Date: 20240827

File: 561-02-47560

Citation: 2024 FPSLREB 119

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

KRISTINA TAKHMI JOSEPH

Complainant

and

TREASURY BOARD
(Department of Employment and Social Development)

Respondent

Listed
Takhmi Joseph v. Treasury Board (Department of Employment and Social Development)

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

Before: Adrian Bieniasiewicz, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Philippe Lacasse and Isabelle Tremblay, analysts, Treasury Board of Canada Secretariat

Decided on the basis of written submissions filed April 21, June 6, July 5, August 2, and December 1, 2023, and January 3, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On April 21, 2023, Kristina Takhmi Joseph ("the complainant") made an unfair-labour-practice complaint under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") against the Department of Employment and Social Development ("the respondent"). She alleged that the respondent threatened her or that it coerced her due to her leave without pay. Furthermore, she submitted that it intimidated her by informing her that the employment contract that she had accepted while on leave without pay would have to be corrected to reflect that she was in a double-employment situation. According to her, those were are unfair labour practices prohibited by ss. 186(2)(a)(iv) and 189 of the *Act*.

[2] The facts underlying the unfair-labour-practice allegations, as presented in the complaint, are unclear and sometimes difficult to follow. As I understand it, in August 2021, the respondent informed the complainant that her request to extend her leave without pay to care for her children had been approved until September 2, 2022. It also advised her that her substantive position (AS-03) could be staffed permanently as her leave without pay exceeded one year. In that context, it asked her to review the terms and conditions of leave without pay of more than one year and the priority process.

[3] During summer 2021, the complainant allegedly reported to the Canada Employment and Immigration Union - National Capital Region (CEIU-NCR or "the union") situations that she described as abusive and discriminatory by the respondent. She wanted to make a complaint. The CEIU-NCR replied that first, it would look into the situations with management. According to her, its lack of communication and failure to share information that was "[translation] essential and crucial" to making an informed human resources decision about an employee "[translation] … are unfair labour practices and an abuse of authority that jeopardize the grievor's safety …".

[4] In May 2022, a few months before her leave without pay was to end, the complainant's position was staffed indeterminately, which thus made her eligible for priority status with the Public Service Commission during her leave and the year after it.

[5] Due to family circumstances, the complainant decided to return to work in July 2022. Since her substantive position had been staffed, she accepted a contract for an acting appointment (IS-04) from July 4, 2022, to October 21, 2022, in Service Canada's Quebec Region communications team . However, because of her family obligations, she terminated that employment contract around September 28, 2022.

[6] On February 13, 2023, a senior human resources advisor contacted the complainant, to advise her that her contract for the IS-04 acting appointment should be corrected to reflect that she was in a double-employment situation, as she was still an indeterminate public service employee during the period in question, although she was on leave without pay. Therefore, she should have been offered a term contract rather than an acting appointment. The advisor encouraged her to register in the Public Service Commission's Priority Information Management System (PIMS). That was followed by the advisor and the complainant having several email exchanges to clarify the double-employment situation, to regularize the contract obtained in summer 2022, and to answer the complainant's questions about her priority right. According to her, it was the first time that a question of double employment arose, despite the fact that Human Resources had made verifications of her file before February 13, 2023. She alleged that after more email exchanges and intimidation that she suffered, on March 13, 2023, she filed two grievances. And on March 28, 2023, she made a complaint with the Canadian Human Rights Commission (CHRC). On April 21, 2023, she made this complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board").

[7] According to the complainant, the respondent corrected her IS-04 employment contract, which was interim and for a defined term, "[translation] to mask" her return to work "[translation] … on July 4, 2022, and before the one-year period of her leave without pay, to justify her layoff, stating that she was in a double-employment situation …". The respondent has continued to fail to provide her with essential information to enable her to avail herself of her leave without pay and to maintain her employment relationship. The respondent registered her in the PIMS without her consent on August 12, 2022, while she was working as an IS-04, which was contrary to the *Privacy Act* (R.S.C., 1985, c. P-21).

[8] According to the complainant, the respondent "[translation] … now prefers to code double employment in [its] file … and ask her to reimburse some amounts…",

contrary to the relevant collective agreement. In addition, she believes that Human Resources is taking actions that contravene the law and that do not account for her family reality.

[9] In response to the Board's request for clarification, by email dated April 27, 2023, the complainant confirmed that the respondent's (and the Human Resources team's) threats or coercion mentioned in her complaint took place on August 4, 2021 (in the leave-without-pay situation), and on February 24, 2023 (intimidation related to correcting her IS-04 contract).

II. Preliminary objections

A. For the respondent

[10] The respondent asked the Board to dismiss the complaint on the grounds that the facts it alleges do not establish an arguable case. In addition, in its opinion, the allegation about the measures that it allegedly took against the complainant on or about August 4, 2021, is time-barred.

[11] Specifically, the respondent submitted that the complainant could not allege that she suffered threats or coercion because she exercised her labour relations rights or those in Part 2 of the *Act* (filing a grievance), since the events described in her complaint occurred on August 4, 2021, and February 24, 2023; that is, before her grievances were filed on March 13, 2023. On that point, the respondent referred me to *Marleau v. Treasury Board (Royal Canadian Mounted Police)*, 2023 FPSLREB 47 at paras. 24 and 25.

[12] In addition, the respondent submitted that in the complaint, the complainant did not describe how the actions alleged against it were reprisals motivated by exercising an appeal right. According to the respondent, the complaint does not establish an arguable case that ss. 186(2)(a)(iv) and 189 of the *Act* were violated. Therefore, it should be rejected (see *Hager v. Statistical Survey Operations*, 2009 PSLRB 80 at para. 34).

[13] Finally, the respondent objected to the Board's jurisdiction to hear the allegation as to events that occurred on August 4, 2021, involving the leave without pay, as it was not made within 90 days, as required under s. 190(2) of the *Act*.

B. For the complainant

[14] In response to the respondent's objections, the complainant submitted that the new actions taken in February 2023 related to correcting her double-employment contract resulted from the situation that existed in July 2021. She became aware of that new fact on February 13, 2023.

[15] On March 3, 2023, the complainant informed her union representative that "[translation] … imposing an erroneous correction to her contract despite her firm opposition and arguments constituted an abuse of power and an unfair labour practice …". She states that because of the correction to her contract, which according to her made no sense, she filed two grievances on March 13, 2023, made one complaint with the CHRC on March 28, 2023, and made this complaint with the Board.

[16] I note that the complainant's response to the respondent's objections amounted to a reiteration of the facts set out in her original complaint. More precisely, she again addressed the question of her registration in the PIMS without her consent and her contract correction. She did not respond to the essence of the respondent's objection that the alleged threats or coercion preceded the exercise of her rights, namely, filing her grievances (see ss. 186(2)(a)(iv) and 189(1)(b) of the *Act*).

[17] As for the respondent's objection that the allegation about the events that occurred on August 4, 2021, is time-barred, the complainant's response was unclear. From what I understand, she submitted that it "[translation] … was in no way reasonable to expect …" that she would make her complaint within the prescribed time limit, considering "[translation] … the volume of her allegations of unfair labour practices …". I also remember from her response that the August 4, 2021, events seem "[translation] part of the historical context".

C. Request for "additional submissions"

[18] To dispose of the respondent's objections, I invited the parties to make additional submissions. In my January 23, 2024, directive, I informed the complainant that to accommodate her family obligations, I was flexible with respect to the deadline for making her submissions. The objective was to give her enough time to respond to the respondent's objections, given their potential impact on her complaint. I specified that if the parties chose not to make further submissions, I would rule on the respondent's request to dismiss the complaint based on the documents already on file.

The respondent informed me that it did not wish to make any more submissions about its objection.

[19] On January 24, 2024, the complainant stated that "[translation] … the parties have already had the opportunity to exchange and share documents about the respondent's objections …". Toward the end of her email, she added this:

> [Translation]
>
> …
>
> *Thus, no additional submissions will be made about the complaint … since the required introductory documents were sent for background purposes, to establish a prima facie case necessary for this type of labour relations complaint, namely, 30 explanatory pages and appendices corresponding to the facts mentioned at the opening of the file that the Board received on April 21, 2023. The employer's objections have already been raised and answered by the complainant and the employer and concluded by the employer during the preliminary document exchange ….*
>
> …

[20] On May 1, 2024, the Board asked the complainant to send it the 30-page explanatory document and appendices that she mentioned in her January 24, 2024, email, for review. In her May 5, 2024, reply, she merely referred the Board to the documents already on file and did not provide the requested documents. Toward the end of her email, she wrote this:

> [Translation]
>
> …
>
> *Thus, taking into account the different exchanges with the Board and the employer referring to the several information documents sent with complaint 561-02-47560 since April 2023, the responses that the employer obtained to the complaint, the complainant's objection and the document production, and then the responses obtained from the Board on July 27 and September 21, 2023, about the Board's handling procedures for this type of complaint, I request that I obtain the Board Member's judgement and decision based on the information available from the 2023 exchanges.*
>
> …

[21] I carefully reviewed the written arguments and documents that the parties filed about the respondent's preliminary objections. For the reasons set out in this decision, I allow the objections and dismiss the complaint.

III. Reasons

[22] The respondent asked that I dismiss the complaint on the ground that it does not establish an arguable case. In addition, it submitted that the allegation about the measures that it allegedly took against the complainant on or around August 4, 2021, is time-barred. First, I will deal with the objection that the allegation in question is time-barred. Next, I will determine whether the complaint, or what remains of it, establishes an arguable case.

A. The unfair-labour-practice allegation made around August 4, 2021, is time-barred

[23] The complainant alleged that the respondent threatened or coerced her due to her leave without pay on August 4, 2021. It is not clear what exactly she accused the respondent of doing. She did not specify the nature of the threats or coercion or the context in which they were made or taken.

[24] That said, the complainant did not dispute that she was aware of the alleged measures or circumstances in July and August 2021. Rather, in her reply to the respondent's objections, she claimed that this situation is related to the actions it took in February 2023 and that it is part of the historical context.

[25] In addition, the complainant appeared to indicate that it was not reasonable to expect her to have made the complaint within 90 days because of the "[translation] … volume of her unfair-labour-practice allegations …". That explanation does not hold water, given the relevant factual framework.

[26] Section 190(2) of the *Act* provides that a complaint must be made within 90 days after the date on which the complainant became aware of, or in the Board's view should have become aware of, the actions or circumstances that gave rise to the complaint. As the complainant did not make her complaint within 90 days of the measures that the respondent allegedly took against her in summer 2021, this part of the complaint is considered out of time. Therefore, I do not have the jurisdiction to hear it.

B. The unfair-labour-practice complaint about the correction to her employment contract (in February 2023) did not establish an arguable case

[27] The Board often applies the arguable-case analysis when it receives an unfair-labour-practice complaint, especially under s. 190(1)(g) of the *Act*. In this analysis, the

key issue to be resolved is determining whether, assuming that all the facts alleged in the complaint are true, there is substantial evidence that the respondent engaged in an unfair labour practice within the meaning of s. 185 of the *Act* (see *Gray v. Canada Revenue Agency*, 2013 PSLRB 11 at para. 79; *Manella v. Treasury Board of Canada Secretariat*, 2010 PSLRB 128 at para. 31; and *Hager*, at para. 34). In other words, assuming that the facts alleged in the complaint are true, if it is found that it cannot be proved that the respondent engaged in an unfair labour practice within the meaning of s. 185 of the *Act*, then the complaint may be dismissed on that ground alone (see *Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37 at para. 21).

[28] The complainant alleged that the respondent engaged in an unfair labour practice contrary to ss. 186(2)(a)(iv) and 189 of the *Act* by intimidating, threatening, or coercing her. That unfair labour practice arose from the fact that the respondent reportedly informed her that her employment contract for the IS-04 position had to be corrected, to reflect that she was in a double-employment situation, which, in my opinion, constitutes the essence of this complaint.

1. Section 186(2)(a)(iv) of the *Act*

[29] Section 186(2)(a)(iv) of the *Act* prohibits the employer from taking certain actions against an employee who has exercised a right under Parts 1, 2, or 2.1 of the *Act*. Its purpose is to protect the interests of employees exercising their rights under the parts of the *Act* in question (see *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2 at para. 364). For convenience, I have reproduced s. 186(2)(a)(iv) of the *Act*, as follows:

Unfair employer practices — employer	***Pratiques déloyales par l'employeur***
186 (2) *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*	***186 (2)*** *Il est interdit à l'employeur, à la personne qui agit pour le compte de celui-ci ainsi qu'au titulaire d'un poste de direction ou de confiance, à l'*officier, *au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada *ou à la personne qui occupe un poste détenu par un tel officier, qu'ils agissent ou non pour le compte de l'employeur :*

(a) *refuse to employ or to continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*	***(a)*** *de refuser d'employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, de la licencier par mesure d'économie ou d'efficacité à la Gendarmerie royale du Canada ou de faire à son égard des distinctions illicites en matière d'emploi, de salaire ou d'autres conditions d'emploi, de l'intimider, de la menacer ou de prendre d'autres mesures disciplinaires à son égard pour l'un ou l'autre des motifs suivants :*
…	[…]
(iv) *has exercised any right under this Part or Part 2 or 2.1 ….*	***(iv)*** *elle a exercé tout droit prévu par la présente partie ou les parties 2 ou 2.1* […]

[30] Section 191(3) of the *Act* reverses the burden of proof. It clarifies that any complaint made under s. 186(2) constitutes evidence of the alleged contravention. Thus, the onus is on the party challenging the complaint to demonstrate that no offence was committed. This reversal of the burden is unusual in the *Act* and is an exception (see *Quadrini*, at para. 25).

[31] That said, for the reverse onus to apply and for the respondent to be required to prove that the alleged offence was not committed, the complainant must demonstrate that her complaint establishes an arguable case: "To engage the respondent's burden to defend itself, the decision maker must first be satisfied that the facts alleged by the complainant — assumed to be true — reveal an arguable case" (see *Hager*, at para. 38; also *Gray*, at para. 79; and *Marleau*, at para. 24).

[32] The complainant alleged that the respondent intimidated, threatened, or coerced her by attempting to correct her employment contract for the IS-04 position to reflect that she was in a double-employment situation. According to her, the situation occurred in February 2023. For the purposes of the arguable-case analysis, I accept that allegation as true. However, she did not specify the exercise of which right or rights under Part 1, 2, or 2.1 of the *Act* would have led the respondent to take the actions complained of. It is not sufficient to demonstrate that the respondent took any

of the actions listed in s. 186(2)(a) of the *Act*. The prohibited action must have been taken in response to the employee exercising a right under Parts 1, 2, or 2.1 of the *Act*.

[33] The complaint reveals that the complainant exercised her right under Part 2 of the *Act* by filing two grievances on March 13, 2023, which are about her contract correction. However, this right was exercised after the respondent allegedly took actions prohibited by s. 186(2)(a) against her in February 2023. She did not specify how the actions complained of constituted reprisals for the grievances that she filed. That is problematic, given that the grievances were filed after the alleged violations, not before, as required (see *Marleau*, at paras. 24 and 25). The complaint does not disclose that the respondent took actions prohibited by s. 186(2)(a) in response to the complainant exercising a right under Parts 1, 2, or 2.1 of the *Act*.

[34] The complainant stated in her complaint that in July or August 2021, she raised abusive and discriminatory situations by the respondent with her union and that she wished to make a complaint. However, she did not because the union wanted to "[translation] … first see what was going on with management". Informally raising such situations with her union did not equate to exercising a right within the meaning of s. 186(2)(a)(iv) of the *Act*.

[35] Accordingly, I find that the complaint does not establish an arguable case that the respondent took reprisals against the complainant because she exercised a right under Parts 1, 2, or 2.1 of the *Act*.

2. Section 189 of the *Act*

[36] The complainant alleged that the respondent also contravened s. 189 of the *Act* for the same reasons stated to support her complaint in s. 186(2)(a)(iv). Section 189(1) reads as follows:

Unfair labour practices — persons	***Pratiques déloyales par quiconque***
189 (1) *Subject to subsection (2), no person shall seek by intimidation or coercion to compel an employee*	***189 (1)*** *Sous réserve du paragraphe (2), il est interdit à quiconque de chercher, par menace ou mesures coercitives, à obliger un fonctionnaire :*
(a) *to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective*	***(a)*** *à adhérer ou à s'abstenir ou cesser d'adhérer à une organisation syndicale, ou encore, sauf*

agreement, to continue to be, a member of an employee organization; or	*disposition contraire dans une convention collective, à continuer d'y adhérer;*
***(b)** to refrain from exercising any other right under this Part or Part 2 or 2.1.*	***(b)** à s'abstenir d'exercer tout autre droit qu'accorde la présente partie ou les parties 2 ou 2.1.*

[37] The complainant did not allege that the respondent threatened or coerced her because she became, refrained from becoming, or ceased to be a member of an employee organization or continued to be one.

[38] As for s. 189(1)(b) of the *Act*, the complaint does not establish an arguable case that the respondent or any person threatened or coerced the complainant, to compel her to refrain from exercising any right under Part 1, 2, or 2.1 of the *Act*. In effect, she did not allege that the respondent or anyone else has attempted, by their actions, to compel her to refrain from exercising the rights in question.

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

(The Order appears on the next page)

IV. Order

[40] The complaint is dismissed.

August 27, 2024.

FPSLREB Translation

Adrian Bieniasiewicz,
a panel of the Federal Public Sector
Labour Relations and Employment Board