

Date: 20240916

Files: 560-02-42892 and 42931

Citation: 2024 FPSLREB 128

*Federal Public Sector
Labour Relations and
Employment Board Act and
Canada Labour Code*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

SETH MUISE

Complainant

and

TREASURY BOARD

(Department of Public Works and Government Services)

Respondent

Indexed as

Muise v. Treasury Board (Department of Public Works and Government Services)

In the matter of complaints made under section 133 of the *Canada Labour Code*

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

For the Complainant: Himself

For the Respondent: Peter Doherty, counsel

Decided on the basis of written submissions,
filed June 24 and 25, 2024.

REASONS FOR DECISION

I. Introduction

[1] Seth Muise (“the complainant”) made two complaints to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; “the *Code*”), alleging reprisal by Public Services and Procurement Canada (“the respondent” or “PSPC”).

[2] The respondent objected to the complaints on the ground of timeliness, asserting that they were not filed within the period of time set out in the *Code*.

[3] During a teleconference with the parties, I requested written submissions on the matter of timeliness and provided the parties with an opportunity to provide and respond to the submissions. The hearing scheduled for July 9 to 11, 2024, was postponed to permit me to consider the parties’ submissions.

[4] This decision addresses only the timeliness of the complaints.

II. Provisions of the *Code*

[5] Employers are prohibited from retaliating against employees who engage the rights protected under the *Code*. This is set out in s. 147, which reads as follows:

147 No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee’s rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

147 Il est interdit à l’employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s’il ne s’était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :

a) soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

b) soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.

[6] Section 133 of the *Code* provides for an employee to make a complaint that s. 147 was contravened. Section 133(2) stipulates a time limit for making a complaint, 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.

[7] Therefore, for the Board to have jurisdiction to proceed with the complaints, they must have been made within 90 days from the time the complainant knew or ought to have known of the circumstances that give rise to them.

III. The complaints

A. The first complaint

[8] On January 29, 2021, the complainant filed the first complaint with the Board concerning a written reprimand issued by PSPC on March 3, 2020, about a workplace incident that occurred on May 27, 2019. He viewed the discipline as an act of retaliation.

[9] On March 26, 2020, the complainant filed a grievance disputing the finding of misconduct and the resulting discipline. The grievance proceeded to the final level, where it was denied.

[10] Documents provided with the written submissions confirm the sequence and timing of the discipline and grievance. The final level grievance presentation occurred

November 27, 2020, and counsel represented the complainant. The complainant acknowledged that he received the final level response on January 19, 2021.

B. The second complaint

[11] On April 27, 2021, the complainant made a second complaint with the Board. It contained a number of separate allegations. They are set out in the following sections, in chronological order.

1. Privacy breach concerns

[12] The information provided sets out privacy breach reports made by the complainant on November 19, 2019, two reports on January 6, 2020, and lastly, one report on July 2, 2020. The reports address the sharing of information in the workplace that he considered unnecessary.

2. Comment about “paranoid behaviour”

[13] On February 4, 2020, the complainant’s manager wrote to him after meeting with him. Among her comments, she wrote this:

...

• As I mentioned I have observed some paranoid behaviour (file monitoring implemented solely for you, removal from fire warden duties, etc.) From your perspective it is reservation and distrust towards the organization. While I can appreciate that, I am hopeful that we can move forward with open communication.

...

[14] The complainant claimed that this indicated differential treatment and harassment.

3. Discipline submission

[15] The complainant alleged an act of retaliation when his manager sent him an email on February 19, 2020, directing him to provide his submission concerning a disciplinary incident that day. As he was expecting the deadline of March 19, 2020, he raised his concern immediately and the date was amended to March 19, 2020.

4. Fitness to work evaluation

[16] On March 26, 2021, the complainant learned that on March 6, 2020, PSPC prepared a draft letter asking him to consent to a fitness to work evaluation. The letter stated that PSPC had requested his consent for the evaluation during a meeting on March 3, 2020.

[17] The letter was not sent to the complainant, and no fitness to work evaluation was conducted. However, he felt that the action of preparing it was groundless and baseless.

5. Long-term disability application

[18] The complainant applied for long-term disability benefits. The insurer acknowledged receiving his completed application on May 29, 2020.

[19] Part 3 of the application, completed by the complainant's manager, asked, "In what way was the Member's performance on the job affected by his/her disability?" His manager completed the form on April 8, 2020, to indicate the performance challenges that the complainant experienced.

[20] The complainant viewed the manager's response as incorrect, coercive, and malicious.

[21] The insurer issued a letter to the complainant on August 17, 2020, indicating that the claim was approved and that the monthly benefits were to begin as of May 28, 2020.

[22] On September 6, 2020, the complainant filed a grievance to dispute his manager's comments on Part 3. On March 14, 2021, PSPC denied the grievance at the final level.

IV. Arguments

A. For the complainant

[23] In his submission, the complainant stated that the delay making his complaints was due to PSPC's "non responsiveness" as he proceeded through the grievance process. He stated that he did not understand the extent of the harassment until one

month before the final level grievance presentation. Consequently, he argued that it must be considered that he made the complaint within the 90-day time limit.

B. For the respondent

[24] The respondent submitted that both complaints were made long after the actions or circumstances that led to them and beyond the 90-day time limit set out in s. 133(2). Before filing the complaints, the complainant pursued two grievances and applied for long-term disability benefits.

[25] The respondent added that the Board has no discretion to extend the time limit provided by s. 133(2) and that, even if the Board did, no extraordinary circumstances beyond the complainant's control prevented him from meeting the deadline set out in the *Code*.

V. Analysis

[26] This decision is confined to the issue of the timeliness of the complainant's two complaints. It does not address the merit of either complaint.

[27] The time for making a complaint is limited by s. 133(2) of the *Code*. It provides for 90 days from the date on which the complainant knew, or ought to have known, of the action or circumstances that gave rise to the retaliation allegation. The issue is whether the complaints were made within that time. The time limit is mandatory, and the Board has no authority to extend it (see *Panesar v. Canada Revenue Agency*, 2024 FPSLREB 32 at para. 104; *Larivière v. Treasury Board (Department of Employment and Social Development)*, 2019 FPSLREB 73 at para. 71; and *Larocque v. Treasury Board (Department of Health)*, 2010 PSLRB 94 at para. 37).

A. The first complaint

[28] Documents before me confirm that on March 3, 2020, PSPC issued a written reprimand to discipline the complainant for a workplace occurrence. On March 26, 2020, he grieved the discipline. This leads me to conclude that at the latest, on March 26, 2020, when he signed the grievance, he knew of the discipline.

[29] The first complaint was made with the Board on January 29, 2021. That was more than 90 days after March 26, 2020, and significantly beyond the 90-day time limit set out in s. 133(2) of the *Code*.

[30] Although the complainant may feel that it took him some time to assess his situation and to conclude that the discipline was retaliatory, this is not a sufficient reason to overlook or extend the time limit to make the complaint. The complainant's eventual understanding of events is not relevant to the time limit. Rather, the focus must remain fixed on when the complainant ought to have known of the facts and circumstances giving rise to the complaint. Only the events that occurred in the 90 days preceding the complaint are considered.

[31] Accordingly, as the first complaint was not made during the time permitted by s. 133(2), the Board has no authority to proceed to hear it. The wording of s. 133(2) of the *Code* mirrors s. 190(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*). Applying s. 190(2) of the *FPSLRA*, the Board has previously decided, “[i]t is a matter of being aware of the circumstances that gave rise to the complaint” (see *Stratton v. Public Service Alliance of Canada*, 2024 FPSLREB 53 at para. 75). Similarly, in the present case, I find that the complainant was aware of the circumstances giving rise to his complaint by March 26, 2020. The complaint of January 29, 2021, was filed well after the 90-day time period that is allowed by the *Code*.

B. The second complaint

[32] The second complaint recounts many incidents of alleged retaliation spanning the period from November 2019 to August 2020. It was made with the Board on April 27, 2021.

[33] The parties' submissions contain the following relevant information that I have considered to determine the timeliness issue:

- The complainant prepared the privacy breach reports. The most recent one is dated July 2, 2020.
- On February 4, 2020, he received an email in which his manager referred to “paranoid behaviour”.
- On February 19, 2020, he knew that his manager set that day for him to provide a submission concerning a disciplinary investigation, and I note that it was an apparent error that was immediately rectified.
- On March 6, 2020, PSPC prepared a draft letter that remained unsent and that asked the complainant to consent to undergo a fitness to work evaluation. The text of the letter makes it clear that he knew of the request on March 3, 2020, which he has not disputed.

- By September 6, 2020, he knew of PSPC's comments on the long-term disability benefits application, as that was the day on which he filed a grievance with respect to them.

[34] More than 90 days before the complaint was made on April 27, 2021, the complainant knew or ought reasonably to have known of each of the actions or circumstances set out in it. His knowledge is evidenced by his participation in preparing reports, receiving emails, and filing a grievance. As to when he knew or ought reasonably to have known that PSPC was considering a fitness to work evaluation, I accept that it was discussed with him on March 3, 2020. While the complainant may not have known of the unsent draft letter until March 26, 2021, I do not view this as an event that renewed the 90-day limit provided in s. 133(2). He knew or ought reasonably to have known that it was a consideration by March 3, 2020.

[35] Accordingly, as the second complaint was not made during the time permitted by s. 133(2) of the *Code*, the Board has no authority to hear it. As with the first complaint. I find that none of the events alleged in the second complaint fall within the 90 days prior to filing the complaint. The complainant was aware of the facts and circumstances of the last of the events by September 2020. He did not file a complaint until June 2021. Again, the filing occurred significantly after the 90-day time period lapsed.

VI. Conclusion

[36] The Board is bound by the provisions of the *Code*. The 90-day time limit is a strict requirement that the *Code* provides. I am satisfied that the complainant knew or ought reasonably to have known of each of the actions or circumstances set out in his complaints well before that period. As a result, his complaints were not made within the time limit imposed by s. 133(2). They are untimely, and the Board has no authority to hear them.

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

(The Order appears on the next page)

VII. Order

[38] The complaints are dismissed.

September 16, 2024.

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