Date: 20240301

Files: 561-02-42808 and 45289

Citation: 2024 FPSLREB 28

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

DANA FRASER

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Fraser v. Public Service Alliance of Canada

In the matter of complaints made under section 190 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 Complainant: Herself

For the Respondent: Claire Michela, counsel

Decided on the basis of written submissions, filed September 26 and 29 and October 13, 2023.

REASONS FOR DECISION

I. Complaints before the Board

[1] Dana Fraser ("the complainant") made two complaints under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") against her bargaining agent, the Public Service Alliance of Canada ("the respondent"), with the Federal Public Sector Labour Relations and Employment Board ("the Board"). The first complaint (Board file no. 561-02-42808) relates to a grievance that the respondent did not file in the fall of 2020 concerning the complainant's psychologically unsafe workplace. The second complaint (Board file no. 561-02-45289) relates to a relocation grievance that the respondent allegedly omitted to transmit to the second level of the grievance process.

[2] The respondent submits that the complaints should be dismissed because they are both out of time, and in any event, the complainant has not made out a *prima facie* case that the respondent breached its duty of fair representation.

[3] Pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may render a decision on the basis of written submissions. For the purposes of this decision, I take the complainant's alleged facts to be true, as well as the respondent's unchallenged explanations for its actions. I have considered all submissions.

[4] The issue to be determined is whether, taking the complainant's alleged facts to be true, the complaints are timely and whether there is an arguable case that the respondent breached s. 187 of the *Act* in that it acted arbitrarily, discriminatorily, or in bad faith in representing the complainant.

[5] For the reasons that follow, the complaints are dismissed.

II. Context

A. Complaint in Board file no. 561-02-42808

[6] This complaint was made on March 30, 2021.

[7] The complainant works for Indigenous Services Canada ("the employer"). According to her, she attempted to make an occupational health and safety complaint with Employment and Social Development Canada (ESDC), specifically its Labour

Program, because she felt psychologically unsafe in her workplace. A labour program officer informed her that the complaint was not within ESDC's jurisdiction but rather was within the mandate of the relevant collective agreement. She then asked the respondent in October 2020 to file a grievance on her behalf, and it refused. She made a complaint with the Canadian Human Rights Commission (CHRC) in October 2020.

[8] The respondent replied to the complaint to the Board on May 20, 2021. It gave a detailed account of the advice, support, and representation it provided to the complainant, especially since 2019. It has investigated and analyzed every incident she has raised. It continues to be willing to file a grievance on her behalf if and when a breach of the relevant collective agreement allegedly occurs.

[9] The respondent raised an objection based on timeliness. The subject matter of the complaint is the respondent's refusal to support a grievance. It agrees that it refused to support a grievance, as there was insufficient evidence about the employer's alleged refusal to accommodate the complainant, and there were ongoing discussions with the employer concerning her working conditions.

[10] The refusal occurred in October 2020, a full six months before the complainant's complaint of March 2021. A complaint made under s. 190 of the *Act*, such as this one, "… 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."

[11] The complainant replied to the timeliness issue by stating that on February 17, 2021, the CHRC advised her that a grievance was the proper recourse. When she told the CHRC that the respondent had refused to file a grievance, she was told that she could make a complaint against it. She did so with this one in March 2021.

[12] The complainant states that until she received a response from the CHRC, she was unaware that her recourse against the employer's actions should be a grievance.

B. Complaint in Board file no. 561-02-45289

[13] This complaint was made on July 26, 2022, and relates to a relocation grievance applying the National Joint Council's *Relocation Directive*.

[14] The complainant grieved a relocation decision by the employer in July 2018, with the respondent's support. She received a first-level reply dated July 26, 2018. The respondent was not copied on it.

[15] According to the *Relocation Directive* and the relevant collective agreement, the complainant had 10 days to transmit the grievance to the second level of the grievance process.

[16] The respondent was not informed of the first-level reply until the end of August 2018, by which time it was too late to transmit the grievance to the second level. Nevertheless, while warning that the lateness might be unsurmountable, and without promising any positive outcome, the respondent did attempt to transmit the grievance to the second level; ultimately, it was dismissed for lateness in June 2022.

[17] The complainant blames the respondent. The respondent counters that she received the first-level reply but did not inform it until it was too late. The respondent argues that it cannot be blamed for the employer's mistake of not copying it on the first-level reply.

[18] The complainant submits that until the final refusal in June 2022, she had been led to believe that things were proceeding normally, and so her complaint to the Board was timely. The respondent states that it always made it very clear to the complainant, including when it transmitted the second-level grievance in October 2018, that the transmittal was late and that the grievance could be denied on that ground. It states that the event that triggered the 90-day timeline to file a complaint was the October 2018 transmittal, and so the complaint is almost four years late.

III. Analysis

[19] The issue before the Board is whether these two complaints should proceed to a hearing, given the timeliness objections and the respondent's claim that it did not breach its duty of fair representation and that therefore, there is no arguable case.

A. Complaint in Board file no. 561-02-42808

[20] It seems unlikely that the complainant was unaware that she could file a grievance, since she asked the respondent to file one in October 2020. It appears that she made the complaint against the respondent immediately after the CHRC advised her that it might not investigate her complaint if she had a labour relations recourse.

[21] The respondent, in its submissions, presents a timeline of the events surrounding the ultimate refusal to file a grievance on the complainant's behalf in October 2020. She does not dispute the facts but does dispute the respondent's assessment of the situation.

[22] The complainant made her complaint to the Board six months after the events of October 2020. It was made under s. 190(1)(g) of the *Act*. The relevant timeliness provision reads as follows (ss. 190(3) and (4) that are referred to do not apply in this case):

…	[…]
190 (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.*	***190 (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.*
…	[…]

[23] The complainant knew in October 2020 that the respondent would not file a grievance on her behalf, and she was told why. This is the event giving rise to her complaint, and it is the starting point of the 90-day timeline. The subsequent exchanges with the CHRC are not relevant to the timeline. If she was dissatisfied with the respondent's refusal to file a grievance, she had 90 days to act upon that dissatisfaction.

[24] This case presents a certain similarity to *Bhasin v. National Research Council of Canada*, 2023 FPSLREB 11. The complainant in that case, Ms. Bhasin, argued that her complaint was timely as she had received further information after her termination. The Board ruled that the starting point of the 90-day deadline was the incident giving rise to the complaint (in that case, a termination), not subsequent information received in the following months.

[25] Absent truly exceptional circumstances (see a decision subsequent to these events, *Beaulieu v. Public Service Alliance of Canada*, 2023 FPSLREB 100), the Board does not extend deadlines for complaints under s. 190 of the *Act*, as the language is

clear that complaints **must** be made within 90 days of the events giving rise to the complaint.

[26] The complainant knew in October 2020 that the respondent would not file a grievance on her behalf. It was too late, six months later, to complain of that action. The complaint is out of time and cannot be heard by the Board.

[27] In any event, even if the complaint were timely, it would be dismissed for lack of an arguable case. Even if all the complainant's allegations are taken as true, there is nothing in those allegations that would indicate a breach of s. 187 of the *Act*.

[28] Section 187 of the *Act* reads 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.*

[29] To be found in breach of s. 187, the respondent must have acted arbitrarily, with discrimination, or in bad faith. An arguable case would be one in which the allegations point to such actions by the respondent, warranting a full hearing on the merits of the case.

[30] The respondent refused to file a grievance on the complainant's behalf after thoroughly studying the situation. That was not arbitrary or bad-faith behaviour. She did not contest that it did accompany her in numerous exchanges with the employer. The respondent made a serious assessment of the situation and decided that it would serve no purpose to file a grievance while the complainant was still in discussions with the employer about her working conditions.

[31] The respondent fulfilled its duty as defined by the legislation and the jurisprudence. As stated in the seminal Supreme Court of Canada decision, *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, "The representation must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

[32] The Board (including its predecessors) has often stated that a bargaining agent has no duty to file a grievance or follow a specific strategy despite a bargaining unit member requesting it (see, for example, *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13).

[33] The complainant raised discrimination issues, namely, the respondent's lack of understanding of mental health issues.

[34] There is nothing to indicate that the respondent discriminated against the complainant or that it was insensitive to her difficulties. At all times, it acted in a professional and respectful manner.

[35] To establish discrimination, the complainant must first make out a *prima facie* case that she is part of a protected group, that she suffered an adverse effect, and importantly that being part of a protected group was a factor in the adverse effect.

[36] There is no doubt that the complainant has had conflicts with her employer related to her perceived mental state. There is also ample indication that the respondent has sought to help her in her relationship with the employer.

[37] Refusing to file a grievance is, in the complainant's perspective, an adverse effect; in the respondent's assessment, it is the preferable solution to a difficult situation. Therefore, it is unclear if there is an adverse effect. Moreover, the refusal was not related to the complainant's mental health status but rather to an objective evaluation of the situation and of the best way forward.

[38] Therefore, I cannot see the respondent's actions as arguably discriminatory.

B. Complaint in Board file no. 561-02-45289

[39] This complaint is related to the fact that the respondent did not transmit a grievance to the second level after the first-level reply was received. However, it is difficult to see how it could be blamed for inaction when it was unaware that the first-level reply had been provided. The complainant received the first-level reply, yet she did not contact the respondent until the transmittal deadline had long passed. Although it is understandable that she relied on the respondent to act, since it had helped her that far in the grievance process, it is not sufficient to impute fault to the respondent for not acting. It was not informed, and therefore, it did not act.

Unfortunately, the complainant is a victim of her own inaction of failing to follow through after receiving the first-level reply.

[40] The complaint was made in July 2022 following the dismissal of the grievance in June 2022. The complainant argues that it is not late, since the event giving rise to it was this dismissal. The respondent argues that the event giving rise to the complaint was the grievance transmittal to the second level in October 2018. The complainant was hoping the late transmittal would not prevent her grievance being dealt with. She blamed the dismissal on the respondent.

[41] Even if the Board were to accept that the complaint is timely, it presents no arguable case.

[42] Nothing in the respondent's behaviour was arbitrary, discriminatory, or in bad faith for the simple reason that it cannot act if it is not made aware that it must act. That is so in this case. The complainant blames the respondent because she thought that the grievance would be accepted, despite its lateness. She was told from the start that that was doubtful but that the respondent would do its best to have it move forward. The grievance was rejected because it was late. The lateness cannot in any way be attributed to the respondent.

[43] The first complaint cannot be heard because it is untimely. The second complaint presents no arguable case since there is no basis to find fault with the respondent's behaviour. Both complaints are dismissed.

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

(The Order appears on the next page)

IV. Order

[45] The complaints are dismissed.

March 1, 2024.

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