In November 2006, the complainant was granted paid education leave to complete a bachelor of computer science degree. When he returned from leave in June 2009, he expected the employer to offer him a position at the EN-SUR-02 group and level, as it had done for two of his colleagues when they returned from education leave. Yet, he received no such offer, even after he applied to some hiring processes. His view was that the employer's decision not to appoint him was a reprisal for the grievances he had filed earlier. According to him, the respondent did nothing at the time to remedy the situation.

[13] In September 2010, the complainant and the employer's relationship deteriorated. It then allegedly tried twice to terminate him. The respondent reportedly did very little to help him.

[14] In March 2014, at the adjudication of the complainant's grievances, a settlement agreement was reached to add two paragraphs to his job description. The amended job description was not evaluated by a classification committee; instead, one of the employer's managers revised it. According to the complainant, the respondent

reportedly did nothing to remedy the situation, except to withdraw the job-description grievance and file a classification grievance.

[15] Marlène Deveth, a classification specialist from the respondent's head office, received the complainant's classification grievance in August 2014. They then had several exchanges. According to him, only in February 2017 did she begin working on his case, and the discussions were difficult because she did not believe that he was carrying out work at the EN-SUR-02 or 03 group and level or that someone with a bachelor of computer science degree could obtain an EN-group position.

[16] On April 12, 2017, the complainant spoke with Ms. Deveth by telephone about his classification-grievance hearing. Apparently, she said that after reviewing the case, she believed that the position's level should be EG-06, not EG-05. He explained that that would not work because his duties were excluded from the EG classification standard. According to him, his position should be classified CS-02 or CS-03, or EN-SUR-02 or EN-SUR-03. Ms. Deveth then said that it was not possible for someone to be an EN-SUR without being an engineer, which, according to him, was not true. Apparently, the discussion did not end well.

[17] On May 29, 2017, the complainant supposedly asked Ms. Deveth via email for the sixth time to send him the document proving that she had sent his grievance-hearing request. On May 31, 2017, she phoned him to inform him that she had not sent it. Supposedly, she had made a mistake, for which she apologized. She asked him whether he would agree to "[translation] carry out a job validation review" and stated that the review would take place in early July. She also asked him to provide her with all the documents that he would provide or receive in connection with the job validation.

[18] In September 2017, the complainant received a preliminary job validation report. Later, he was able to comment about adding what he felt was missing. In October 2017, he received the final report. He then noticed that his director had demeaned and minimized his work. In the end, a new job description was written. According to him, it took 14 years for the employer and the respondent to recognize that his job description was not consistent with what he did.

[19] On November 21, 2017, the complainant filed a harassment grievance against his director. He stated that on November 30, 2017, he also had made a harassment complaint under the *Canada Labour Code*, and he requested an investigation. The complaint was not allowed because the facts it raised did not constitute workplace violence. Later, he raised the issue again and requested an investigation. He did not specify what he blamed the respondent for in that process.

[20] On January 31, 2018, the complainant received the first draft of his new job description, which a consultant prepared. He was not satisfied with its content. He reported as much to the consultant and asked the consultant several questions, who did not answer him and suggested that he approach Ms. Deveth. Meanwhile, the complainant shared his many concerns about the new job description with the employer. He felt that it continued to minimize and demean his work. He claimed that supposedly, the respondent received a response from the employer after he raised his concerns, but that he had received nothing.

[21] On February 5, 2018, a respondent representative reportedly told the complainant to cease communicating with Ms. Deveth. Otherwise, his case's processing would be intentionally delayed. According to him, she had already taken too much time with his case, and since then, she has had no further contact with him, and his case has been delayed. None of his questions could any longer be addressed directly to her.

[22] The complainant said that on March 13, 2018, he met with two of the respondent's local representatives and that he informed them of his dissatisfaction with the progress of the case, the slow pace of the process, and the bad faith of the employer and respondent.

[23] On April 19, 2018, the complainant made an abuse-of-authority complaint against the employer for how it applied the merit principle while staffing a position at the EN-SUR-02 group and level. According to him, on August 14, 2018, the employer reportedly dismissed his allegations. He did not specify what he blamed it for in that respect.

[24] On May 30, 2018, and then on July 16, 2018, a local representative of the respondent asked the employer to hear the complainant's harassment grievance at the

first level of the grievance process. The employer was not in favour of it because a harassment complaint was already outstanding. Allegedly, the representative then insisted on a grievance hearing because there were two separate processes. The complainant did not specify what he blamed the respondent for in that respect.

[25] On May 8, 2018, the complainant asked the employer by email for news about the concerns he had expressed about his new job description. He then reportedly telephoned Ms. Deveth to find out what she intended to do about his concerns. At that point, she allegedly told him that it was "[translation] bad form to defend a member who would change bargaining agents if he won his case". He said that he then understood why the respondent had a tendency to demean and minimize his work. She allegedly repeated the comment on July 25, 2018, in a telephone conversation with a local respondent representative, who also attested to it in an email sent to the complainant and dated August 2, 2018. For its part, the respondent claimed that Ms. Deveth's files did not indicate that she had any communication with the complainant in May 2018.

[26] On June 21, 2018, the complainant made this complaint.

[27] In his written submissions dated October 22, 2021, the complainant referred to several facts that occurred after he made his complaint, in July, August, October, and November 2018 and in February 2019. I carefully read that part of his submissions. I will not summarize it, given that it concerns facts that occurred after the complaint was made and that in no way help me determine whether the complaint was made within the time limit prescribed by the *Act*.

[28] The complainant relies on an expert report that concludes that based on an assessment, he displays most of the characteristics associated with autism spectrum disorder (ASD). He also relies on a three-page document that provides some of the characteristics of people who live with an ASD. According to the document, they have qualitative difficulties or differences in terms of social interactions and communication. The document also specifies that they often have logic, analysis, and sustained concentration abilities and perseverance, along with conscientious, loyal, and sincere personalities, an exceptional eye for detail, and a pronounced passion for facts and for thoroughness in technical expertise.

III. Summary of the arguments

A. For the respondent

[29] Section 190(2) of the *Act* states that a complaint must be made within 90 days after the date on which the complainant knew or ought to have known about the circumstances giving rise to it. To apply that provision to the facts of this case, the Board must first determine the essential nature of the complaint and then when the complainant ought to have known about the circumstances that gave rise to it.

[30] The complainant blames the respondent for not taking every step to recognize his work. He refers to the fact that he had to wait 14 years before the employer and the union recognized that his job description did not correspond with his duties. He also blames the respondent for refusing to use the job description for the EN-SUR-02 and 03 group and levels.

[31] The complainant's view is that the respondent did not take the steps that were deemed necessary to ensure compliance with the 2006 settlement agreement or the appropriate actions to prevent the employer from requiring him to apply to a process to keep his job in 2012. He also blames the respondent for not preventing the employer from abusing its authority, intimidating him, and demeaning and minimizing his work.

[32] The complainant alleges that the respondent acted in bad faith by not defending his rights and interests because he was an employee who could change unions if his classification changed.

[33] Accusations against the respondent continued over the years, and they seem to have culminated around 2017, when it was decided that a new job description should be prepared.

[34] The essential nature of the complaint can be summarized by stating that the respondent did not take the necessary action to obtain a job description and a classification for the complainant that truly corresponded with his work. All his accusations relate to that issue.

[35] Well in advance of the 90-day period before he made his complaint, the complainant knew why he criticized the respondent. Even though he continues to

criticize the respondent for those failures, it cannot be cited to extend the time. And he did not criticize the respondent about the essential nature of his complaint within the 90-day time limit set out in the *Act*.

[36] The respondent said that it was unable to speak with Ms. Deveth to verify the complainant's claim that she allegedly told him that it was bad form to defend an employee who would change bargaining agents if he won his case. However, according to the notes available in the file, apparently, she had no communication with him in May 2018 or any communication with the respondent's local representative in July 2018. Furthermore, such a comment is also inconsistent with all the effort that the respondent expended since 2004 to defend him.

[37] The respondent referred me to the following decisions: *Tyler v. Public Service Alliance of Canada*, 2021 FPSLREB 107; *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98; and *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2010 PSLRB 7.

B. For the complainant

[38] The complainant declares that he is autistic. On that point, he relies on an expert report and an information sheet. He also points out that he is merely a worker. He states that he does not have the skills to properly defend himself because he is unfamiliar with the law and with how quasi-judicial tribunals operate. Therefore, it was difficult for him to know when, why, and how to properly make complaints and file grievances about his problems with the employer and the union. On the other hand, the union and the employer have all the financial means necessary to defend themselves properly, which is definitely not so for him.

[39] Clearly, several things led the complainant to make a complaint against his union. On that point, he notes several reasons behind him blaming it. He alleges that it acted in bad faith, dishonestly, and deceitfully by not pressing his rights and interests because he was an employee who could change unions if his classification changed.

[40] The complainant also alleges that the respondent was seriously negligent because it knew all along that some of his duties were excluded from the EG

classification standard and because it misled him and did not resolve the problem over 15 years.

[41] According to the complainant, local representatives accepted the harassment grievance that was filed at the end of November 2017. On May 30, 2018, he asked the respondent to hear the grievance because he believed that it was deliberately delaying his hearing.

[42] On February 7, 2018, the complainant submitted his concerns about the first draft of his new job description, which had not yet been dealt with when the complaint was made.

[43] To this day, the respondent refuses to defend the complainant before quasi-judicial tribunals on the issue of the alleged harassment. He argues that he waited until he had "[translation] very strong evidence" before making his complaint. The final item was Ms. Deveth's May 2018 comment that it is bad form to defend an employee who would change bargaining agents if he won his case.

[44] According to the complainant, the Board must absolutely react to these widespread practices that are obviously inconsistent with a union's duty to defend an employee in the bargaining unit for which it is certified. Consequently, the complaint should not be dismissed because it was made within the 90-day time limit set out at s. 190(2) of the *Act*.

IV. Analysis and reasons

[45] The complaint cites s. 190(1)(g) of the *Act*, which refers to s. 185. Among the unfair labour practices noted in that section, the unfair labour practice from s. 187 is of interest in this complaint. The provisions read as follows:

> ***190 (1)*** *The Board must examine and inquire into any complaint made to it that*
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> …
>
> ***(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.*
>
> …
>
> ***185*** *In this Division,* **unfair labour practice** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> …
>
> ***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.*
>
> [Emphasis in the original]

[46] The respondent asked the Board to summarily dismiss the complaint because the 90-day time limit set out at s. 190(2) of the *Act* allegedly was not respected. The complainant's view is that he complied with the time limit in question.

[47] The 90-day time limit set out at s. 190(2) of the *Act* is mandatory. In that respect, the Board has no latitude and no authority to extend it. The time limit begins to run when the complainant knew or ought to have known of the circumstances that gave rise to his complaint.

[48] To find out when the complainant knew or ought to have had that knowledge, as the Federal Court of Appeal suggested in *Boshra*, I must first determine the essential nature of the complaint. As in *Tyler*, I must identify the actions that the respondent did or did not take that form the basis of what caused the alleged violation of the duty of fair representation.

[49] Based on what the complainant submitted in writing, the essential nature of the complaint corresponds perfectly with what he wrote in sections 4, 8, and 9 of the complaint form, which I reproduced in their entirety at paragraph 2 of this decision. I will repeat a few excerpts from it, as follows:

> *Since I filed my grievances in 2004, my employer has acted in bad faith, abused its authority, failed to adhere to classification standards, and failed to honour its agreements… My union acted and is still acting in a manner that is arbitrary and discriminatory and in bad faith in terms of representation. It has done nothing to ensure that the agreements are honoured.…*

…

> *Since I filed my grievances, I have asked my union several times to do its job properly… After more than 15 years of requests, my problems with classification, threats, harassment, and reprisals have still not been settled.…*
>
> …
>
> *… Obviously, my union has known since the beginning that my duties did not correspond to the classification standard and that in the end, the PSAC should never have been my union.…*

[50] Essentially, the complainant is dissatisfied, even frustrated, by the employer's attitude with respect to the classification of his position and his job description that according to him, does not reflect his work. He believes that the respondent has not done all that it should have done over the years to ensure that he wins his case in this respect. That is the essential nature of his complaint.

[51] Specifically, the complainant blames the respondent for not providing him with classification training until 2014, for doing nothing in 2004 to stop the harassment that he claims to have been a victim of, for doing nothing to ensure that the August 2006 settlement agreement was honoured, for doing nothing to address the issues he experienced on his return from education leave in 2009 or in 2010 when the employer tried to terminate him, and for doing nothing with respect to the additions to his job description in 2014. Then added are the several difficulties from 2017 and 2018 in his exchanges with Ms. Deveth, who was a respondent representative.

[52] In the 90 days before he made his complaint, the complainant made a staffing complaint against his employer, but on that point, he assigned no blame to the respondent. Then, he noted the delays in May 2018 with respect to hearing a harassment grievance. He claimed that the respondent's local representatives deliberately delayed the grievance's hearing. Finally, he claimed that Ms. Deveth supposedly said in May 2018 that it was "bad form to defend a member who would change bargaining agents if he won his case". Yet, according to the respondent, her files indicated that she did not speak with him in May 2018.

[53] It is clear that the essence of the complaint does not hinge on the respondent's actions in the 90 days before the complaint was made. In addition, there is no mention of that period in the complaint, in which the complainant blames the respondent for

the representation provided with respect to his job-description and classification problems. On that point, he was fully aware of the nature and quality of the representation that the respondent provided well in advance of the 90 days before the complaint was made.

[54] The complainant stated that after the respondent submitted its summary-dismissal request for his failure to meet the 90-day time limit, he waited "[translation] to have very strong evidence" before making his complaint, referring at that time to Ms. Deveth's May 2018 statement about it being bad form to defend an employee who would change bargaining agents. I do not know whether she made such a comment. Be that as it may, according to the complainant, she had been handling his case since at least 2014. Yet, his claims still seem to have been clear; namely, his duties were those of the EN group, of which it is practically impossible that Ms. Deveth, a classification expert, was unaware. However, it did not prevent her from handling his case for all those years. And, according to his submissions, she continued to handle it after the complaint was made.

[55] The essence of the complaint is that the complainant believes that the respondent did not do all that it should have done to ensure that he won his job-description and classification case. Nothing new occurred in that respect in the 90 days before the complaint was made. That is the essential nature of his complaint.

[56] I carefully read the ASD documents that the complainant submitted. They change nothing; nor do they explain the fact that the complaint was made outside the 90-day time limit set out in the *Act*.

[57] Clearly, the complainant believes that he is a victim of an injustice because his employer does not properly recognize his duties and does not compensate him correctly. He may be right. However, I would like to remind him that bargaining agents like the respondent do not decide what to put in a job description, much less classify positions. At best, they can represent the employees in the bargaining unit for which they are certified, but they have no decision-making authority in this area, especially since classifying positions rests with the employer.

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

(The Order appears on the next page)

V. Order

[59] The summary-dismissal request is granted.

[60] The complaint is dismissed.

[61] The hearing scheduled for January 25 to 28, 2022, is cancelled.

December 17, 2021.

FPSLREB Translation

Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board