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*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

SAM ABDI

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Abdi 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: Joanne B. Archibald, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Himself

For the Respondent: Sandra Gaballa

Decided on the basis of written submissions,
filed April 8, 27, and 28, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] Sam Abdi (“the complainant”) made a complaint to the Federal Public Sector Labour Relations and Employment Board (“the Board”) against his bargaining agent, the Public Service Alliance of Canada (“the respondent” or “PSAC”). The complainant, formerly employed with Service Canada (“the employer”), alleged that the respondent breached the duty of fair representation by acting in bad faith or in an arbitrary or discriminatory manner.

[2] 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 unfair labour practice alleged in this complaint is described 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.

187 Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.

[3] The respondent submitted that it discharged the duty of fair representation, and it explained the reasons for not referring the complainant’s grievance to adjudication or providing funding for a court action. It denied the allegation and requested that the Board dismiss the complaint without a hearing.

[4] Pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), I have decided that I have sufficient material to render a decision on the basis of the parties’ written submissions. I have taken the complainant’s allegations as true. I have accepted the respondent’s unchallenged explanations for its actions, and I have taken into account the complainant’s reply to these explanations.

[5] The issue to be decided is whether, after accepting the submissions as true, there is evidence to show, on the balance of probabilities, that the respondent acted in

an arbitrary or discriminatory manner or in bad faith and that it breached the duty of fair representation. I find that the evidence does not show this to be the case. Therefore, the complaint is dismissed.

II. Facts

[6] The facts set out in this decision are drawn from the parties' submissions. The complainant's submission includes many details of his relationship with the employer. I have not reproduced those details except as they relate to the substance of the matter before me.

[7] The complainant first contacted the Board by email on April 8, 2022, stating that his bargaining agent, the Canada Employment and Immigration Union ("CEIU"), a component of the PSAC, did not do enough for him with respect to his grievance at the second and third levels of the grievance process and that it did not refer his grievance to adjudication. It also failed to support him when he wanted to take the employer to Federal Court or to inform him of the deadline to make a court filing.

[8] In response to the complaint, the respondent described the complainant's relevant employment history. He began his employment with the employer on January 25, 2021, subject to one year of probation. To demonstrate competency, he was required to complete over eight weeks of training and to attain a minimum score of 75% on three of five tests.

[9] The complainant achieved the minimum score on only two of the tests. On March 24, 2021, he was rejected on probation as he failed to attain the required test results to demonstrate competency.

[10] On April 26, 2021, the CEIU filed a grievance on the complainant's behalf, alleging that the rejection on probation was in bad faith and seeking his reinstatement.

[11] On May 14, 2021, a local CEIU representative presented the grievance at the first level. On May 28, 2021, the employer denied the grievance at the first level.

[12] The grievance was transmitted to the second level.

[13] CEIU National Representative Kathy Sand ("the national representative") then assumed representation of the grievor.

[14] The national representative represented the complainant at the second level of the grievance process on September 13, 2021. The employer denied the grievance on October 5, 2021, at that level.

[15] The grievance was transmitted to the third level.

[16] On February 22, 2022, the national representative represented the complainant at the third and final level of the grievance process. The employer denied the grievance at that level on March 2, 2022.

[17] On March 15, 2022, the national representative provided a letter to the complainant explaining the employer's decision. She also furnished him with a summary of the relevant facts, legislation, and case law. She provided her assessment that the grievance did not have sufficient merit to warrant a referral to the Board for adjudication.

[18] The PSAC's senior grievance and adjudication analyst ("the PSAC analyst") was consulted and agreed with the national representative's assessment. The CEIU's director of representation and labour relations ("the CEIU director") concurred and told the complainant that the grievance did not fall within the Board's jurisdiction. He added that if the complainant wanted to proceed to adjudication independent of the CEIU, the deadline to make a referral to the Board was April 12, 2022.

[19] The complainant asked the CEIU to reconsider the decision not to refer the grievance to the Board. His request was denied. The CEIU director provided him with information to make a duty-of-fair representation complaint.

[20] In the complainant's opinion, the PSAC and the CEIU were biased and merely backed each other up.

[21] On March 18, 2022, the complainant emailed the CEIU director to advise that he intended to sue the employer in Federal Court. He sought funding from the respondent but did not receive a response.

III. Summary of the arguments

A. For the complainant

[22] The complainant asked the Board to order the respondent to refer the grievance to adjudication, in order for the Board to look at the whole picture. He felt that the national representative did not do much and had little interest in his grievance.

[23] The complainant also objected to the delay from March 2 to March 15, 2022, to provide him with the third-level outcome. He felt that this contributed when he missed the deadline to file a claim in Federal Court.

B. For the respondent

[24] The respondent stated that it provided timely, competent assistance to the complainant. It filed a grievance on his behalf and represented him at the first, second, and third level grievance hearings. All timelines were met.

[25] As for the decision not to refer the grievance to adjudication, it noted that a grievance based on a rejection on probation is not adjudicable under s. 209(1)(a) of the *Act* in the absence of proof of bad faith, disguised discipline, a camouflage, or a cover up, none of which was present. The complainant knew what the employer expected of him during his probation and was given guidance on how to meet those expectations.

[26] The decision not to refer the grievance to adjudication was within the scope of the respondent's discretion and did not amount to arbitrary, discriminatory, or bad faith conduct.

[27] Concerning the complainant's request for funding for a Federal Court proceeding against the employer, s. 236 of the *Act* indicates that the right to grieve any dispute related to terms and conditions of employment precludes an employee from pursuing the employer through separate litigation. It does not provide an exception for a grievance that is not subject to adjudication.

[28] As the action could not proceed, it would not be a good use of the respondent's resources.

IV. Reasons

[29] In a complaint under s. 187 of the *Act*, the burden of proof falls on the complainant to present sufficient evidence to establish that the respondent failed to meet the duty of fair representation by conducting itself in a manner that was arbitrary, discriminatory, or in bad faith. As noted in *Manella v. Treasury Board of Canada Secretariat*, 2010 PSLRB 128, “The bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high”.

[30] The Board will examine the manner in which the respondent handled the complainant’s grievance and related matters, to determine whether they were “... fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee” (*Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 at 527).

[31] The respondent represented the complainant through three levels of the grievance process and then declined to refer the matter to adjudication. The national representative explained to him that a grievance concerning a rejection on probation cannot proceed to adjudication unless the rejection was tainted by other factors. The complainant was told that those factors were absent in his situation.

[32] The complainant knew that the PSAC analyst and the CEIU director concurred. However, beyond disagreeing with them, the complainant provided no evidence to the Board to show that the decision was discriminatory, arbitrary, or made in bad faith. There is no evidence to suggest that their decision was ill-founded or improperly motivated.

[33] While the complainant suggested that the respondent had little interest in his matter, he provided no evidence to ground this suggestion. Indeed, the actions taken on his behalf demonstrate the engagement of PSAC and CEIU on his behalf. The decision not to proceed beyond the third level grievance did not reflect disinterest, but an assessment of the complainant’s circumstances and the relevant law.

[34] The complainant objected to the delay from March 2, 2022, to March 15, 2022, which was from the date of the disposition of the grievance at the third level to the time he was advised of it. I find nothing substantial to link this delay to the grounds of the complaint. The complainant has not shown that the delay was unreasonable, and in

any event, it did not prevent him from proceeding further with the matter in a timely way.

[35] When the complainant sought the respondent's support for a Federal Court action against the employer, he did not receive a direct reply. However, the respondent did provide its reasoning in its submission to the Board. It supported the decision by referring to s. 236 of the *Act*, which specifically provides that a "... grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute."

[36] I do not find that the question of whether this grievance falls within the ambit of s. 236 is determinative of the issue before me. A rejection on probation, it is governed by s. 211(a) of the *Act* which provides that a termination of employment that falls under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*") cannot be referred to adjudication. Accepting the facts presented by the parties as true, the circumstances of the complainant's rejection on probation fall within s. 62 of the *PSEA*. As such, it could not properly be referred to adjudication.

[37] This is a case where the complainant has forcefully expressed his disagreement with the respondent's decisions not to refer the grievance to adjudication or to fund a court proceeding. However, he has not challenged the respondent's decisions with evidence to contradict or undermine them, and he has not shown any degree of arbitrary conduct, discrimination, or bad faith by the respondent.

[38] The Board has consistently held that a complainant's disagreement with a respondent's handling of the grievance is not the gauge of whether the respondent's actions constitute an unfair labour practice. (See *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52; *Bergeron v. Public Service Alliance of Canada*, 2019 FPSLRB 48; *Boudreault v. Public Service Alliance of Canada*, 2019 FPSLRB 87; and *Andrews v. Public Service Alliance of Canada*, 2021 FPSLRB 141.)

[39] The complainant is required to provide evidence to demonstrate discrimination, arbitrariness, or bad faith to discharge the burden of proof.

[40] In the absence of such evidence, I have concluded that the allegations put forward by the complainant do not establish a violation of the duty of fair representation set out in s. 187 of the *Act*.

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

(The Order appears on the next page)

V. Order

[42] The complaint is dismissed.

July 28, 2022.

**Joanne B. Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board**