**Date:** 20221122

**File:** 561-02-44540

**Citation: 2022 FPSLREB 96**

*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

**DUANE MACDONALD**

Complainant

and

**PUBLIC SERVICE ALLIANCE OF CANADA AND GOVERNMENT SERVICES UNION**

Respondents

Indexed as
*MacDonald 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:** Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Himself

**For the Respondents:** Wael Afifi, Public Service Alliance of Canada

Decided on the basis of written submissions, filed April 7, May 4 and 5, 2022.

**REASONS FOR DECISION**

## I. Complaint before the Board

[1] Duane MacDonald ("the complainant") filed this complaint on April 7, 2022 under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 2, s. 2; "the *Act*") against the respondents the Public Service Alliance of Canada ("the Alliance") and one of its components, the Government Services Union ("the Union").

[2] The complaint alleges that by refusing to refer his November 19, 2015 grievance for adjudication the respondents failed in their duty of fair representation outlined 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 respondents objected that the complaint was filed outside of the statutory 90-day time limit and asked that it be dismissed. The objection was determined by way of written submissions of the parties.

## II. Motion to dismiss

[4] The complainant alleged the following in his complaint:

> *On April 4, 2022 Chris Aylward, National President of* [the Alliance] *confirmed his support with* [the Union] *that they would no longer represent me or give me permission to represent myself for my grievance held in abeyance since November 19, 2015. I consider this to be an arbitrary decision that was done in bad faith….*

[5] Mr. Aylward's letter reads, in part, as follows:

> …
>
> *I have looked into the concerns expressed in your recent communications. In speaking with the Government Services Union … I note that these matters have been extensively reviewed by* [the

> Union] *and* [the Alliance] *and communicated with you, going back a number of years. Comprehensive responses regarding your grievances have previously been provided to you by representatives of* [the Union]. *In reviewing this documentation, I support the position and responses provided by* [the Union].
>
> *I understand that you had filed two grievances: #484 and # HQ-14-022. Grievance #484 was filed in 2015. On January 8, 2019,* [the Union] *withdrew representation and provided rationale to you in support of this action. Consequently,* [the Union] *and* [the Alliance] *consider this file closed since January 8, 2019.*
>
> …

[6] The respondents argued that the complainant was well aware that the Union withdrew its support and referred the Board to the following January 8, 2019 email exchanges between the complainant and the Union's representatives.

[7] On the morning of January 8, 2019, Shanny Doucet, the Union's regional vice-president wrote to the complainant explaining why the Union would not support his grievance and concluded with the following:

> …
>
> *For the reasons above,* [the Union] *withdraws support of the grievance on the basis that the claims cannot succeed or are academic given your medical retirement. You are not contesting the interpretation of a collective agreement article and, in theory could represent yourself. It would be the employer's call as to whether to hear the grievance or not. Should you have any questions, you may contact Craig Spencer by email at … or by telephone at ….*
>
> …

[8] The complainant responded as follows the same day:

> …
>
> *If* [the Union] *does not want to represent me, then yes I would like to represent myself in this matter. Would still like a call from Craig in this matter.*

[9] Later that day, Craig Spencer, acting senior representative for the Union emailed the complainant to advise that he was on another matter at that moment and would call him that afternoon. He apologized for the delay. The complainant thanked him and said he looked forward to the discussion.

[10] It appears that the phone conversation did take place and later that afternoon Mr. Spencer wrote to the complainant as follows:

> *Hello Duane*
>
> *As promised, I am writing further to our telephone conversation of this date to discuss* [the Union's] *decision not to pursue your grievance further. As I said, Sister Doucet did discuss the matter with me before writing to inform you of* [the Union's] *decision. This is not a decision indicating that there is no empathy for your situation but one based upon whether the grievance route would offer any remedy given your status today as a former employee on medical retirement. In* [the Union's] *opinion, it will not.*
>
> …
>
> *From my point of view, you have two options. I agree with the conclusion of* [the Union] *that your current status as a retired employee on permanent disability has altered your ability to reply on the grievance process for a remedy. You can try to go forward on your own and see if your former employer agrees to hear your argument. It may.*
>
> *The other option is to speak with the Canadian Human Rights Commission and seek advice as to whether it will investigate your Complaints if the grievance process has been exhausted. You have told me that the concerns raised by this grievance are before the Commission as well.*
>
> *Effectively, Sister Doucet's letter has said the grievance route is at an end and it can be relied upon if you wish to consult with the Commission. If the Commission agrees to open an investigation if the grievances process is exhausted, that might be another route to explore the actions of the employer to drive you out of its workplace. Your status as a former employee would have no impact on that route for a remedy.*
>
> [Sic throughout]

## III. Reasons for decision

[11] The Board's task is to determine whether the complaint was filed in a timely manner. If it was not, the complainant cannot bring it before the Board.

[12] Unfair labour practice complaints, including those based on a bargaining agent's duty of fair representation, are made with the Board under s. 190 of the *Act*. Section 190(2) specifies the time within which such a complaint may be made:

| | |
|---|---|
| ***190(2)*** *Subject to subsections (3) and (4), a complaint under subsection (1)* | ***190(2)*** *Sous réserve des paragraphes (3) et (4), les plaintes prévues au* |

| | |
|---|---|
| *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.* | *paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.* |

[13] Subsections (3) and (4) do not apply here.

[14] It has been well established that the language of s. 190(2) is mandatory. It states that a complaint "… **must** be made to the Board not later than 90 days after the complainant knew … of the action or circumstances giving rise to the complaint" [emphasis added]. Given this language it has been consistently held that no extension of time can be granted for complaints under s. 190(2) (see *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55 and others.)

[15] Accordingly, as the Board said in *Esam v. Public Service Alliance of Canada* (*Union of National Employees*) 2014 PSLRB 90:

> …
>
> *33 In* England v. Taylor et al., *2011 PSLRB 129, the Board noted that the only possible discretion when interpreting subsection 190(2) of the* PSLRA *arises when determining when the complainant knew, or ought to have known, of the circumstances giving rise to the complaint. In* Boshra v. Canadian Association of Professional Employees, *2011 FCA 98, the Federal Court of Appeal held that in order to apply subsection 190(2) to the facts of a particular case, it is necessary for the Board to determine the essential nature of the complaint and to decide when the complainant knew or ought to have known of the circumstances giving rise to it.*
>
> …

[16] The Board further commented in *Esam* as follows:

> …
>
> *35 The essence of the complaint before me is that the union breached its duty of fair representation under section 187 of the* PSLRA *by failing to submit a grievance on behalf of the complainant …. The complainant argued that her complaint is timely because she was not aware that the union breached its duty of fair representation until August 3, 2013, when she learned of the implications of the failure to file a grievance.*

> *36 In my opinion, the time limit for filing a complaint did not begin when the complainant first understood the consequences of the failure to file a grievance between 2010 and 2012; it began when she knew or ought to have known that no grievance was filed, because that is the essential nature of the complaint.*
>
> …

[17] The essence of the complaint before me is the union's refusal to refer the complainant's grievance to adjudication. That refusal constitutes the action or circumstances giving rise to the complaint and January 8, 2019 was the date on which the complainant knew of that action or circumstance.

[18] The complainant's response to Ms. Doucet's email shows clearly that he understood at that time that the union was refusing to proceed with his grievance:

> …
>
> *If* [the Union] *does not want to represent me, then yes I would like to represent myself in this matter. Would still like a call from Craig in this matter.*

[19] The complainant did receive a call from Mr. Spencer as well as a follow-up letter from him reiterating the same decision and the reasons for it. He was informed by both Ms. Doucet and Mr. Spencer on January 8, 2019 that the union would not refer his grievance to adjudication. Accordingly, he had 90 days from that date to submit a complaint in order for it to be timely.

[20] The 90-day clock did not start ticking again simply because the complainant wrote to the Alliance's national president who reviewed the case and confirmed the Union's decision that had been made and clearly communicated more than three years earlier.

**IV. Jurisprudence**

[21] The Board dealt with a similar issue in *Nemish* v. *King, Walker and Union of National Employees (Public Service Alliance of Canada),* 2020 FPSLREB 76. As in this case, Ms. Nemish sought to rely on her request to the Alliance's national president to overturn an earlier decision, arguing that she did not know all the circumstances giving rise to her complaint until she knew that he would not do so. At paragraph 37:

> *[37] I do not accept the complainant's argument that she knew only of the UNE's action (Ms. Sanderson's letter) but not the totality*

> *of the circumstances (that Mr. Aylward would not change the UNE's decision). Firstly, the wording in s. 190(2) of the* Act *is disjunctive — the clock starts ticking when a complainant knows of the action* ***or*** *circumstances giving rise to his or her complaint. Furthermore, the timeline does not continue to evolve depending on what actions or circumstances occur after a decision is made and communicated.*

[22] *Ennis v. Meunier-McKay and Canada Employment and Immigration Union*, 2012 PSLRB 30, was a decision that addressed a similar argument as follows:

> …
>
> *[32] For the complaint against CEIU to be timely I would have to accept that the complainant knew of the events that gave rise to his complaint only on December 9, 2009, but I am simply unable to do so. Even if I was prepared to accept that the complainant received Ms. Meunier-McKay's letter of November 23, 2009 only on December 9, 2009, as suggested, nothing in that letter could be extend the time limits in a complaint of this type, since its content only repeated, albeit in a much condensed fashion, what Ms. Paul had already communicated to him on October 30, 2009 on behalf of the CEIU National office….*
>
> …
>
> *[35] Even had the complainant tried to convince me that his letter of November 12, 2009 represented an attempt on his part to get Ms. Meunier-McKay to reverse the decision previously communicated by Ms. Paul, which he did not try to do, such an attempt would still not impact my findings. The Board commented on this issue in* Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN, *2010 PSLRB 7 at para 21, which reads as follows:*
>
> > *[21] … The period for filing a complaint cannot be extended by a complainant's attempts to convince a union to change its decision. To the extent that there is a violation of the* PSLRA, *there is no minimum or maximum standard for the degree of knowledge that a complainant must have before filing his or her complaint.*
>
> *[36] In* Lampron v. Professional Institute of the Public Service of Canada, *2011 PSLRB 29, I wrote the following:*
>
> > …
> >
> > *[46] … even were I to accept that the complainant had discussions with representatives of the Institute to reverse its decision to expel him, as he testified, or that he tried during the meeting on September 5, 2009 to persuade the respondents to revisit its decision, which*

> *was not established by the evidence, it would not change the date on which he knew or ought to have known of the circumstances giving rise to his complaint. Despite the complainant's efforts to resolve the conflict, the* PSLRA *requires that the complaint be filed within the prescribed time limit (see* Boshra, *at paragraph 47). …*
>
> *[37] Therefore, I conclude that the deadline for filing this complaint was not extended by Ms. Meunier-McKay's letter of November 23, 2009.*
>
> *[38] In this matter, the complainant's knowledge on October 30, 2009 of the CEIU's decision to withdraw its representation was the trigger for the violation that he alleged and the start of the 90-day period….*
>
> …

[23] With respect to the complaint against the Alliance's National President the *Ennis* decision said this:

> …
>
> *[40] … The evidence demonstrated that Ms. Meunier-McKay wrote to the complainant in her capacity of National President of CEIU with the sole objective of confirming a decision that had already been taken by the component. Neither her letter nor that of the complainant contained any facts or arguments that differed from those already expressed up to October 30, 2009. The complainant's letter to Ms. Meunier-McKay was nothing more than an attempt on his part to re-start the applicable deadline. Nothing in the exchange between the complainant and Ms. Meunier-McKay should have the effect of extending the applicable deadline beyond October 30, 2009. For those reasons I agree with the respondents' objection that the complaint against Ms. Meunier-McKay is also inadmissible because it is out of time.*
>
> …

[24] *Ethier v. Correctional Service of Canada and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN,* 2010 PSLRB 7, briefly cited in *Ennis,* also dealt with this kind of argument at paragraphs 20 to 22:

> *[20] The fact that the complainant pursued his grievance at all levels does not in any way change the fact that the union refused to support the dispute, which is the subject of this complaint, and that the complainant was so advised by the end of June 2006.*
>
> *[21] In general, the circumstances that give rise to a complaint cannot be extended by invoking other circumstances that go beyond the first refusal to proceed with the grievance or dispute at*

> *issue. In this case, the 90-day period to make a complaint with the Board began on the date of that refusal, at the end of June 2006, and not on the date on which the complainant deemed that he had sufficient evidence to make the complaint, which was December 13, 2006. The period for filing a complaint cannot be extended by a complainant's attempts to convince a union to change its decision. To the extent that there is a violation of the* PSLRA*, there is no minimum or maximum standard for the degree of knowledge that a complainant must have before filing his or her complaint.*
>
> *[22] The essence of the complaint was the union's refusal to exercise the representation rights and recourses to which the complainant claims he was entitled. Accordingly, the complainant's knowledge of the union's refusal to support his dispute is the triggering event of a violation of section 190 of the* PSLRA *and the 90-day period for filing the complaint. Therefore, the period began when the complainant realized that the union would not help him settle his disagreement….*

[25] As in *Nemish, Ennis*, *Ethier,* and *Lampron,* the complainant in this matter knew everything he needed to know about the action and circumstances giving rise to his complaint in January, 2019. He waited more than three years to ask Mr. Aylward to change the Union's decision. Like Ms. Meunier-McKay who wrote such a letter in her role as National President of the CEIU, Mr. Aylward reviewed the file and confirmed what the union had decided.

[26] For these reasons, the Board makes the following order:

*(The Order appears on the next page)*

## V. Order

[27] The objection to the timeliness of the complaint is upheld.

[28] The complaint is dismissed.

November 22, 2022.

**Nancy Rosenberg,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**