Date: 20230620

File: 561-02-00829

Citation: 2023 FPSLREB 64

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

HEATHER NASH

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Nash 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 Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Leslie Robertson

Decided on the basis of written submissions, filed January 3 and February 21 and March 16, 2017.

REASONS FOR DECISION

I. Complaint before the Board

[1] On January 3, 2017, Heather Nash ("the complainant") made a complaint with the Public Service Labour Relations and Employment Board ("the former Board") under s. 190 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), as it was then named, alleging that the Public Service Alliance of Canada ("the respondent") committed an unfair labour practice by breaching its duty of fair representation when it refused to represent her in a grievance concerning a breach of her human rights.

[2] On February 21, 2017, the respondent raised a preliminary objection and asked the former Board to dismiss the complaint as it was untimely. According to the respondent, the complainant was informed on August 8, 2016, of its decision not to represent her in a grievance alleging a breach of article 19 of the collective agreement between the Treasury Board and the respondent governing the Border Services (FB) group that expired on June 20, 2018 ("the collective agreement"). The complaint was untimely as it was made beyond the mandatory 90-day deadline provided in s. 190(2) of the *Act* for making a complaint alleging a breach of a bargaining agent's duty of fair representation. In the alternative, the respondent put forward that the complaint did not raise an arguable case that it failed to meet the duty of fair representation.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the former Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *FPSLREBA*), and the *Federal Public Sector Labour Relations Act*.

[4] In this decision, both the former Board and the current one are referred to as "the Board".

[5] On January 11, 2023, the Board issued notice of a hearing scheduled from April 24 to 26, 2023. The complainant responded to request a hearing by written submissions, and the Board granted the request. The Board then asked the parties for

any further submissions on the preliminary question of whether the complaint was timely. The respondent stated that it intended to provide no additional information. The complainant received an extension of time in which to respond but provided no further information.

[6] In accordance with s. 22 of the *FPSLREBA*, the Board may decide any matter before it without holding an oral hearing.

[7] I have reviewed the complaint and the submissions with care, and I am satisfied that I can decide the respondent's timeliness objection on the basis of the parties' written submissions.

[8] For the following reasons, I find that the complaint is untimely, and it is dismissed. The filing deadline is binding, and there is no provision of the *Act* that allows the Board to extend it.

II. Summary of the evidence

[9] The complainant was a member of the Customs and Immigration Union, a component of the respondent, which was responsible for providing her with assistance and representation in employment matters.

[10] The complainant was employed by the Canada Border Services Agency. On June 30, 2016, she met with one of its representatives to discuss three options to bring her public service career to an end: resignation, termination, or medical retirement. She considered that certain comments made to her during that meeting constituted human rights discrimination and wanted to take action to redress the situation.

[11] On August 8, 2016, the respondent wrote to the complainant concerning the issues arising from that meeting. In part, that email addressed the complainant's human rights concerns, stating:

> …
>
> *You did not say you wanted to grieve Article 19 of the CA – in that case you require the approval of the union, which you do not have. Members can file a grievance without union consent, however they do need authorization from the union when grieving the application or interpretation of the collective agreement as per article 18 which provides: where the grievance relates to the interpretation or application of this Collective Agreement or an Arbitral Award, an employee is not entitled to present the*

> *grievance unless he has the approval of and is represented by the Alliance.*
>
> *I will reiterate that the CIU will offer advice, assistance and representation with respect to the employer's intention to terminate your employment.*
>
> *And if you need assistance with the CHRC complaint, please let me know and I can put you in touch with a Representation Officer at the PSAC.*
>
> …

[12] The message referred to article 19 of the collective agreement, which prohibited discrimination in the workplace.

[13] On August 11, 2016, the respondent wrote to the complainant, reiterating that it would help her with respect to grieving the choice of medical retirement. As for human rights discrimination, it offered a contact to assist her with making a complaint to the Canadian Human Rights Commission.

[14] After the respondent received notification of the January 3, 2017, complaint alleging failure in the duty of fair representation, it filed an objection to the Board's jurisdiction to hear the matter. It stated that the events relied on by the complainant occurred in August 2016. Therefore, the complaint of January 3, 2017, was untimely as it fell outside the 90-day deadline provided in s. 190(2) of the *Act*.

[15] The complainant responded that on a date that fell during the period of October 5 to 7, 2016, she met with a friend, who told her that it appeared to him that the respondent was not acting properly by refusing to represent her in a human rights grievance. According to her, this was when she first made that realization. She did not earlier understand the respondent's position, which she stated was due to a disability. No medical evidence was provided to the Board to support her assertion.

[16] The analysis and the decision that follow address the respondent's objection based on the timeliness of the complaint. They do not address the merits of the complaint.

III. Analysis

[17] The issue that I must determine is whether the complaint was made within the 90-day deadline set out in ss. 190(1)(g) and (2) of the *Act*, for if the complaint was untimely, the Board has no authority to hear it. They state the following:

190 (1) *The Board must examine and inquire into any complaint made to it that*	***190 (1)*** *La Commission instruit toute plainte dont elle est saisie et selon laquelle :*
…	[…]
(g) *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*	***g)*** *l'employeur, l'organisation syndicale ou toute personne s'est livré à une pratique déloyale au sens de l'article 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 the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*	***(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 le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.*

[18] For the purpose of this decision, the relevant portion of that excerpt is the defined time for making a complaint under s. 190. As stated in s. 190(2), "… 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 the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.". This time limit is mandatory. Sections 190(3) and (4), referred to in s. 190(2), do not apply to this complaint. They address expulsion, suspension, or discipline by a bargaining agent against a member of a bargaining unit.

[19] The Board has consistently held that it has no authority to extend time (see, for example, *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90, *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).

[20] The sole discretion reserved to the Board is to determine when the complainant knew or ought reasonably to have known of the matter giving rise to the complaint (see *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100).

[21] According to the respondent's submissions, the "action or circumstances" underlying the complaint occurred on August 8, 2016, when it informed the

complainant in writing that it would not represent her in a grievance alleging a breach of article 19 of the collective agreement.

[22] The complaint was made on January 3, 2017, nearly 5 months later and well beyond the prescribed 90-day deadline set out in s. 190(2). On its face, the complaint was well out of time. However, the complainant argued that the time should be calculated from the date on which she met with a friend, which fell in the period of October 5 to 7, 2016. According to her, this individual brought to her attention the fact that the respondent declined to provide representation for a grievance addressing article 19 of the collective agreement. It is her position that at that point, she knew the respondent's position.

[23] I have considered the complainant's assertion that she has an impairment that prevented her from comprehending the meaning of the respondent's August 8, 2016, email until as late as October 7, 2016. However, there is no medical evidence to buoy this assertion.

[24] I find that the email of August 8, 2016, was plainly worded and unequivocal. The complainant then knew or ought to have known that she would not be represented if she wished to initiate a grievance alleging a breach of article 19.

[25] Therefore, in my view, August 8, 2016, is the date of the alleged breach of the duty of fair representation. The 90-day deadline defined in s. 190(2) of the *Act* started to run from that date. By the time the complainant made her complaint with the Board, the 90-day deadline had elapsed. The Board is without authority to extend it further. As the complaint is untimely, there is no need for me to address the respondent's alternative argument that the complaint does not disclose an arguable case.

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

(The Order appears on the next page)

IV. Order

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

[28] The complaint is dismissed.

June 20, 2023.

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