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File: 561-02-46481

Citation: 2024 FPSLREB 80

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

BRITTANY RACKHAM

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Rackham 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: Pierre Marc Champagne, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Sandra Gaballa, representative, and Lidet D. Getachew, counsel

Decided on the basis of written submissions, filed January 10 and 13, February 28, October 3, and November 3, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] When she made her complaint, Brittany Rackham ("the complainant") was employed by the Correctional Service of Canada ("the employer" or CSC) in the Food Services Department (FSD) of the CSC's Stony Mountain Institution in Stony Mountain, Manitoba. The Public Service Alliance of Canada (PSAC) is the certified bargaining agent for the employer's food service workers, and at all material times, the Union of Safety and Justice Employees was the PSAC component responsible for providing the complainant with direct workplace assistance and representation. In this decision, "the union" and "the respondent" refer to either or both entities.

[2] In January 2023, the complainant made this complaint, in which she alleges that the respondent breached its duty of fair representation and therefore also s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). She alleges that it acted arbitrarily, as it failed to investigate an ongoing workplace-safety issue and handled her case superficially.

[3] The respondent denies the allegations and made a preliminary request that the complaint be dismissed summarily, as the allegations fall outside the scope of the *Act* or the relevant collective agreement, which is between the respondent and the Treasury Board for the Operational Services group that expired on August 4, 2021 ("the collective agreement").

[4] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) allows the Federal Public Sector Labour Relations and Employment Board ("the Board") to decide any matter before it without holding an oral hearing (see *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68 at para. 4). Since the parties had the opportunity to file additional submissions, I am satisfied that it is possible to decide the respondent's preliminary request on the basis of the documents on file as well as the parties' written submissions.

[5] For the following reasons, I find that the complaint does not make an arguable case, as its substance does not fall under the scope of the *Act* or the collective agreement.

II. Summary of the facts

[6] As a food service worker with the employer's FSD, in addition to her food preparation duties, the complainant is required to train, mentor, and help inmates hired through the FSD work program prepare food alongside the kitchen staff. In August 2021, an inmate assaulted a food services supervisor with a weapon while working in the kitchen. The complainant was present during that incident and during other similar incidents that had occurred in the past.

[7] After that incident, the complainant and 22 of her FSD colleagues made an internal complaint under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*") and eventually exercised their right under the *Code* to refuse to work by reason of the existence of what they considered a workplace danger. The complainant acted as the leading person for the group.

[8] In September 2021, a senior investigator mandated under the *Code* ("the investigator") issued both a decision confirming the existence of a danger in the complainant's workplace and directions to the employer, to resolve the situation.

[9] After the report was issued, the complainant advised the respondent that she wished to appeal it, as she found that it contained inaccuracies and that the trainings that the employer was ordered to provide were inadequate. One of the respondent's senior representatives confirmed with her that the appeal would be filed.

[10] The complainant followed up with the respondent several times in the following weeks, only to have it confirmed that the appeal process was underway. Later, in October 2021, the investigator issued a second decision, confirming that the employer had implemented the requested measures and that the workplace danger had been resolved. The next day, the respondent filed an appeal with the Canada Industrial Relations Board (CIRB) against both of the investigator's decisions.

[11] Eventually, the CIRB dismissed the appeals, as the one against the investigator's first decision had been filed late, and it did not have jurisdiction over the one against the second decision. Therefore, the complainant made this complaint against the respondent, as she was disappointed with its lack of representation for her and her colleagues in the whole process.

III. Summary of the arguments

A. For the complainant

[12] Although more than once, the complainant had the opportunity to provide all the necessary information to support her complaint, she submitted only very brief, limited, and undetailed written submissions, to which she joined examples of emails and documents mostly related to the workplace-safety matter described earlier in this decision.

[13] Nevertheless, her allegation in general is that the union failed to represent her and her 22 colleagues in the CIRB appeal process. The respondent had the necessary knowledge and experience to prepare and submit an appeal application within the time limits set out in the *Code*. It did not put the necessary attention on the file, as required, and the appeal was lost because it was not submitted in a timely manner.

[14] The complainant finds it shameful that the union has requested that the complaint be dismissed, as she hoped that it would be accountable and remorseful for its mistake. She questions its argument that this case does not fall within the collective agreement's scope, as it agreed to handle her case on her behalf, and insisted on it.

[15] Furthermore, she submits that her occupational-health-and-safety issue falls under the collective agreement, as its article 7 refers to the list of National Joint Council (NJC) agreements that form part of it, which includes the NJC's *Occupational Health and Safety Directive* ("the Directive").

[16] By law, the union is required to represent its members fairly. However, despite her numerous communications to follow up and monitor the filing of the appeal, it did not respect the expected deadlines. Therefore, she submits that it did not do what it was required to do under the law.

[17] As for the corrective measures that she seeks, the complainant simply reproduced s. 192 of the *Act* and added that she wants "more than anything" for a correctional officer to be posted in the Stony Mountain Institution's food services area, to ensure its safety.

B. For the respondent

[18] The respondent submits that the Board has no jurisdiction to hear this issue as it falls outside the ambits of both the *Act* and the collective agreement. Therefore, the duty of fair representation set out in s. 187 is inapplicable to this case.

[19] The process for which it provided representation to the complainant was an appeal process under Part II of the *Code*. It suggests that it had no obligation whatsoever to provide such representation in that context.

[20] Referring to *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3, and *Brown v. Union of Solicitor General Employees*, 2013 PSLRB 48, the respondent submits that the Board's jurisprudence established long ago that s. 187 of the *Act* applies only to matters arising from the *Act* or the relevant collective agreement. The respondent further suggests that in *Burlacu v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 51, the Board has already specifically recognized that the appeal processes for employees available under ss. 129(7) and 146(1) of the *Code* do not fall under the Board's jurisdiction.

[21] The respondent adds that there is no provision in the collective agreement that would place on it an explicit or implicit obligation to represent employees in disputes that arise under Part II of the *Code*. The Directive and article 7 of the collective agreement that the complainant referred to do not bring this issue within the collective agreement's ambit.

[22] It concludes its arguments by submitting that the law has been long settled in this area by the Board and that the complainant did not present any case law or arguments in her submissions that would suggest otherwise.

IV. Reasons

[23] This complaint was made under s. 190(1)(g) of the *Act*. In it, the complainant alleges that the respondent breached its duty of fair representation set out in s. 187. Following its preliminary request to dismiss this case without holding an oral hearing, I would normally have to determine whether, after taking all her factual allegations as true, there is an arguable case that the respondent acted arbitrarily or in bad faith. I would not need to make any determination with respect to discrimination in this case, as she did not make any allegation suggesting that she was discriminated against.

[24] However, a simple analysis of the written submissions and the supporting documents presented in this case quickly demonstrate that the entire context, allegations, and facts that the complainant submitted are related to a workplace-safety issue that fell under Part II of the *Code* for which the respondent provided representation to her and her colleagues.

[25] As a long line of Board jurisprudence has consistently concluded over the years, a complaint alleging a breach of s. 187 must be related to rights, obligations, and matters that are set out in the *Act* or a collective agreement and that are related to the relationship between employees and their employers (see *Elliott*, at paras. 183 to 188; *Brown*, at paras. 52 and 54; *Hancock v. Professional Institute of the Public Service of Canada*, 2023 FPSLREB 51 at para. 84; *Fidèle v. National Police Federation*, 2023 FPSLREB 48 at para. 16; and *Archer v. Public Service Alliance of Canada*, 2023 FPSLREB 105 at para. 35).

[26] The appeal process for which the respondent provided representation to the complainant and of which she claims to be unsatisfied in this complaint was filed under ss. 129(7) and 146(1) of the *Code* after a refusal to work that she exercised under s. 128.

[27] When it comes to the *Code*, it is well established that the Board's jurisdiction under the *Act* is very limited and restrained to complaints dealing with ss. 133 and 147 of the *Code*. Those provisions do not concern refusals to work or applications to appeal a decision or a direction issued after such a refusal under Part II of the *Code* (see *Archer*, at paras. 42 to 48; and *Burlacu*, at paras. 76 and 77).

[28] The union is not limited to representing its members only in matters linked to the *Act* or the collective agreement, but when it does, as it did in this case, it does so voluntarily. That does not mean that the duty of fair representation set out in s. 187 of the *Act* is actioned automatically, as the matter still falls outside the scope of the *Act* or the collective agreement (see *Elliott*, at paras. 195 and 198; *Millar v. Public Service Alliance of Canada*, 2021 FPSLREB 68 at para. 19; and *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48 at para. 78).

[29] The complainant's reference to article 7 of the collective agreement and to the Directive that forms part of that agreement does not support her suggestion that this complaint would be covered by s. 187 of the *Act*.

[30] Indeed, article 7 does enumerate some NJC directives that form part of the collective agreement, including five related to occupational health and safety (OHS). At first glance, two seem potentially relevant to the complainant's situation: the Directive and the *Refusal to Work Directive*.

[31] While five directives related to OHS are listed in article 7, the version of the Directive that came into force on April 1, 2008, mentions in its preamble that the NJC was working toward amalgamating all the OHS directives and that the *Refusal to Work Directive* had already been amalgamated in that version.

[32] Whether the version of the Directive that came into force on March 1, 2022, or the version from January 1, 2011, is referred to, its preamble sets out that it contains only clarifications, precisions, and enhancements to Part II of the *Code* and that it should be read together with the appropriate sections of the *Code* and its applicable regulations.

[33] Therefore, the Directive simply intends to complement and clarify the application of certain parts of Part II of the *Code* for the parties to the collective agreement. It does not intend to replace the *Code* or to incorporate it into the collective agreement. Moreover, the only reference to a refusal to work in the Directive confirms that one should be exercised in accordance with s. 128 of the *Code*.

[34] The Directive also stresses the fact that a grievance procedure can be used only for protections in the Directive that are additional to the *Code* and that it should not be used if an alternative redress procedure is available under the *Code*. By being silent about the appeal procedures available to the complainant under ss. 129(7) and 146(1) of the *Code*, the Directive makes it clear that that procedure still falls outside the collective agreement's scope.

[35] On another note, the corrective measure that the complainant seeks also makes it clear that she wants "more than anything" for the employer to take what she believes are the necessary measures to protect her and her colleagues while they work in the kitchen. However, as the Board stated in some of its previous decisions, she must understand that a complaint alleging a breach of s. 187 of the *Act* should not be used to resolve outstanding issues with the employer (see *Corneau v. Association of Justice Counsel*, 2023 FPSLREB 16 at para. 95; *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at para. 164; and *Archer*, at para. 61).

[36] Finally, when the Board gave the parties the opportunity to provide additional submissions in advance of rendering this decision, it directly invited them to comment on specific paragraphs from some of its decisions. While the respondent presented observations on most of them in its written submissions, the complainant chose not to address them or simply ignored that suggestion. Furthermore, she did not refer to any other case law that would support her position.

V. Conclusion

[37] Consequently, I conclude that this complaint does not demonstrate an arguable case of a breach to s. 187 of the *Act*, as its substance does not fall under the scope of either the *Act* or the collective agreement.

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

(The Order appears on the next page)

VI. Order

[39] The complaint is dismissed.

June 13, 2024.

Pierre Marc Champagne,
a panel of the Federal Public Sector
Labour Relations and Employment Board