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File: 561-02-48645

Citation: 2024 FPSLREB 166

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

LAURENT LOUBET

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Loubet 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: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Eve Berthelot, analyst, Public Service Alliance of Canada

Decided on the basis of written submissions, filed November 21, 2023, and January 26 and February 27, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On November 23, 2023, Laurent Loubet (“the complainant”) made an unfair-labour-practice complaint against the Public Service Alliance of Canada (“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] During the applicable period, the complainant was a correctional programs officer (WP-04) on an acting basis with the Correctional Service of Canada and was in the Program and Administrative Services (PA) group. He had been considered a member of the respondent since May 2022, and since that date, he had his paid union dues to it. However, his substantive position was classified CX-02 and represented by another bargaining agent (the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN).

[3] On April 18, 2023, the respondent announced the that a strike would be launched beginning on April 19, 2023, which included members of the PA group. They returned to work on May 1 after an agreement in principle was reached.

[4] One of the terms negotiated in the new agreement was a $2500 lump sum payable to all who were bargaining unit members when the agreement was concluded. On the other hand, acting employees with substantive positions outside the bargaining unit were excluded from receiving that amount.

[5] The complainant alleged that on October 25, 2023, he became aware that he was not entitled to the lump-sum payment. He alleged that the respondent’s representatives and officers acted arbitrarily or in bad faith with respect to representation by forcing him to strike while knowing that he would not receive the $2500 lump sum when the new collective agreement was signed and while he was part of the bargaining unit.

[6] The respondent submitted that the duty of fair representation was not violated and that at all times, it and its representatives acted in good faith and not arbitrarily or discriminatorily. In addition, it asked that the complaint be summarily dismissed on the grounds that it was out of time and that it did not make out an arguable or a *prima facie* case.

[7] I decided to proceed by written submissions. The Federal Public Sector Labour Relations and Employment Board ("the Board") has the authority to decide a complaint on the basis of written submissions, as it has the authority to decide "… any matter before it without holding an oral hearing" under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *FPSLREBA*) (see *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141 at para. 3; upheld in 2022 FCA 159 at para. 10).

[8] Any reference to the Board in this decision refers to both the current Board and any of its predecessors.

[9] This decision deals only with the respondent's preliminary objections. For the following reasons, they are dismissed.

II. The facts

[10] The parties referred to several facts in their written submissions. Since they did not object to each other's remarks, I assume that the following facts are not disputed.

[11] The respondent is the bargaining agent certified under the *Act* for the PA group bargaining unit. During the applicable period, the complainant was a member of that unit and paid union dues to the respondent.

[12] On April 18, 2023, the respondent informed its members that a strike had been launched and that it would start on April 19, 2023. Among others, it affected the PA group's members.

[13] The complainant's name was on the list of employees who had to strike. Therefore, he had no choice but to participate actively. Every morning, he went to a picket station, registered, stayed a minimum of four hours, and was reverified when he left. Otherwise, he would not have been entitled to the replacement amount that the respondent allocated for the missed workdays.

[14] The complainant also participated in the gathering at the Lacolle border crossing with several of the respondent's members.

[15] On May 1, 2023, the respondent informed its members that it had reached an agreement for its 120 000 members of the PA, SV, TC, and EB groups. It informed them of the highlights of the tentative agreements, including cumulative salary increases

totaling 12.6% over 4 years and a 1-time, lump-sum, and pensionable payment of $2500. The respondent stated, “The pensionable one-time lump sum payment of $2,500 will be applicable to all members of the bargaining unit employed at the time of signing the agreement.” No mention was made of exceptions to the lump sum.

[16] On May 6, 2023, the respondent sent a second communiqué to its members, with further details on the tentative agreements. It stated, “This lump sum payment will be applicable to all members of the bargaining unit employed at the time of signing the agreement.” It added that by joining more than 100 000 of the respondent’s members on the picket lines, they obtained “… [a] $2500 pensionable lump sum payment …”. Again, no mention was made of exceptions to the lump sum.

[17] The respondent then published a list of frequently asked questions (FAQ) on its website. For the first time, exceptions to the lump sum were set out. Under the question, “Who will get the lump sum payment?”, it stated this:

> *As part of your economic package for this tentative agreement, a one-time, pensionable, lump sum payment of $2,500 will be paid to each employee who is a member of the bargaining unit on the date of signing of the new agreement. Additionally, the one-time lump sum is to be paid to employees on Leave Without Pay (LWOP). Part-time employees working more than 1/3 of full-time hours will receive the full lump sum. The employer has 180 days after the date of signing to issue the lump sum payment.*
>
> *The payment will be based on the substantive position occupied by the employee on the date that the collective agreement is signed. As such, an employee who is on an acting assignment outside the bargaining unit but whose substantive position is in the bargaining unit will receive the lump sum.*
>
> ***The lump does not apply to:***
>
> - *An employee who is on an acting assignment in the bargaining unit but whose substantive position is outside the bargaining unit;*
> - *Excluded employees who are eligible to receive performance pay;*
> - *Non-unionized employees who are eligible to receive performance pay;*
> - *Casual employees, students, term employees (less than 3 months), and part-time employees (working less than 1/3 of full-time hours)*
>
> [Emphasis in the original]

[18] The respondent stated that the website containing the FAQ was last modified on June 29, 2023.

III. The relevant legislative provisions

[19] Section 190(1) of the *Act* requires the Board to investigate any complaint that an employee organization engaged in an unfair labour practice within the meaning of s. 185, which under that section includes any practice prohibited by ss. 187 and 188.

[20] Section 187 of the *Act* sets out a bargaining agent's duty of fair representation 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.*

[21] Section 190(2) of the *Act* provides that complaints be made under s. 190(1) "… 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."

IV. Questions to decide

A. Is the complaint out of time?

1. The parties' positions

[22] In his complaint, the complainant stated that the date on which he "[translation] … became aware of the action, omission or circumstance giving rise to the complaint …" was November 17, 2023.

[23] The respondent argued that the complaint is out of time and that it should be dismissed because the *Act* does not allow extending that time.

[24] The respondent relied on the FAQ published on its website, which indicated that persons on acting assignments in the bargaining unit with substantive positions

outside the unit were not entitled to the lump sum. The respondent stated that the FAQ web page was last modified on June 29, 2023.

[25] The respondent did not indicate the date on which, in its opinion, the time limit should have started to run. I assume that it was based on June 29, 2023, since no other date was set out.

[26] In his reply to the objection, the complainant argued that the respondent's communication plan was very clear, with the announcements made on April 18, May 1, and May 6, as well as the FAQ. He said that those communications did not specify the exceptions to the entitlement to the lump sum but referred only to "the members". He stated that at no time could he have expected to not receive the lump sum simply because he paid his union dues to the respondent. He submitted that on that point, he could not for a moment have imagined that holding a substantive position outside the bargaining unit would have been a criterion that the respondent negotiated to not give the entitlement to the lump sum.

[27] The complainant stated that he realized that the $2500 lump sum had not been paid to him only on October 25, 2023, which was when he said he looked at his pay stub. Therefore, he submitted that the time limit to make the complaint was respected.

[28] The complainant offered no explanation as to why the date on which he claimed to have become aware that he was not entitled to the lump-sum payment changed from November 17 to October 25, 2023.

2. Analysis and decision

[29] Section 190(1) of the *Act* provides that a complaint must be made within 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" [emphasis added].

[30] Having considered the parties' arguments and the respondent's communiqués, I find that the complainant became aware of the fact that he was not entitled to the lump-sum payment only when he looked at his pay stub on October 25, 2023. I reach that conclusion for the reasons that follow.

[31] The respondent's communiqués of May 1 and 6, 2023, were very clear. The first one, which announced the lump sum, was addressed to all members, without exception. The second one, which purported to specify the details of the tentative agreements, stated that the lump sum would be paid to "all **members** of the bargaining unit" [emphasis added] when the respondent entered into the agreement.

[32] By contrast, the FAQ that the respondent relied on is unclear. It is rather contradictory. First, it stated that "… all **members** of the bargaining unit employed at the time of signing the agreement" were entitled to the lump sum. The exception on which the respondent's objection is based stated, "An **employee** who is on an acting assignment in the bargaining unit but whose substantive position is outside the bargaining unit …" [emphasis added] was inadmissible. That exception in no way indicated that it applied to bargaining unit members.

[33] For the communiqué to be clear, it should have clarified that the exceptions applied to members and that they applied despite the statements made in the preceding paragraphs.

[34] Since the complainant was a member of the bargaining unit when the new collective agreement was signed, it is understandable that he identified himself in the first paragraph of the communiqué, which referred to "members", and not in the paragraph referring to "employees", where the exceptions were set out.

[35] On the other hand, the respondent did not indicate the date on which, according to it, the time limit should have started to run. It simply stated that its website was last updated on June 29, 2023, which left it to the Board to assume that that was the date on which the time limit could have started to run. It is not for the Board to guess the respondent's argument. Its arguments were not exhaustive and were unclear.

[36] For those reasons, I agree that the complainant became aware that he was not entitled to the lump-sum payment only when he received his pay on October 25, 2023. I am not concerned that he changed that date from November 17 to October 25, since both dates were within the time limit set out in the *Act*.

[37] Therefore, the complaint under s. 190(1) of the *Act* was made within the time limit set out in s. 190(2).

B. Does the complaint make an arguable case?

1. The parties' positions

[38] The complainant submitted that the respondent's representatives and officers acted arbitrarily or in bad faith with respect to representation by forcing him to strike while knowing that he would not receive the $2500 lump-sum payment when the new agreement was signed, while he was in the bargaining unit. In his opinion, those actions were arbitrary or in bad faith and contrary to the duty of fair representation set out in s. 187 of the *Act*.

[39] According to the respondent, the complainant did not establish an arguable case that it acted arbitrarily or in bad faith under s. 187.

[40] The respondent argued that concluding an agreement at the collective bargaining table that benefits most, but not all, bargaining unit members is not arbitrary, discriminatory, or in bad faith. It submitted that the complainant is not in a situation that is worse than the one he was in before the new collective agreement was concluded.

[41] The complainant had the burden of proof. He had to present sufficient evidence to establish that the respondent failed its duty of fair representation by engaging in conduct that was arbitrary, discriminatory, or in bad faith (see *Ouellet v. St-Georges*, 2009 PSLRB 107 at paras. 50 and 52).

[42] The Supreme Court of Canada, in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 at 510, states, "The representation must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

[43] The respondent relied on *Cousineau v. Walker*, 2013 PSLRB 68 at para. 33, and argued that the complainant's disagreement with its decision is not sufficient to establish that it failed to fulfill its duty of fair representation. Serious wrongdoing had to be established.

[44] The respondent maintained that it negotiated in good faith and acknowledged that collective rights might sometimes exceed a person's wishes during the negotiation. It relied on *Francis v. Public Service Alliance of Canada*, 2021 FPSLREB 90

at paras. 30 to 32, and argued that this situation is not a sign of bad faith or illegitimate motives on its part.

[45] According to the respondent, the complainant did not establish that it acted arbitrarily, discriminatorily, or in bad faith within the meaning of the *Act*. It requested that the complaint be dismissed without a hearing, in accordance with s. 22 of the *FPSLREBA*.

2. Analysis and decision

[46] The respondent argued that the complainant failed to make a *prima facie* or an arguable case that it failed to fulfill its duty of fair representation. On that basis, it argued that the complaint should be dismissed without a hearing.

[47] After reviewing the complainant's allegations, I find that he made out an arguable case, for the reasons that follow.

[48] Section 187 of the *Act* defines the duty of fair representation. It provides that the respondent shall not act in an "… arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit."

[49] Most complaints about that duty are about the representation of a member in an individual dispute involving that person and his or her employer. Despite that, the duty of fair representation is worded broadly so that it also extends to the collective bargaining process.

[50] That point was examined in *Francis*, which the respondent cited. In that decision, the Board examined the issue and made the following observations:

> …
>
> *[29] Most duty-of-fair-representation complaints relate to the individual representation of members of a bargaining unit. However, in some narrow circumstances that duty does extend to bargaining on behalf of all the members of a bargaining unit. The Federal Court of Appeal recognized this as follows in* VIA Rail Canada Inc. v. Cairns*, 2001 FCA 133 at para. 54:*
>
> > [54] … The existence of a duty of fair representation does not preclude a union from making concessions with respect to existing rights or privileges of its members in order [*sic*] as part of the bargaining process. What it does do, is to require that the union, in making those concessions not act

> in a manner that is arbitrary, discriminatory or in bad faith during the collective bargaining process.
>
> *[30] In this case, the bargaining agent was negotiating improvements in job security for term employees, who did not lose rights but gained them. The bargaining agent did not make concessions with respect to the existing rights of its members who were in the same situation as the complainant.*
>
> *[31] The duty of fair representation does not require that a bargaining agent achieve a particular outcome in collective bargaining. However, the process and results of the decisions made during bargaining must be free of improper motive. In* Cairns v. International Brotherhood of Locomotive Engineers*, 1999 CanLII 18497 at para. 113, the Canada Industrial Relations Board described the obligations of a bargaining agent in bargaining as follows:*
>
> > 113 The weighing of interests and the ultimate choices are without a doubt highly political and will inevitably be influenced by competing preferences, values and viewpoints. However, the union will be judged on whether it approached the issue objectively and acted responsibly towards all its members. It must take a reasonable view of the problem and thoughtfully assess the various and conflicting interests.
>
> *[32] Although the complainant did not agree with the outcome of the bargaining process, he provided no allegations that would suggest an improper motive on the part of the bargaining agent.*
>
> …

[51] In *Francis*, the complainant alleged that his bargaining agent acted in bad faith when it entered into an agreement that amended the employer's policy on converting term jobs into indeterminate jobs. The negotiated amendment provided that the conversion would take place after three years of continuous service, rather than five. The complainant had four years and nine months of continuous service as a temporary employee when his contract ended. The agreement came into force one month after his contract ended.

[52] In *Francis*, the adjudicator dismissed the complainant's complaint on the grounds that he did not make any allegation suggesting an inappropriate motive on the bargaining agent's part. That conclusion was reached only after the efforts that the bargaining agent made for a group of members, including the complainant, became known.

[53] In this case, the respondent provided no information on the context of the negotiations or its efforts to consider the interests of the group of members including the complainant.

[54] The complainant alleged that the respondent acted arbitrarily or in bad faith. He relied on the fact that it negotiated a significant benefit of $2500 for all but some bargaining unit members.

[55] According to the facts, the lump sum was payable to all members, including those on leave without pay, those working part-time hours equivalent to one-third of a full-time schedule, and those on acting assignments outside the bargaining unit whose substantive positions were in the bargaining unit. In other words, the negotiated benefit applied to those who were not working, who worked fewer hours than did the complainant, or who were not members of the bargaining unit and had not participated in the strike.

[56] Rather, members in acting assignments, such as the complainant, were included in the same group as employees who were not unionized or were excluded but were eligible for performance pay, namely, casual term employees of less than three months, part-time employees with less than one-third of a full-time schedule, and students. That was despite the fact that they were in the bargaining unit, paid their union dues to the respondent, worked full-time, and participated in the strike.

[57] On the face of it, this exception seems completely arbitrary. On the other hand, the respondent did not explain why its actions were not completely arbitrary.

[58] To support its position that the complaint should be dismissed without a hearing, the respondent cited *Ouellet* and *Cousineau*. I note that those two decisions were rendered on the merits of each complaint after the respondents' evidence was examined that demonstrated that they did not behave insensitively or cavalierly and that they did not act on illegitimate, hostile, arbitrary, illegal, or unreasonable grounds. Those complaints were not dismissed on the grounds that the complainant did not make a *prima facie* or an arguable case.

[59] I find that the complainant made an arguable case that the duty of fair representation under s. 187 of the *Act* was breached. It does not necessarily mean that the complaint will be allowed but instead that a hearing on the merits will be required,

to reach a decision on the complaint's merits. I believe that it is possible to proceed by written submissions, to accelerate the handling the complaint.

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

(The Order appears on the next page)

V. Order

[61] The respondent's preliminary objections are dismissed.

[62] The complaint under s. 190(1) of the *Act* was made within the time limit set out in s. 190(2).

[63] There is an arguable case that s. 187 of the *Act* was contravened.

[64] The hearing of the complaint will proceed by written submissions, according to a schedule that the Board will establish and amend, as necessary.

[65] The employer, which may have a substantial interest in the decision on the merits, will be notified of the complaint and will have the opportunity to apply to be added as an intervenor.

November 28, 2024.

FPSLREB Translation

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board