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File: 561-02-43432

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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

LEOPOLD GOMA-YITA

Complainant

and

UNION OF SAFETY AND JUSTICE EMPLOYEES AND DENYSE SAUMUR

Respondents

Indexed as
Goma-Yita v. Union of Safety and Justice Employees

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondents: Rohoma Zakir, counsel

Decided on the basis of written submissions, filed July 19 and August 8 and 15, 2024.

REASONS FOR DECISION

I. Overview

[1] Leopold Goma-Yita, the complainant, filed a complaint alleging that the Union of Safety and Justice Employees ("USJE") and one of its officers, Denyse Saumur, violated its duty of fair representation. The USJE is a component of the Public Service Alliance of Canada ("PSAC"), and I will refer to the respondents collectively as "PSAC" in this decision. The respondents have moved to dismiss the complaint on a preliminary basis because it was filed late and because the Federal Public Sector Labour Relations and Employment Board ("the Board") has no jurisdiction to grant the remedies sought by the complainant.

[2] I have dismissed the complaint because there is no arguable case that the Board has the jurisdiction to grant the complainant the remedies he seeks. I have also dismissed the complaint because most of it is untimely, and the complainant has no arguable case about the part that is timely.

[3] My reasons follow.

II. Analytic approach to the preliminary objections

[4] When dealing with preliminary objections to duty-of-fair representation complaints, the Board typically applies what it calls the "arguable case" approach. The arguable-case approach means that the Board will consider all the facts alleged by the complainant as true, so long as those facts have an air of reality, are not based solely on possible future supporting evidence, and are more than mere arguments, speculation, or rhetorical questions; see *Kemp v. Public Service Alliance of Canada*, 2024 FPSLREB 87 at para. 54. The Board will also consider facts set out by the respondent when those facts are unchallenged by the complainant; see *Kemp*, at para. 56. The Board will then decide whether the complainant has made out an arguable case that the bargaining agent has breached its duty of fair representation.

[5] I have applied that approach in this case. I have accepted the complainant's factual allegations as true, except those without an air of reality or that are mere arguments and speculation.

[6] Additionally, the Board has the authority to decide matters in writing, according to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C.

2013, c. 40, s. 365). I convened a case management conference with the parties on June 17, 2024, to discuss the best way to resolve these preliminary issues and to deal with other procedural matters unrelated to this decision. Neither party objected to dealing with the preliminary issues in writing, and so I ordered that they do so and that they file submissions on a timetable that they also agreed to.

III. Background facts to the complaint

[7] The complainant was hired to work for the Royal Canadian Mounted Police (RCMP) in 2009. On March 4, 2019, he began an assignment with another division in the RCMP. The RCMP ended that assignment early on April 4, 2019, and the complainant returned to his substantive position. The complainant grieved this early end to his assignment on May 1, 2019; he also grieved that the employer excluded him from team meetings and that it failed to pay him overtime. PSAC represented him in that grievance process.

[8] The RCMP dismissed the grievance at the final level of the grievance process on June 22, 2020. The complainant states that this final-level decision was made by someone without the delegated authority to do so. While he states that this means that the decision was never made, his argument could be read to mean that the decision was a nullity because it was made by a decision maker without delegated authority to do so. The complainant did not attend the hearing of this final-level grievance, which took place by telephone on February 27, 2020, because of a snowstorm; he also states that he never approved the submissions made by his representative on his behalf that day.

[9] The complainant attended a disciplinary meeting on July 24, 2020, about his behaviour in the workplace. Following that meeting, he was placed on sick leave pending a fitness-to-return-to-work evaluation. His paid sick leave ran out on August 13, 2020, and he was on unpaid sick leave from some date after August 13, 2020, until May 17, 2021.

[10] The complainant responded to being placed on sick leave by indicating his intention to resign. Rather than accept his resignation immediately, the RCMP invited him to engage in Informal Conflict Management Services (ICMS). Eventually, the complainant agreed. PSAC represented him during this ICMS process. There was a facilitated discussion on January 7, 2021; there is some dispute over whether another

meeting took place on May 10, 2021. There is no dispute there was a final ICMS meeting on June 3, 2021.

[11] The complainant states that he reached an agreement with the RCMP during the ICMS session on January 7, 2021, which was that he would provide a doctor's letter certifying his fitness to return to work and that once it was provided, he would be paid his lost wages between September 2020 and May 2021 and would be relocated to a new position within the RCMP. The complainant does not explain how an agreement reached on January 7, 2021, would provide for lost wages up to May 2021. The complainant states that the June 3, 2021, ICMS session was to finalize his lost wages and relocation but that the ICMS session concluded abruptly when the employer's representative became angry and walked out.

[12] The complainant made this complaint on August 17, 2021, which is within 90 days of that June 3, 2021, ICMS session.

[13] The complainant also made two complaints with the Board against the Treasury Board (acting on behalf of the RCMP) and tried to refer his 2019 grievance to the Board. The Board dismissed both complaints and his grievance because they were untimely; the Board also concluded that the two complaints did not disclose an arguable case against the employer, and it did not have the jurisdiction to hear his grievance. The Board's decision on all these points is *Goma-Yita v. Treasury Board (Royal Canadian Mounted Police)*, 2024 FPSLREB 64 ("*Goma-Yita #1*").

[14] Finally, in his submissions, the complainant set out a lengthy history of personal animosity between himself and several union and RCMP officials. He also alleges a series of criminal actions and alleges that PSAC's representation of him was in bad faith because it supported the employees who committed these criminal acts. The complainant has provided no evidence to substantiate these allegations; however, they are also not relevant to the preliminary issues raised, and I will say no more about them.

IV. The Board has no jurisdiction to grant the relief sought by the complainant

[15] The complainant asks the Board to "… issue an order to the union for contravening section 187 …" of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). At the case management conference held on June 17, 2024,

the complainant clarified that he was seeking three remedies in this complaint: to be reinstated in his job, to be paid lost wages for the period of September 2020 to May 2021 when the complainant says he was suspended, and to be relocated to a different location in Ontario within the RCMP. In his written submissions, the complainant made it clear that he is seeking an order that "… the employer and the union … abide by what was agreed upon."

[16] The respondents argue that the Board has no jurisdiction to grant these remedies against the employer in a duty-of-fair-representation complaint. They rely on *Bufford v. Canada Revenue Agency*, 2015 PSLREB 20 at para. 69, where the Board stated that a remedy for a breach of the duty of fair representation "… cannot be as [*sic*] against the employer, because the employer is not one of the parties against whom the complaints are made." The complainant states that an unfair labour practice is defined in s. 185 of the *Act* as anything prohibited by ss. 186 to 189(1), which includes complaints against the employer as well as against a bargaining agent, and therefore, the Board has jurisdiction to grant a remedy against the employer in this case.

[17] I have concluded that the Board does not have the power to reinstate the complainant, order the employer to relocate him, or order that he be compensated for his period of unpaid sick leave. I have reached that conclusion because of the wording of s. 192(1) of the *Act*, which states that "[i]f the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances **against the party complained of** …" [emphasis added]. The employer is not the "party complained of" in this case; therefore, I do not have the jurisdiction to make an order against the employer.

[18] In other jurisdictions, labour boards have issued awards against an employer in a duty-of-fair-representation complaint. However, in those jurisdictions, the legislation is worded differently so that it permits a labour board to make such an order. For example, in *Cairns v. International Brotherhood of Locomotive Engineers*, 2003 CIRB 230 at para. 64 (upheld in *Via Rail Canada Inc. v. Cairns*, 2004 FCA 194), the Canada Industrial Relations Board concluded that s. 99(2) of the *Canada Labour Code* (R.S.C., 1985, c. L-2) gave it the express authority to impose a remedy against "an employer" in a duty-of-fair-representation complaint. The Ontario Labour Relations Board concluded in *McCormack v. Amalgamated Transit Union*, 2001 CanLII 2376 (ON LRB) at para. 10, that it could make some award implicating an employer; however, while that board did

not cite this specifically, s. 96(4) of the Ontario *Labour Relations Act, 1995* (S.O. 1995, c. 1, Sched. A) provides that it may impose a remedy on an employer or any "other person" in order to "rectify" an unfair labour practice. In *Hutchinson v. Hospital Employees' Union*, [2003] B.C.L.R.B.D. No. 71 (BCLRB) (QL), the British Columbia Labour Relations Board remedied a breach of the duty of fair representation by ordering the union and employer to provide the complainant with a settlement that met the terms that the employer previously offered to settle the case; however, while that board did not cite this specifically, s. 14(4)(b) of the British Columbia *Labour Relations Code* (RSBC 1996, c. 244) gives it the power to direct "any person" to "rectify" an unfair labour practice.

[19] The *Act* does not have any provision that is similar to those other statutes.

[20] The Board in *Bufford* came to the same conclusion about the meaning of s. 192 of the *Act*. It stated that a remedy requiring the employer to do something is not available in this jurisdiction because s. 192 of the *Act* gives the Board the power to "… make any order that it considers necessary in the circumstances **against the party complained of** …" [emphasis added]. In *Lessard-Gauvin v. Public Service Alliance of Canada*, 2022 FPSLREB 4, the bargaining agent breached its duty of fair representation by failing to file the complainant's grievance with the employer. The Board remedied that breach by ordering the bargaining agent to apply to the Board for an extension of time, because granting the extension of time without a separate application "… would really be binding only on the employer, even though it is in no way responsible for the respondent's error …". While the Board did not cite s. 192 of the *Act* in that decision, its reasons are consistent with those in *Bufford* — the Board has no jurisdiction to make an employer bear the burden of a remedy to a duty-of-fair-representation complaint.

[21] I note that the Board has granted a grievor an extension of time to file a grievance as a remedy for a breach of the duty of fair representation in *Peacock v. Union of Canadian Correctional Officers*, 2005 PSSRB 9. That case was decided under the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), s. 23(2) of which was worded similarly to the current *Act*.

[22] I do not need to resolve the difference between *Peacock* and *Bufford* because the issue in both cases was whether the Board could order an extension of time for a

bargaining agent to take some step in the grievance process. The Board's power to extend times in the grievance process flows from its regulation-making powers in s. 237(1)(d) of the *Act* and s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79), enacted under that section; see *Coleman v. Treasury Board*, PSSRB File No. 149-02-26 (19800630) at paras. 26 to 28, for the basis of the Board's jurisdiction to extend grievance time limits.

[23] In this case, the complainant is not seeking an order that would extend some time limit to allow him to pursue a grievance. Instead, he is seeking two orders that only the employer can perform: that he be reinstated, and that he be transferred as soon as he is reinstated. The Board's powers to do so in this complaint could be found only in s. 192(2) of the *Act* which only gives the Board the power to make orders against the party to a complaint. The extent of the Board's powers in s. 237(1)(d) is not at issue. Since the employer is not a party to this complaint, I cannot make those orders.

[24] I considered whether I have the power to grant the other remedy in this case — that the complainant be compensated for his period of unpaid sick leave. As I have just explained, I cannot order the employer to pay him for that period. However, s. 192(1) of the *Act* gives the Board the power to award damages against a bargaining agent for breaching the duty of fair representation. When a bargaining agent breaches the duty of fair representation, the Board could order that it "step into the shoes" of the employer and provide the remedy that the employer would have had to pay had the bargaining agent pursued a case properly.

[25] For example, in *Auyeung v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-3567*, 2013 CanLII 15862 (BC LRB), a union violated its duty of fair representation by carelessly entering into a settlement that waived a statutory right to termination pay. The British Columbia Labour Relations Board concluded that 62 of the complainants would have been entitled to statutory termination pay and ordered that the union pay the termination pay that the employer would have paid but for the settlement.

[26] I considered whether the complainant has an arguable case that the Board can do something similar in this case and order the respondents to pay damages equal to his compensation for the period of his unpaid sick leave. I have concluded that he does

not, for the simple reason that he has not asked for such a remedy. He was clear in his submissions that he alleges that there was an agreement reached during ICMS, that the alleged agreement included a requirement that the employer pay him for his period of unpaid sick leave, and that he wants the Board to order the employer to make this payment. He states that he wants the Board to "… issue orders to both the employer and the union to abide by what was agreed upon." The alleged agreement was that the employer pay him money — not PSAC. I am not prepared to conclude that the complainant has shown an arguable case that the Board should give him a remedy that he has not asked for.

[27] Additionally, the complainant has not set out an arguable case that shows a link between the events that he alleges breached the duty of fair representation and the failure to pay him this money.

[28] The complainant alleges that PSAC did not properly represent him during the grievance process. This agreement was not part of that grievance process. The grievance was about the early end of an assignment, overtime, and not inviting him to team meetings. The unpaid sick leave came after the grievance and the agreement that he alleges was reached during the ICMS process, long after the employer dismissed his grievance.

[29] The only complaint that the complainant levels at PSAC about the ICMS process is an allegation in his complaint form that his representative was arbitrary, discriminatory and in bad faith "… **up to** the recent two Informal Conflict Management sessions …" [emphasis added]. He then goes on to state that the final ICMS session failed because the employer's representative raised her voice and walked out. He does not allege that the respondents did anything wrong during the final ICMS meeting; on the contrary, he states clearly that "We could not solve all the issues [during the last ICMS session] due to the fact that [the employer's representative] at some point during the teleconference got angry, raised her voice and threatened me …". His complaint does not provide any arguable case of improper representation during the ICMS process. His rebuttal filed after the respondents' response focuses on the grievance and not the alleged agreement reached during ICMS. His submissions also focus on PSAC's handling of his grievance and his allegations about a series of conflicts with several people up to and during that grievance process.

[30] In short, nothing provided by the complainant provides an arguable case that the respondents violated the duty of fair representation in a way that could have caused the employer not to pay him for the period of his unpaid sick leave.

[31] For these reasons, the complainant has not shown an arguable case that the Board has the jurisdiction to grant him the remedies he seeks. The Board cannot order the employer to reinstate him, transfer him, or pay him money. The respondents do not have the power to reinstate him in his employment or transfer him elsewhere in Ontario because PSAC is not his employer. As for paying him money, the complainant has not alleged that PSAC violated its duty of fair representation by failing to enforce this alleged agreement or in any other way that links this complaint to the employer's alleged requirement to pay him.

V. The complaint is timely in part, but there is no arguable case of a breach of the duty of fair representation during the timely portion of the complaint

[32] The respondents argue that the complaint is untimely because it is about the handling of the complainant's grievance. The employer dismissed the grievance on June 20, 2020. The respondents argue that the time limit to make this complaint ran from the date it informed him that it would not refer his grievance to adjudication (February 11, 2020) or, at the latest, the date of the employer's decision. The complaint was made on August 17, 2021, or well more than 90 days after those events.

[33] The complainant continues to assert that there was no grievance decision on June 20, 2020. As I stated earlier, his submissions are more that the decision was a nullity than that it did not exist. The Board has already decided that the final-level reply to the grievance was made on June 22, 2020; see *Goma-Yita #1*, at para. 57. I need not consider the submissions about the existence of a grievance decision further.

[34] The complaint about PSAC's handling of his grievance is untimely because the complaint was filed more than 90 days after that grievance was decided.

[35] However, as I mentioned earlier, the complainant does state that PSAC's representation of him continued through the ICMS session ending on June 3, 2021, and that it acted arbitrarily, discriminatorily, and in bad faith **up to** that period. He argues that the 90-day period to file this complaint runs from the date of the final ICMS.

[36] As I said earlier, his complaint does not specifically allege any breach of the duty of fair representation during the ICMS process. To the extent that the complaint says anything about the end of the ICMS process, that aspect of it is timely; however, he has not alleged any breach of the duty of fair representation that occurred during the final ICMS meeting on June 3, 2021. The rest of the complaint (i.e. anything before May 19, 2021) is untimely.

[37] In conclusion, the complainant is certainly out of time to file a complaint about the way PSAC handled his grievance; however, to the extent that the complaint is about his representation during the ICMS session on June 3, 2021 (or anything else that occurred in the 90-day window before August 17, 2021), his complaint is timely. However, he has not made an arguable case about any breach of the duty of fair representation during that 90-day window.

[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.

October 23, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board