Date: 20230419

File: 525-09-46715
XR: 560-09-45666 and 46213

Citation: 2023 FPSLREB 40

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

MILAN BHASIN

Applicant

and

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent

Indexed as
Bhasin v. National Research Council of Canada

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Federal Public Sector Labour Relations Act*

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Herself

For the Respondent: Response not sought

Decided on the basis of written submissions, filed January 31 and March 5, 2023.

REASONS FOR DECISION

I. Request before the Board

[1] On January 30, 2023, the Federal Public Sector Labour Relations and Employment Board ("the Board") issued a decision, *Bhasin v. National Research Council of Canada*, 2023 FPSLREB 11, dismissing two related complaints for being out of time.

[2] On January 31, 2023, Milan Bhasin ("the complainant" in the decision cited in the previous paragraph and "the applicant" in this case) wrote to the Board, requesting that her case be reconsidered by another Board member.

[3] The email requesting the reconsideration is worded as follows:

> …
>
> *In para 23 and 28, the judge says my complaint is untimely. I can show the judge that it was timely as the action in the second complaint happened within 90 days of Dec. 9th. The documents related to my termination were not released to me for long time.*
>
> *There was no way for me to know that documents were forged before June 17th and also in Dec so there was no means for me to know that termination was reprisal.*
>
> *In addition to this, the several years mentioned in termination letter, these documents were also not released to me. So, there was no way for me to know that supervisor had manipulated the documents relevant to my termination.*
>
> *Can I be assigned a different judge who knows about reprisal complaints and CLCII?*
>
> …
>
> [*Sic* throughout]

[4] On February 21, 2023, the Board provided the applicant with information on how it deals with an application for reconsideration and asked her if she had any new facts or arguments that she could not have offered at the original hearing. Her response was received on March 5, 2023. It did not raise any new allegations of fact or any new arguments.

II. Context and contested decision

[5] The applicant had made two complaints with the Board under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *CLC*"), one on September 8, 2022 (Board file no.

560-09-45666), and one on December 5, 2022 (Board file no. 560-09-46213). On December 9, 2022, at her request, the two files were consolidated.

[6] The applicant worked at the National Research Council ("the respondent") in the Human Health Therapeutics subunit. On March 30, 2022, she was terminated for unsatisfactory performance. She grieved her termination; on June 15, 2022, the grievance was dismissed. Subsequently, the applicant attempted to show the respondent that the termination was based on false allegations, but the respondent simply confirmed its decision on August 2, 2022.

[7] In her first complaint, the applicant submitted that her termination was a reprisal for her making a harassment complaint against her supervisor. She said that this became clear to her when she saw her employer's response to her grievance, which alleged that her unsatisfactory performance dated back several years. Her contention is that her performance evaluations must have been forged by her supervisor.

[8] She sought to obtain documents through an access-to-information and privacy (ATIP) request. She obtained some documents in October 2022.

[9] Her second complaint was based on the same allegations of reprisal for having reported harassment, but she added that she had received documents that showed the respondent's bad faith in terminating her.

[10] The respondent objected to the first complaint for three reasons: timeliness, abuse of process, and lack of merit. It did not respond to the second complaint.

[11] Complaints made under the *CLC* are subject to mandatory time limits, which this Board has no power to extend. The wording of the relevant section, 133(2), is as follows:

133 (2) *The complaint shall be made to the Board not later than ninety 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.*	***133 (2)*** *La plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant a eu connaissance — ou, selon le Conseil, aurait dû avoir connaissance — de l'acte ou des circonstances y ayant donné lieu.*

[12] The respondent's argument with respect to timeliness was that as of the termination, March 30, 2022, the complainant knew or ought to have known the basis for the allegation she made in her complaint; that is, the termination was allegedly motivated by reprisal because she had made a harassment complaint.

[13] The Board decided to deal only with the timeliness objection, on the basis of written submissions.

[14] In response to the timeliness objection, the complainant argued that in fact, the complaints were not late.

[15] She stated that she had only learned that her supervisor must have forged false performance improvement plans from her employer's grievance response on June 15, 2022. In the grievance response, the respondent alluded to many years of shortcomings being addressed, which the complainant contended was false. Consequently, she was within the 90 days when she made her complaint on September 8, 2022, since according to her, she could have known of the reprisal only on June 15, 2022.

[16] In its decision, the Board dealt directly with the complainant's explanations, namely, she suspected forged documents only on June 15, 2022, and was provided with further documents only in October 2022. At para. 26, the Board wrote the following: "She confused the discovery of evidence to support an allegation with the allegation itself."

[17] The Board stated the issue to be decided as follows (at para. 21): "… when did the complainant know, or should have known, of the circumstances giving rise to her complaint of reprisal?"

[18] The Board concluded that the essential nature of the complaint was the alleged reprisal for the complainant exercising her rights under the *CLC* and filing a notice against her supervisor in February 2022. She knew or ought to have known that her employer was relying on performance shortcomings to justify the termination in March 2022, since that was written in the termination letter. Therefore, she should have known at the time of the termination that it was an act of (alleged) reprisal, since she had filed a notice against her supervisor and believed her performance was not an

issue. Therefore, the Board found the complaint made in September 2022 untimely. The complaint made in December 2022 was also untimely.

III. Analysis

[19] Section 43 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") provides for the possibility for the Board to review and amend its orders and decisions. There may be some debate as to whether s. 43, found in Part 1 of the *Act*, also applies to orders rendered under Part 3, which applies to complaints made under the *CLC*.

[20] Section 43 speaks of Board orders and decisions and does not limit its application to Part 1. Part 3 provides that the authority to apply Part II of the *CLC* in the federal public sector is given to the Board. It can therefore be argued that orders of the Board under Part 3 of the *Act* are subject to the reconsideration provision found in s. 43.

[21] This issue was not raised in the context of this case, and I make no definitive statement about it. For the purpose of this case, I believe it is sufficient to find that if s. 43 does apply to decisions of the Board made under Part 3 of the *Act*, the test for reconsideration has not been met.

[22] In *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376, the Federal Court of Appeal explained that a request for reconsideration under s. 43 is neither an appeal nor a request for a redetermination. Rather, it is a limited exception to the finality of the Board's decisions which enables the decision-maker to revisit the decision in the light of fresh evidence or a new argument.

[23] A request for reconsideration must also be justified. In *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39, the predecessor Board stated the law with respect to reconsiderations under s. 43 succinctly, as follows:

> …
>
> *29 A review of the jurisprudence shows the following guidelines or criteria for reconsidering a decision of the PSLRB [references omitted]. The reconsideration must:*
>
> · *not be a relitigation of the merits of the case;*
>
> · *be based on a material change in circumstances;*

> · *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
> · *ensure that the new evidence or argument have [sic] a material and determining effect on the outcome of the complaint;*
> · *ensure that there is a compelling reason for reconsideration; and*
> · *be used "…judiciously, infrequently and carefully…"*
>
> [reference omitted].

…

[24] The applicant's arguments in her reconsideration request are exactly the same arguments she made to the Board in her complaints. In other words, the request fails to meet the criteria that would lead the Board to reconsider its decision.

[25] Specifically, there are no new allegations of fact nor new arguments; the arguments advanced were presented at the original hearing and were dealt with by the decision maker. There is no material change in the circumstances. To summarize, this is clearly an attempt to relitigate a case that has already been decided.

[26] Parties who are dissatisfied with a Board decision have the opportunity to apply for judicial review of the decision (see s. 28(1) of the *Federal Courts Act* (R.S.C., 1985, c. F-7)).

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

(The Order appears on the next page)

IV. Order

[28] The application is dismissed.

April 19, 2023.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board