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*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

JULIA DUNDAS

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as

Dundas v. Canadian Association of Professional Employees

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

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Herself

For the Respondent: Khristian Khouri, counsel

Decided on the basis of written submissions,
filed June 23 and July 11, 14 and 18, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] On April 28, 2022, Julia Dundas (“the complainant”) made a complaint against the Canadian Association of Professional Employees (“the CAPE” or “the respondent”) under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”).

[2] The details of her complaint are that she submitted a complaint to her employer on November 27, 2020, with respect to a colleague harassing her and that she sought the assistance of the CAPE in representing her during the course of her employer’s investigation relating to the complaint. However, unbeknownst to the complainant, the same CAPE representative with whom she was discussing the matter was representing the colleague who she complained was harassing her. She stated that the CAPE representative declared a conflict of interest only after they had represented the person the complainant had made the harassment complaint against and after CAPE had represented him during his interview in the employer investigation. In her complaint, she states that the date she knew of the act, omission, or other matter giving rise to the complaint was April 27, 2021.

[3] On June 23, 2022, the CAPE filed a response to the complaint and submitted that the complaint should be dismissed summarily without a hearing on the grounds that the complaint does not disclose a *prima facie* violation of s. 185 of the *Act*. In the alternative, it submits that the complaint lacks merit and that it should be dismissed. In the further alternative, it submits that the complaint was not made within the time limit prescribed by the *Act* and that it should be dismissed.

[4] On July 11, 2022, the complainant filed a reply to the CAPE response. In it, she states that she knew of the act, omission or other matter giving rise to the complaint on November 30, 2021. She further states that her complaint is timely as she filed it within 90 days of the respondent’s internal appeal process being complete.

[5] The parties were advised that the Federal Public Sector Labour Relations and Employment Board (“the Board”) would consider their submissions and issue a decision with respect to the respondent’s preliminary objection.

[6] 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 decide any matter before it on the basis of written submissions.

[7] For the reasons that follow, I find that the complaint was not made within the time frame required by s. 190(2) of the *Act*, and as such, it shall be dismissed.

[8] As the complaint is dismissed for not having been made within the time frame set out in the *Act*, I need not address the reasons that the respondent provided as part of its request that the complaint be dismissed summarily.

II. Summary of the arguments

[9] In their submissions, the complainant and the respondent named the CAPE representative that the complainant dealt with as well as the work colleague against whom the harassment complaint was made. Given that this decision addresses only the preliminary issue of timeliness, and not the merits, I have referred to the CAPE representative involved as “the CAPE representative” and the work colleague as “the person against whom the harassment complaint was made”.

[10] In her reply filed on July 11, 2022, the complainant set out the following:

...

B. FACTUAL BACKGROUND RELEVANT TO THE COMPLAINT

6. The Respondent [CAPE] has omitted relevant background information regarding the correspondence between the Complainant and [the CAPE representative]. On or around February 2, 2021 [the CAPE representative] called the Complainant in response to the email she had sent which contained background of the issues as well as a redacted version of Complainant's original sexual harassment complaint to their employer. The Complainant sent the email encrypted to [the CAPE representative] through their google account. [The CAPE representative] called the Complainant specifically to request that they resend the email to her unencrypted. Call logs supporting this have been requested from the Complainant's phone service provider and will be shared once they are sent to the Complainant. Line 1 of Annex A contains emails requesting the call logs.

7. On February 2, 2021, [the CAPE representative]'s assistant ... to set up a meeting between the Respondent and the Complainant for February 9, 2021. Supporting documentation is found in line 2 of Annex A.

8. On February 5, 2021, the Complainant sent [the CAPE representative] the same email, but unencrypted, through their google account. The body of the email stated the stated the background of the complaint and the attached redacted version of the original sexual harassment complaint [details of sexual harassment redacted]

9. The respondent claims that after February 5, 2020 the Complainant did not make any further inquiry. However, the Complainant contacted [the CAPE representative] on or around April 23, 2021 seeking guidance on their complaint. [The CAPE representative]'s assistant ... sent a calendar invite to the Respondent and the Complainant on April 23, 2021 for a meeting on April 27, 2021. Supporting documentation is found in line 4 of Annex A.

10. On April 27, 2021, the Complainant sent an email to the Respondent with further details for the meeting scheduled later that day, which included a request in writing for representation. A copy of this email is found in line 6 of Annex A.

11. The Respondent never disclosed to the Complainant that she had reported a conflict of interest. The Respondent cancelled the April 27, 2021 meeting without reason. Her cancellation email is found in line 7 of Annex A.

12. The final report on the Complainant's sexual harassment complain against their employer details that [the CAPE representative] represented [the person against whom the harassment complaint was made] during his initial interview with the investigator on April 13, 2021. Additionally, [the CAPE representative] represented [the person against whom the harassment complaint was made] while he prepared and submitted his response to the allegations on April 26, 2021. This is detailed in item 5 of Annex A.

13. The Complainant was unaware of the nature of the conflict on interest and could not have reasonably known until they had received the report in its entirety from their employer's responsible human resources team, the Harassment and Violence Center of Expertise, on November 30, 2021. The Complainant provided the full report to their Labour Relations Officer, Jake Baizana, on November 30, 2021. This email is in line 8 of Annex A. The Complainant also noted this in their complaint to Jean Ouellette sent on December 10, 2021, which is found in line 9 of Annex A.

14. On January 26, 2022, Jean Ouellette provided his response to the Complainant. This email is in line 10 of Annex A.

...

[Sic throughout]

[11] Annex A of the complainant's reply to the CAPE response is in a chart format that contains a number of columns with information to help the reader identify the document and the reference to it in the complainant's reply to the CAPE response.

[12] At Annex A, line 7, the complainant sets out a copy of the email she received from the CAPE representative cancelling the planned April 27, 2021 meeting. It states:

...
*Unfortunately I am not able to speak to you at 11:30 this morning.
I have notified our management of your situation and someone
will get back to you shortly.*

[13] At Annex A, line 9, is a copy of the complainant's email dated December 10, 2021, to Jean Ouellette, the Executive Director of CAPE, which states as follows:

...
Subject: failure to provide fair representation

...
I am writing in regards to a perceived failure in CAPE's duty to provide me fair representation throughout my sexual harassment case I filed with my employer. I understand there is a time limit connected to this and note that I did not receive the report in its entirety from the Harassment and Violence Centre of Expertise (HVCE) in my department until Monday, November 29, 2021.

To begin, I had initially contacted my union representative, [the CAPE representative], in early February of 2021 to discuss my report on the sexual harassment I had experienced in the workplace. On Feb 2, [the CAPE representative]'s assistant ... contacted me and set up an appointment between myself and [the CAPE representative]. I have attached that interaction to this message.

On Feb 5, 2021 I sent [the CAPE representative] an email which included the original report, all evidence I had presented to the HVCE, as well as context and concerns I had surrounding the process. I have attached a copy of that email to this message.

On Feb 9th, 2021 I had my meeting with [the CAPE representative] and we discussed the material I had shared with her.

After that meeting, there was no follow up from my labour representative. Ultimately, I attended the interview with the 3rd party investigator unrepresented by the union.

It was not until late April that I communicated with [the CAPE representative] and her assistant again. On April 23, 2021 I had tried to arrange a meeting between myself and [the CAPE

representative]. I received a calendar invite from her assistant on April 23, 2021 to have a meeting on April 27, 2021 at 11:30 am.

At 11:00 am on April 27, 2021 I received an email from [the CAPE representative] informing me that she would not be able to speak to me that day. She wrote to me that she had notified management of my situation, but did not provide any additional details. That exchange is attached to this email.

Later that day, I was contacted by Jake Baizana, who has continued to represent me since then.

However, the final report and its supporting appendices indicate that [the CAPE representative] had represented the respondent after she had access to my complete complaint against the respondent, including the evidence I provided, as well as context and concerns I had shared with her in February. It is for this reason that I believe CAPE failed to provide me with fair representation for this case.

Please let me know if there is any additional information I can provide.

...

[14] At Annex A, line 10, dated January 26, 2022, is referenced the email exchange between the complainant and Mr. Ouellette and a copy of Mr. Ouellette's email to the complainant that day at 11:42, which states as follows:

...

As soon as we became aware of a potential conflict of interest in the handling of your file, we investigated the matter and informed your representative of our findings.

Although it was an unfortunate situation, I have reviewed the matter and I am satisfied that your interests or position were not undermined by the fact that our LRO, [the CAPE representative], was aware of the facts as reported by you to her regarding your complaint prior to our LRO taking on the representation of [the person against whom the harassment complaint was made] for a very short while. I am also satisfied that [the CAPE representative]'s knowledge of the facts provided to her by you was not prejudicial to your position.

As soon as this potential conflict of interest was brought to my attention, I immediately took steps to remove our LRO from the investigation process completely and contracted with outside consultants so our members, both yourself and the respondent, would be represented fairly and without any conflict of interest on our part.

I am therefore of the opinion that, while unfortunate, the fact that [the CAPE representative] acted as [the person against whom the harassment complaint was made]'s representative for a very short

time, even though she had been informed by you of the facts of your complaint, it was not prejudicial to your case as [the CAPE representative] was removed as [the person against whom the harassment complaint was made]'s representative at the uncompleted fact-finding stage of the investigation.

I am also satisfied that the representation provided to you by CAPE through our consultant was done fairly, equitably, without arbitrariness or discrimination.

If you do not agree with my decision, you may as per the provisions of our Protocol 2 submit your complaint in writing to the President not later than ten (10) calendar days.

...

[Emphasis added]

[15] On February 8, 2022, the complainant appealed Mr. Ouellette's decision to the president of the CAPE, Greg Phillips.

[16] On February 28, 2022, Mr. Phillips provided his decision to the complainant. He advised that he had carefully considered her appeal but had found no signs of bad faith or arbitrary conduct by the CAPE representative or any other member of the CAPE's staff. In his opinion, the CAPE did not breach its duty of fair representation. He advised that, if the complainant disagreed with his decision, she could pursue the matter using the recourse provided under s. 190 of the *Act*.

III. Reasons

[17] Section 190(1)(g) of the *Act* requires that the Board examine and inquire into any complaint made to it that an employer, an employee organization, or any other person has committed an unfair labour practice within the meaning of s. 185.

[18] A complaint made under s. 190(1)(g) of the *Act* alleges an unfair labour practice within the meaning of s. 185, which states as follows:

185 *In this Division, unfair labour practice means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

185 *Dans la présente section, pratiques déloyales s'entend de tout ce qui est interdit par les paragraphes 186(1) et (2), les articles 187 et 188 et le paragraphe 189 (1).*

[Emphasis in the original]

[19] The portion of the Act noted in s. 185 to which the complainant referred is s. 187, which holds an employee organization to a duty of fair representation and states 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.

[20] Section 190(2) of the Act sets out the time frame within which a complaint may be made, stating as follows:

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.

[21] Sections 190(3) and (4) of the Act state as follows:

190(3) Subject to subsection (4), no complaint may be made to the Board under subsection (1) on the ground that an employee organization or any person acting on behalf of one has failed to comply with paragraph 188(b) or (c) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the employee organization and to which the complainant has been given ready access;

190(3) Sous réserve du paragraphe (4), la plainte reprochant à l'organisation syndicale ou à toute personne agissant pour son compte d'avoir contrevenu aux alinéas 188b) ou c) ne peut être présentée que si les conditions suivantes ont été remplies :

a) le plaignant a suivi la procédure en matière de présentation de grief ou d'appel établie par l'organisation syndicale et à laquelle il a pu facilement recourir;

(b) the employee organization

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented their grievance or appeal under paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than 90 days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.

(4) The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by an employee organization to comply with paragraph 188(b) or (c) that has not been presented as a grievance or appeal to the employee organization, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the employee organization has not given the complainant ready access to a grievance or appeal procedure.

b) l'organisation syndicale a :

(i) soit statué sur le grief ou l'appel, selon le cas, d'une manière que le plaignant estime inacceptable,

(ii) soit omis de statuer sur le grief ou l'appel, selon le cas, dans les six mois qui suivent la date de première présentation de celui-ci;

c) la plainte est adressée à la Commission dans les quatre-vingt-dix jours suivant la date à partir de laquelle le plaignant était habilité à le faire aux termes des alinéas a) et b).

(4) La Commission peut, sur demande, statuer sur la plainte visée au paragraphe (3) bien que celle-ci n'ait pas fait l'objet d'un grief ou d'un appel si elle est convaincue :

a) soit que les faits donnant lieu à la plainte sont tels qu'il devrait être statué sans délai sur celle-ci;

b) soit que l'organisation syndicale n'a pas donné au plaignant la possibilité de recourir facilement à une procédure de grief ou d'appel.

[22] Sections 188(b) and (c) of the Act state as follows:

188 No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall

...

188 Il est interdit à l'organisation syndicale, à ses dirigeants ou représentants ainsi qu'aux autres personnes agissant pour son compte :

[...]

(b) *expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;*

b) *d'expulser un fonctionnaire de l'organisation syndicale ou de le suspendre, ou de lui refuser l'adhésion, en appliquant d'une manière discriminatoire les règles de l'organisation syndicale relatives à l'adhésion;*

(c) *take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner*

c) *de prendre des mesures disciplinaires contre un fonctionnaire ou de lui imposer une sanction quelconque en appliquant d'une manière discriminatoire les normes de discipline de l'organisation syndicale;*

[23] Section 190(2) sets out a 90-day limit within which a complainant must make a complaint unless the subject matter of the complaint falls within the exceptions set out in ss. 190(3) and (4). The exceptions referred to in ss. 190(3) and (4) arise only in complaints that have as their basis s. 188(b) or (c) of the *Act*. Section 188(b) addresses complaints with respect to the expulsion or suspension of an employee from membership in an employee organization or the denial of membership in an employee organization by applying the membership rules in a discriminatory manner, while s. 188(c) addresses disciplinary action taken by an employee organization.

[24] The complaint is not one that has as its basis anything to do with the expulsion or suspension of an employee from membership in an employee organization or the denial of membership in an employee organization by applying the membership rules in a discriminatory manner. Nor does it have as its basis disciplinary action or the imposition of a penalty against the complainant by the employee organization. As such, I am satisfied that the complaint is not one that would fall under the exception in s. 190(2) as it is not one for which either s. 188(b) or (c) of the *Act* apply.

[25] Given that neither s. 188(b) or (c) of the *Act* apply, the complainant was required to make her complaint to the Board within 90 days of the date on which she either knew of the action or circumstances that would form the basis of her complaint or in the Board's opinion ought to have known of the action or circumstances that would form the basis of her complaint.

[26] In the absence of truly exceptional circumstances (see *Beaulieu v. Public Service Alliance of Canada*, 2023 FPSLR 100, decided subsequent to these events), none of

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which exist in the present case, the Board does not extend deadlines for complaints made under s. 190 of the Act.

[27] When interpreting s. 190(2), the Board will review the circumstances to determine the date on which the 90-day period begins, in other words, when the complainant knew, or ought to have known, of the circumstances giving rise to the complaint (see *Éthier v. Correctional Service of Canada*, 2010 PSLRB 7 at para. 18; *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90 at para. 33; *Nemish v. King, Walker and Union of National Employees (Public Service Alliance of Canada)*, 2020 FPSLREB 76, at paras. 35 and 36).

[28] As explained in *Éthier*, however, 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 dispute at issue:

...

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 ... 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. The PSLRA does not contain any provision that a complainant must exhaust all alternate recourse before filing a complaint.

...

[29] The complaint was made on April 28, 2022. If the grievor was aware of the actions or circumstances that gave rise to her complaint more than 90 days before April 28, 2022, her complaint is out of time, and the Board is without jurisdiction. Ninety days before April 28, 2022, was January 29, 2022; therefore, if the complainant knew of the action or circumstances giving rise to her complaint before January 29, 2022, it is untimely.

[30] In her complaint, the complainant identifies the date that she knew of the circumstances giving rise to her complaint as April 27, 2021. If this date is accurate, and it is on the complainant's complaint, then she was well past the 90-day limit set out by s. 190(2) of the *Act*, as the date she made her complaint was a year and one day later, on April 28, 2022.

[31] Assuming that date may be in error, in her reply to the response of CAPE, filed on July 11, 2022, the complainant stated that she was unaware of the conflict of interest and could not reasonably have known about it until November 30, 2021, when she received the full report of the harassment investigation. She attached as evidence an email she sent to CAPE's executive director, Mr. Ouellette, on December 10, 2021. The subject line of that email is "failure to provide fair representation". In that email, she sets out in detail the facts that she alleges form the basis of this complaint. She indicated to Mr. Ouellette that it was the receipt of the report that led her to believe CAPE failed to fairly represent her. Those facts set out in her reply are more specific and detailed than what is in the complaint; however, they are clearly the same facts that are alleged in this complaint. Therefore, it is evident that as of November 30, 2021, the complainant was aware of the actions and circumstances giving rise to her complaint. As such, she should have made her complaint within 90 days of at least November 30, 2021, and that date would have been February 28, 2022.

[32] Once the complainant was aware of the circumstances giving rise to her complaint, whether it was April 27, 2021 as stated in her complaint, or November 30, 2021 as stated in her reply, nothing prevented her from making a complaint to the Board and then asking that the complaint be held in abeyance pending the completion of any internal process.

[33] I note, in closing, two decisions of a predecessor Board: *Renaud v. Canadian Association of Professional Employees*, 2009 PSLRB 177 and *Markey v. Professional Institute of the Public Service of Canada*, 2011 PSLRB 36. Both address the issue of whether the use of an internal complaints process extends the 90-day deadline under s. 190(2). In *Renaud*, the Board found that it did, whereas in *Markey*, the Board said that it agreed with the reasoning in *Renaud*, however not as the reason for the decision but in a very extensive obiter.

[34] I decline to follow these decisions because they have misinterpreted the clear and unambiguous wording contained in the *Act*. They suggest that the 90-day time limit as set out in s. 190(2) does not start to run in cases where the complainant has utilized the internal employee organization's appeal process. This reasoning cannot stand as it is clear that Parliament had contemplated when the utilization of the internal employee organization's processes affects the 90-day time limit set in s. 190(2). That is set out in s. 190(3) of the *Act* and refers to ss. 188(b) and (c) where a bargaining agent has either expelled, disciplined, or imposed a penalty on a member. In those circumstances Parliament has referred specifically to internal employee organization processes. If Parliament had wanted to provide an expanded exception to s. 190(2) of the *Act*, generally where a complainant has utilized an employee organization's internal processes, it would have stated so in the *Act*. It has not.

[35] As the complaint was not made until April 28, 2022, the complainant was outside the 90-day time frame within which she was permitted to make a complaint under s. 190(2) of the *Act*. As such, the complaint is dismissed for being untimely.

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

(The Order appears on the next page)

IV. Order

[37] The complaint is dismissed.

April 15, 2024.

**John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board**