

Date: 20230210

File: 561-02-44725

Citation: 2023 FPSLREB 14

*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

ARLENE VAXVICK

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Vaxvick v. Public Service Alliance of Canada

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

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Morgan Rowe, counsel

Decided on the basis of written submissions,
filed August 17, 26, and 31, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] On May 11, 2022, Arlene Vaxvick (“the complainant”) made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) against her bargaining agent, the Public Service Alliance of Canada (“PSAC” or “the respondent”). The complaint alleged that the respondent had committed an unfair labour practice, notably by breaching its duty of fair representation when it refused to challenge the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (“the Policy”) adopted by the Treasury Board. The complainant subsequently alleged that the respondent breached its duty when it refused to represent her in her efforts to challenge the application of the Policy, and file a grievance on her behalf following her employer’s denial of her request to be exempted from the application of the Policy on the grounds of religious belief.

[2] The respondent raised two preliminary objections, the first of which argued that the complaint must be dismissed as it is untimely. According to the respondent, the complaint was made with the Board beyond the mandatory 90-day deadline for the filing of complaints alleging a breach of a bargaining agent’s duty of fair representation (s. 190(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”). The respondent submits that the complaint was made more than 90 days after the date on which the complainant was informed of the PSAC’s decision not to represent her.

[3] The respondent raised a second preliminary objection, arguing that the complaint should be dismissed on a preliminary basis and without an oral hearing because it does not disclose an arguable case that the respondent breached its duty.

[4] In accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may decide any matter before it without holding an oral hearing. The parties to this matter were informed that the Board was considering rendering a decision with respect the respondent’s objections based on written submissions. They were provided with the opportunity to file additional written submissions. Both parties availed themselves of that opportunity and provided detailed submissions.

[5] I have reviewed the complaint and the submissions thoroughly and am satisfied that I can decide the respondent's timeliness objection on the written submissions filed by the parties.

[6] I find that the complaint is untimely and should be dismissed. Accordingly, there is no need for me to decide whether the complaint discloses an arguable case. I am cognizant that this outcome will not be a satisfactory one for the complainant. However, the filing deadline is a mandatory one and complainants are required to abide by it. No provision of the *Act* allows the Board to extend it.

II. Summary of the circumstances giving rise to the complaint

[7] The complainant was employed by the Treasury Board, her legal employer, from 2009 to 2022. She worked as an acting senior program officer at the Indigenous Services Canada. For the purposes of this decision, Indigenous Services Canada shall be referred to as the complainant's employer.

[8] The complainant was a member of the PSAC, the certified bargaining agent for her bargaining unit. The Union of National Employees ("UNE") is the component of the PSAC responsible for providing the complainant with direct assistance and representational services.

[9] On October 6, 2021, the Treasury Board adopted the Policy. Broadly speaking, it required employees in the core public administration to submit an attestation as to their vaccination status by a specified date unless they were accommodated pursuant to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). Employees unwilling to be fully vaccinated or to disclose their vaccination status would be advised not to report to work and would be placed on administrative leave without pay while they remained unvaccinated or continued to refuse to disclose their vaccination status. As an employee in the core public administration, the Policy applied to the complainant. The Policy's application was suspended in June of 2022.

[10] Also on October 6, 2021, after the Policy was announced, the complainant met with UNE representatives to explore options available to her. At this meeting, she suggested that the PSAC file a policy grievance challenging the Policy. Two days later, she received written confirmation that the PSAC would not be filing a policy grievance. That correspondence was detailed. It explained the PSAC's decision and its intent to

grieve any punitive measure taken by the employer against a PSAC member. It also informed the complainant that UNE representatives were seeking additional information on her behalf with respect to exemptions available under the Policy.

[11] On October 14, 2021, the complainant asked her employer to be exempted from the application of the Policy, invoking her religious beliefs.

[12] On January 13, 2022, the complainant was informed that her employer had denied her request for an exemption. She appealed the decision internally, but her employer ultimately confirmed its decision to deny her request.

[13] Between her employer's initial and final denials of her exemption request, the complainant contacted UNE representatives to request support in challenging her employer's decision to deny her exemption request and eventually place her on leave without pay. UNE representatives corresponded with the complainant to gather more information about the facts of her case and the basis for her exemption request. Among these email exchanges were two emails from a UNE representative that referred to the possible filing, by the union, of a grievance on the complainant's behalf once she had been put on leave without pay.

[14] On February 8, 2022, the UNE representatives communicated with the complainant and informed her of the outcome of the PSAC's regional executive team's review of her file. They advised her that the PSAC would not support her in challenging the employer's denial of her exemption request nor would it support her if she sought to challenge the employer's decision to put her on leave without pay for failing to comply with the Policy. They explained that they felt that the complainant's grievances were unlikely to succeed. They also referred to jurisprudence from the Supreme Court of Canada on the issue of limitations to the *Charter* protection afforded to religious freedoms. In addition, the UNE representatives noted the PSAC's assessment that, in light of the jurisprudence and the circumstances as they existed at the time, being placed on leave without pay was likely to be seen to be an administrative measure, not a disciplinary one, and therefore could not be referred to adjudication pursuant to the *Act*. While the UNE representatives confirmed that the PSAC would not proceed with grievances on the complainant's behalf, it confirmed that they could advise her on the grievance process if she decided to grieve on her own.

[15] On February 11, 2022, the complainant was placed on leave without pay due to her failure to comply with the Policy. That same day, she wrote to the UNE representatives, asking them to immediately present a grievance.

[16] On February 14, 2022, the complainant submitted a letter informing her employer of her retirement from the federal public service. The following day, a UNE representative wrote to the complainant and provided her with a link to an individual grievance form as well as general guidance with respect to information that should typically be included in a grievance. The representative referred the complainant to their correspondence of February 8, 2022, where the complainant was informed that the PSAC would not represent her or provide her with support in the grievance process.

[17] On February 18, 2022, the complainant responded to the UNE representative. She identified the articles of the collective agreement that she planned on relying on when filing her grievance, and asked the representative to confirm in writing that the PSAC would not be supporting her grievance. She received that written confirmation the same day, along with a reminder that the complainant could present a grievance on her own.

[18] In June 2022, and after the application of the Policy was suspended, the complainant attempted to rescind her retirement from the federal public service. She once again asked the respondent to file a grievance on her behalf challenging the employer's decision to put her on leave without pay, arguing that the employer's decision to place her on leave without pay had forced her to retire. The respondent once again refused to represent her.

III. Summary of the arguments

[19] As previously mentioned, the respondent raised two preliminary objections. This decision deals only with the respondent's timeliness objection. The arguments of the parties on that issue are summarized below.

[20] The complainant submits that her complaint was filed with the Board in a timely manner. The employer placed her on leave without pay on February 11, 2022, after her request for an exemption under religious grounds was denied. She argues that the calculation of the 90-day filing deadline should start from February 11, 2022, and not

from February 8, 2022, the date on which the respondent informed her of its decision not to represent her. She argues that the UNE representatives had, in their correspondence with her, repeatedly identified the date of which she was placed on leave without pay as being the date to be used for the calculation of time for the purposes of presenting a grievance.

[21] The complainant also submits that, on or around June 20, 2022, she asked the respondent to represent her in respect of her unsuccessful efforts to rescind her early retirement from the federal public service. According to her, the respondent arbitrarily handled her case, as it failed to undertake a case-by-case review.

[22] The respondent submits that the complaint is untimely and that it must be dismissed. The 90-day filing deadline set out at s. 190(2) of the *Act* is mandatory, and there is no discretion to extend the time limit to allow for the late filing of a complaint; see *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90, and *Éthier v. Correctional Service of Canada*, 2010 PSLRB 7.

[23] The respondent submits that its decision to decline representation in challenging both the employer's application of the Policy to the complainant and the employer's refusal of the complainant's request to be exempted from the application of the Policy was explicitly communicated to the complainant by no later than February 8, 2022. Accordingly, pursuant to the timeline prescribed by subsection 190(2) of the *Act*, the complaint had to be filed no later than May 8, 2022, for it to be timely. The complaint was made on May 11, 2022. It is outside the mandatory timeline and therefore must be dismissed.

[24] The respondent submits that many of the arguments raised by the complainant in her written submissions are not relevant to the Board's decision with respect to the timeliness of the complaint. The fact that the employer subsequently placed the complainant on leave without pay is not relevant to the calculation of time with respect to the complaint. In a duty of fair representation complaint, it is the actions of the bargaining agent, not the employer, that are at issue. The complainant was aware of the bargaining agent's decision by no later than February 8, 2022. Time began to run as of that date.

[25] Moreover, the fact that the complainant continued to communicate with the respondent after February 8, 2022, does not extend the 90-day timeline for making a

complaint. Those communications amounted to indirect and informal challenges to the decision previously made and communicated by the bargaining agent, as well as reiterations of the decision that the respondent had already communicated to the complainant. The fact that a complainant continued to correspond with the respondent cannot be used to extend the timeline for making a complaint.

[26] Lastly, the respondent submits that the complainant is attempting circumvent the timeliness issue by relying on allegations not raised in her complaint and pertaining to events that occurred after the date on which she made her complaint. Those allegations do not assist the complainant. They represent further attempts by her to get the bargaining agent to reconsider its earlier decision or constitute allegations pertaining to a distinct and separate incident, unrelated to her previous correspondence with the bargaining agent, more specifically, her efforts to rescind her resignation from the federal public service. None of those allegations can be used to extend the timeline for when the complainant first knew or ought to have known that the respondent was declining to represent her in challenging the application of the Policy or in challenging her employer's denial of her exemption request.

IV. Analysis

[27] The *Act* establishes a statutory filing deadline for the making of a complaint alleging a breach of a bargaining agent's duty of fair presentation. Together, sections 190(1) and (2) of the *Act* establish a 90-day filing deadline for such complaints. Those sections state the following:

190 (1) *The Board must examine and inquire into any complaint made to it that*

...

(g) *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

(2) *Subject to subsections (3) and (4), 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*

190 (1) *La Commission instruit toute plainte dont elle est saisie et selon laquelle :*

[...]

g) *l'employeur, l'organisation syndicale ou toute personne s'est livré à une pratique déloyale au sens de l'article 185.*

(2) *Sous réserve des paragraphes (3) et (4), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle*

the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.

[28] The wording above is mandatory. As the Board has stated countless times, it does not have the statutory authority to extend the 90-day period; see *Esam, Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55, *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20 and *MacDonald v. Public Service Alliance of Canada*, 2022 FPSLREB 96, among others. That conclusion does not change where the complaint is made only a few days beyond the statutory deadline. The Board's only discretion when interpreting s. 190(2) with respect to the 90-day time limit is in determining when the complainant knew or ought to have known of the matter giving rise to the complaint; see *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100; and *Esam*, at para. 33, citing *England v. Taylor*, 2011 PSLRB 129.

[29] In a complaint such as this, it is typically only the actions of the bargaining agent that are relevant to a determination with respect to timeliness. In the circumstances of this case, the employer's actions in placing the complainant on leave without pay for failing to comply with the Policy or in rejecting her request for an exemption, are irrelevant to the determination of whether the complaint is timely. What is relevant are the bargaining agent's actions or omissions in the representation of the complainant.

[30] To assess the timeliness of the complaint, I must first identify the action of the bargaining agent that is alleged to constitute a breach of the duty of fair representation.

[31] The complaint is lengthy. Inclusive of appendices, it is 212 pages in length. The subject matter of the complaint, as the originating document is worded, is the respondent's decision not to file a policy grievance challenging the Policy. However, in her written submissions, the complainant describes the matter giving rise to the complaint as the respondent's decision not to represent her in her efforts to challenge the application of the Policy to her situation as well as her employer's denial of her exemption request.

[32] If the timeliness of the complaint, as the originating document is worded, is assessed against the date on which the complainant knew or ought to have known of the respondent's decision not to file a policy grievance challenging the Policy, the complaint is clearly untimely. The complainant was informed of that decision in an email dated October 8, 2021. Her May 11, 2022, complaint was made well beyond the 90-day statutory deadline.

[33] Alternatively, if timeliness is assessed against the date on which the complainant knew or ought to have known of the respondent's refusal to represent her by filing grievances with respect to her personal situation, the relevant date is much later in time.

[34] The complainant has filed copies of emails that she exchanged with UNE representatives. Those emails reveal that she was informed of the respondent's decision not to represent her on February 8, 2022. That decision was expressed in clear and unambiguous terms. The complainant does not allege that she did not understand that the respondent had refused to represent her. Although she continued to ask the UNE representatives to file a grievance on her behalf, she had understood that the PSAC would not be representing her.

[35] In her arguments, the complainant dismisses the date of February 8, 2022, as largely irrelevant, focussing instead on the date of February 11, 2022, and arguing that her complaint is timely because it was made within 90 days of that date. The complainant focusses on the date of February 11 because a UNE representative had previously indicated that a grievance with respect to the application of the Policy could only be filed once the complainant had been placed on leave without pay. That occurred on February 11, 2022. The complainant's reliance on the date of February 11 is an unfortunate error on her part, an error that led her to calculate the deadline for making a complaint based on her employer's action rather than the action of the bargaining agent. I conclude that she knew of the respondent's decision not to represent her on February 8, 2022.

[36] The complainant acknowledges that her complaint was made on May 11, 2022. As mentioned, the *Act* requires that complaints be made within 90 days of the alleged breach of the duty of fair representation. Whether the 90-day period is calculated in light of the respondent's October 8, 2021 decision not to file a policy grievance or its

February 8, 2022, decision not to represent the complainant, the complaint made on May 11, 2022 is untimely.

[37] Before concluding, I would add that the complainant's exchanges with UNE representatives between February 8 and February 18, 2022, are not relevant to calculation of the 90-day deadline. In those exchanges, the UNE representatives continued to repeat the respondent's refusal of representation first expressed on February 8. Nothing in those exchanges can be seen to constitute a new decision on the part of the respondent or an undertaking by it to review its decision. The exchanges cannot have the effect of extending the applicable deadline beyond February 8, 2022. The jurisprudence of this Board is clear. The deadline to present a complaint does not change based on a complainant's attempts to have a bargaining agent reconsider a decision previously made and communicated by it: see, for example, *Éthier, Nemish v. King, Walker and Union of National Employees (Public Service Alliance of Canada)*, 2020 FPSLRB 76, *Tohid v. Public Service Alliance of Canada*, 2022 FPSLRB 69 and *MacDonald*. Time did not begin to run again simply because the complainant wrote the UNE representatives on the same issue or raised a separate and discrete issue with them at a later time, notably her efforts at rescinding her retirement from the federal public service.

[38] The complaint was made with the Board more than 90 days after that date on which the respondent made and communicated its decision to the complainant. If assessed against the date on which the respondent communicated its decision not to file a policy grievance, the complaint is months out of time. Alternatively, if it is assessed against the date on which the respondent communicated its decision not to represent the complainant, the complaint was made two days beyond the 90-day statutory deadline. I do not have the statutory authority to extend that deadline, even where the complaint was made mere days beyond the deadline. The complaint is untimely and should be dismissed.

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

(The Order appears on the next page)

V. Order

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

[41] The complaint is dismissed.

February 10, 2023.

**Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**