Date: 20220729

File: 561-02-43915

Citation: 2022 FPSLREB 65

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

FRÉDÉRICK MARCIL

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Marcil v. Public Service Alliance of Canada

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

Before: Guy Giguère, 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 written submissions, filed January 25, February 15, and March 1, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

Introduction

[1] On December 13, 2021, Frédérick Marcil ("the complainant") made an unfair-labour-practice complaint against the Public Service Alliance of Canada ("the respondent") with the Federal Public Sector Labour Relations and Employment Board ("the Board"). It states that the respondent failed its duty to fairly represent him when it did not recommend referring his two grievances to adjudication in its July 28, 2021, decision ("the decision"). Although his complaint was made 138 days after the decision, he submitted that the Board should consider that due to his health issue, he made the complaint within the 90-day time limit.

[2] On January 4, 2022, the Board asked the parties to make written submissions on its jurisdiction to hear the complaint, in light of the time limit set out in s. 190(2) of the *Federal Public Sector Labour Relations Act* ("the *Act*").

[3] To render a decision on the Board's jurisdiction to hear the complaint, I must determine whether the complainant's state of health prevented him from knowing of the respondent's July 28, 2021, decision and from making his complaint within the 90-day time limit.

[4] For the following reasons, I find that despite being on sick leave, the complainant knew of the July 28, 2021, decision. Since he did not make his complaint within the prescribed time limit, it is dismissed.

Background

[5] The complainant filed two grievances against his employer, which proceeded through the several levels of the grievance process and were dismissed at the final level. Subsequently, the respondent assessed the grievances in full and decided not to refer them to adjudication.

[6] On July 2, 2021, the complainant consulted a doctor due to serious health problems who put him on sick leave until he could consult his specialist.

[7] On July 28, 2021, the respondent sent the complainant a 12-page analysis explaining its decision not to refer his grievances to adjudication. It indicated that it

understood that he would be disappointed by the decision and invited him to contact it with any questions or comments by August 2, 2021.

[8] After learning of the July 28, 2021, decision, the complainant sent a 14-page document to the respondent, requesting that it review its decision. He also discussed it by phone. However, the respondent stood by its decision.

[9] On December 13, 2021, the complainant made his complaint with the Board, in which he summarized his allegations. He stated that the decision was sent to him on July 28, 2021. However, he made his complaint 138 days later because he was on sick leave for 49 days.

The complainant's arguments

[10] The complainant stated that his state of health did not allow him to make his complaint within the applicable time limit. His health deteriorated after he learned of the July 28, 2021, decision and after preparing a document requesting its revision. He then avoided thinking about the respondent's decision, to avoid aggravating his condition.

[11] He further stated that he was on leave starting July 2, 2021, awaiting an appointment with his specialist. The absence from work continued until August 19, 2021, inclusively. He then focused on his work, to protect his health. Only when the 90-day time limit approached did he begin to think again about the respondent's refusal to refer his grievances to adjudication. It required more energy than anticipated, and only on the night of October 26, 2021, 90 days after the decision, did he make an unfair-labour-practice complaint with the Canada Industrial Relations Board (CIRB).

[12] The next day, October 27, 2021, he received an email from the CIRB, notifying him that as a federal public servant, his unfair-labour-practice complaint should be made with the Board and not the CIRB. That devastated him.

[13] On December 13, 2021, he made his complaint with the Board, explaining that due to his health problems, he could not make it during his sick leave, which ended on August 19, 2021. He asked the Board to calculate the 90-day time limit based on the duration of his sick leave. Thus, although he made his complaint 138 days after the

decision, by subtracting 49 days, which is the entirety of his sick leave, the complaint would have been made 89 days after the entirety of his sick leave.

The respondent's arguments

[14] The respondent argued that the start date for calculating the time limit was not in dispute because the complainant knew of the July 28, 2021, decision. Furthermore, the case law is unanimous that the Board does not have discretion to extend the 90-day time limit, even including the complainant's allegation that his state of health prevented him from acting within the prescribed time limit.

[15] The respondent further argued that the complainant provided no evidence demonstrating his inability to make the complaint within the 90-day time limit. Thus, he had until October 26, 2021, to make his complaint, and he did not demonstrate that he was not able to make it during the sick leave or in the weeks after his return to work on August 20, 2021.

Analysis

[16] Section 190(2) of the *Act* provides that unfair-labour-practice complaints must be made "… 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] It is well established that the time limit is mandatory and that the Board has no discretion to extend it. When ambiguity arises as to the date on which a complainant knew of a decision, the Board determines the date on which he or she ought to have known of the actions or circumstances that gave rise to the unfair-labour-practice complaint. Among other decisions, see *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55, *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20 at para. 36, and *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98.

[18] The complainant argued that after completing the document requesting a revision of the respondent's decision, his health status deteriorated, and that he "[translation] could" not make his complaint within the prescribed time limit. He stated that he was inspired by the term "could" in s. 190(3)(c) of the *Act* but without invoking it.

[19] In fact, s. 190(3)(c) of the *Act* does not apply to an unfair-labour-practice complaint alleging a violation of the duty of fair representation but instead to complaints about the breaches listed in ss. 188(b) or (c), for example when a complaint is made that an employee organization refused an employee's membership or took disciplinary action against him or her. Yet, in his unfair-labour-practice complaint, the complainant accused the respondent of failing its duty to fairly represent him under s. 187.

[20] The complainant argued that he was unable to make his complaint during his sick leave. According to him, the entire 49-day sick leave should be subtracted from the 138-day period that he took to make his complaint. However, I note that his 49-day sick leave began on July 2, 2021, well before the decision was made. Therefore, the sick leave's duration is not relevant but instead when it ended. However, calculating the time limit from the end of his sick leave on August 20, 2021, the complaint would still be untimely, because it should have been made on November 18, 2021, to meet the 90-day time limit.

[21] I believe that the other arguments that the complainant made also cannot be accepted. He was already on sick leave, which began on July 2, 2021, when he received the decision. Nevertheless, he was able to quickly prepare a 14-page document in which he asked the respondent to change its decision. He returned to work on August 20, 2021, and he had 67 days to make his complaint and meet the 90-day time limit. He explained that he avoided thinking about the decision, to protect his health. However, he was under medical care and could have asked for support if necessary. In addition, he made an unfair-labour-practice complaint with the CIRB on October 26, 2021, 90 days after the decision.

[22] I find no ambiguity about the date on which the complainant knew of the respondent's decision. His state of health did not prevent him from knowing of the July 28, 2021, decision. He confirmed it from the outset in his written submissions and in the Form 16, which constitutes his complaint. He was also aware of the 90-day time limit and even sent a complaint to the CIRB on October 26, 2021, although he was mistaken about the organization to which he had to make the complaint.

[23] Furthermore, no principle of law or equity trumps Parliament's intent that a complaint about a breach of the duty of fair representation must be made within 90

days of the date on which the complainant learned of the facts that gave rise to the complaint. See, in particular, *Roberts v. Union of Canadian Correctional Officers*, 2014 FCA 42.

[24] I find that the complainant made his complaint out of time.

[25] For all of the above reasons, the Board makes the following order.

(The Order appears on the next page)

Order

[26] The complaint is dismissed.

July 29, 2022.

FPSLREB Translation

Guy Giguère,
a panel of the Federal Public Sector
Labour Relations and Employment Board