Date: 20241205

File: 561-02-39259

Citation: 2024 FPSLREB 168

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

PAUL ABI-MANSOUR

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Abi-Mansour 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: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Daria Strachan, counsel

Decided on the basis of written submissions filed November 8, 2018, January 11, 2019, and November 30, 2022.

REASONS FOR DECISION

I. Background

[1] Paul Abi-Mansour ("the complainant") is employed in an AS-03 data support position with the Department of Fisheries and Oceans. This position is classified in the Program and Administrative Services Group, for which the Public Service Alliance of Canada ("the union") is the bargaining agent.

[2] On June 15, 2015, the complainant asked the employer for four days of leave without pay ("LWOP") under clause 52.01(b) of the relevant collective agreement. He said he needed the time to prepare a memorandum of fact and law for what he referred to as a staffing decision appeal. The employer denied his request on the basis that he had enough vacation leave available to cover four days and approved four days of vacation leave.

[3] At the complainant's request, the union grieved the denial of LWOP through the three levels of the grievance process but refused to refer the grievance to adjudication. On October 5, 2018, the complainant made this complaint to the Board under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). He alleged that by not referring his grievance to adjudication, the union had breached its duty of fair representation, as set out in s. 187 of the *Act*.

[4] On November 8, 2018, the union filed a response to the complaint and asked the Board to summarily dismiss it. On January 11, 2019, the complainant responded to the summary dismissal request. On August 30, 2022, the Board advised that the union's dismissal request would be heard by written submission and gave the parties the opportunity to make any additional submissions on the issue. The union made no further submission.

[5] The complainant's additional submissions were due to be filed on September 26, 2022. On September 27, 2022, the day after the due date, he asked for an extension until the end of November because he had many cases of higher priority on the go, and as this matter had been "put in a drawer" by the Board since 2018, a two-month delay would make little difference. Asked for its position on the request, the union consented to an extension but only until October 31, 2022. Although the complainant

offered no appropriate reason for requesting an extension, given the union's consent, the Board granted one until October 31, 2022.

[6] On October 31, 2022, the due date, the complainant again asked for an extension until the end of November. This time, the union objected. The Board noted that a proper reason had still not been offered for the request; however, in the interest of fairness it granted a further extension to November 30, 2022, and indicated that no further extensions would be considered. On November 30, 2022, the complainant filed his submission.

[7] On March 27, 2023, the Board issued a decision finding that five of the complainant's allegations could amount to an arguable case. That is, if assumed to be true and without considering any defence to them that the union might put forward, they could constitute a breach of the union's duty of fair representation (see *Abi-Mansour v. Public Service Alliance of Canada*, 2023 FPSLREB 28 at para. 7). The Board ordered that the matter be set for an oral hearing to hear evidence with respect to those allegations. Remaining allegations, submissions, and requests were dismissed with reasons to follow in the final decision. Subsequently, this matter had to be reassigned to be heard by another Board member. Accordingly, this decision deals only with those matters that were dismissed in the March 27, 2023 decision.

II. Reasons

[8] The complainant's submissions as to why this matter should not have been summarily dismissed focussed largely on legal arguments. He argued, among other things, that the Board lacked jurisdiction to apply an arguable case analysis, that no "leave step" was required at the Board, that he simply had a right to be heard, that the Board should apply the correctness or reasonableness standard of review to union decisions, that a union's refusal to refer a grievance to adjudication should be reviewed by different standards depending on the type of grievance, and that ss. 187 and 190 of the *Act* and ss. 6 and 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *FPSLREBA*) are unconstitutional. These reasons address the complainant's main legal arguments.

A. The Board may dismiss a complaint without a hearing if no arguable case

[9] The complainant objected to the union's summary dismissal request as follows: "No enactment was mentioned. The Complainant simply does not know of any

enactment authorizing this Board to dismiss complaints without a hearing. This is a request made without jurisdiction, it amounts to a vexatious request." That the complainant knows of no enactment authorizing the Board to dismiss complaints without a hearing is not a basis upon which to conclude that the Board is without jurisdiction to do so. Nor does it render vexatious the union's request for summary dismissal.

[10] The Board may dismiss a complaint without a hearing if no arguable case is presented, that is, taking the allegations as true and without considering any defence that might be made by the respondent, the complaint does not amount to a violation of the duty of fair representation. The Board has decided many cases by applying an arguable case analysis to determine the need for a hearing.

[11] One recent example, among many, is the Board decision in *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48, in which this same complainant made the same arguments in the context of a request for summary dismissal of his duty of fair representation complaint. The Board said this, and I agree:

> …
>
> *[46] Procedural fairness does not always require an oral hearing. In* Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) the Supreme Court stated that the "flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations" (paragraph 33). Procedural fairness requires that those affected by a decision have an opportunity to "put forward their views and evidence fully and have them considered by the decisionmaker" (paragraph 22).*
>
> *[47] Section 22 of the* FPSLREBA *provides that the Board "… may decide any matter before it without holding an oral hearing." The preamble to the* Act *includes the statutory objective of the "fair, credible and efficient resolution" of disputes. In* Grant v. Unifor*, 2022 FCA 6, the Federal Court of Appeal stated in relation to similar legislation (see the* Canada Labour Code *(R.S.C., 1985, c. L-2), s. 16.1) that the ability of the Canada Industrial Relations Board (CIRB) to proceed without an oral hearing "… furthers the statutory objectives of efficiency, conservation of resources and speed." I agree that deciding a case based solely on written submissions can be an appropriate approach that supports efficiency and the conservation of the resources of the Board and the parties.*
>
> *[48] In determining whether it is appropriate to dismiss a complaint without a hearing, the Board has relied on an "arguable*

> *case" test or analysis: taking all the facts alleged in the complaint to be true, is there an arguable case that the respondent has contravened s. 187 of the Act (see* Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37 at para. 32)?*
>
> *[49] For these purposes, credibility is not an issue, as all the complainant's relevant (and admissible) allegations are presumed true. The decision maker then assesses whether the complainant has an arguable case that would justify an oral hearing, based solely on the allegations raised in the complaint.*
>
> *[50] I am satisfied that I can decide the respondent's request to dismiss the complaint based on the written submissions filed, without convening an oral hearing.*
>
> …

[12] See also *Sganos v. Association of Canadian Financial Officers,* 2022 FPSLREB 30, in which the Board outlined the procedural history of that case, as follows:

> *[67] The Board clearly notified the parties of its intention to address the preliminary objection without holding an oral hearing and sought the parties' submissions on that point. They were also specifically notified that upon receipt of their written submissions, the complaint may either be scheduled for an oral hearing, or it may be dismissed based on the written submissions and the file would then be closed. The statutory requirement that the Board "examine and inquire into any complaint" does not entitle any party to an oral hearing. Furthermore, the duty of procedural fairness does not require that an oral hearing be held in every instance (see* Osman v. Public Service Alliance of Canada*, 2021 FCA 227 at para. 10; and* Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98 at paras. 12 to 14).*

[13] In this case as well, the Board clearly notified the parties that the union's request for summary dismissal would be heard by written submission, that they were to focus their submissions on whether or not the complaint made out an arguable case, and that depending on the Board's conclusion on that issue the matter would either be dismissed or scheduled for an oral hearing.

[14] The complainant submitted that the arguable-case concept was developed in previous Board decisions that were "… void of any legal value [and] should not be followed." He added that:

> *… If anything, these cases presents* [*sic*] *the Board as acting without jurisdiction, creating provision* [*sic*] *that Parliament did not authorize it to create. In other words, in the former cases, the Board declared itself to be Parliament, while in fact it is not. This*

> *Board is composed of appointed members (employees). Their task is to hear and determine cases, not to legislate.*
>
> …

[15] The complainant is correct that the Board's task is to hear and determine cases, not to legislate. However, when the Board carries out its task of hearing and determining cases, it creates jurisprudence. Of course, its decisions must be made within its statutory jurisdiction, which includes the authority to dismiss a matter without a hearing. The Board's long-established jurisprudence in this regard has never been overturned on judicial review.

[16] The complainant also argued that by applying an arguable-case analysis, the Board introduced what he referred to as a "leave step" and that no such "leave step" is required by statute. Rather, it "… appears to have been created in jurisprudence … created by Board members." He stated that he was entitled to a hearing, that "… there is no leave step he needs to cross", and that under ss. 190 and 187 of the *Act*, he has the right to make a complaint, without the Board's leave.

[17] Applying an arguable-case analysis to a summary dismissal request does not constitute a requirement to seek leave to appear before the Board. It simply requires that the complainant make out an arguable case that his allegations, if proven to be true, could amount to a violation of the duty. In this case, the complainant made five allegations based on alleged facts that, if true, could meet that test. Therefore, they were scheduled for a hearing.

B. Union decisions are not subject to a correctness or reasonableness standard of review, regardless of the type of grievance under consideration

[18] The complainant argued that the two types of grievances set out in the *Act* should be treated differently. He suggested that a union's refusal to refer a s. 209(1)(b) or (c) grievance to adjudication could legitimately be assessed on the arbitrary, discriminatory, or bad-faith standard because in such a case a grievor would still have the option to continue on their own. However, he argued that a union's refusal to refer a s. 209(1)(a) grievance stops the grievor's ability to pursue recourse and, therefore, should be assessed against the higher standard of reasonableness, as established in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[19] The complainant further argued that the union's motion "… clearly mentions the terms found in s. 187 of the *FPSLRA*, that is, 'arbitrary', 'discriminatory', and 'made in bad faith'." He deduced from that that the union was "clearly hiding behind these terms". He noted that the union did not argue that its refusal to refer his grievance was reasonable or correct. He stated that the "standard of review" was correctness, that the union's decision was incorrect, and that even if the standard was reasonableness, then the union's decision was unreasonable.

[20] Neither the legislation nor the jurisprudence makes such a distinction between the two types of grievances. The *Act* and the Board's jurisprudence are clear that there is only one test for a duty of fair representation complaint regardless of the type of grievance.

[21] The complainant confounds judicial standards of review with the test for a duty of fair representation complaint, but they are not the same thing. The Board does not sit as a review or appeal court over union decisions, to assess their correctness or reasonableness. A union's decision to refer a grievance to adjudication is its to make, as long as it makes that decision in a way that is not arbitrary, discriminatory, or in bad faith as clearly set out in s. 187 of the *Act*.

C. Complainant's request for extension of time to raise constitutional challenge

[22] In his November 30, 2022, submission, the complainant said that he would "explain why section 187 is unconstitutional" and "… seek [an] extension of time to file the notice of constitutional question against section 187 of the *FPSLRA* and other sections of the *FPSLREBA*." He offered a brief summary of the constitutional arguments that he intended to make with respect to ss. 187 and 190 and then requested an extension of 1.5 months, as follows:

> …
>
> ***2) Extension of time to file the constitutional question or setting a hearing date***
>
> *85. On November 16, 2022, the Board allowed an extension of time till November 30, 2022.*
>
> *86. The complainant provided these submissions. Other submissions are also required, specifically regarding serving and filing the notice of constitutional question.*
>
> *87. On this point, the complainant asks the Board to set a hearing, fifteen days before the hearing, the complainant will file his notice*

> *of constitutional question according to the applicable provisions on* [*sic*] *the Federal Courts Act.*
>
> *88. If the Board wants to proceed in writing, a schedule needs to be established. The complainant suggests January 16, 2023 as a deadline to file his notice of constitutional question and additional submissions, if any.*
>
> *89. This was only a summary of* [the] *statutory provisions that are unconstitutional. Other unconstitutional provisions would be sections 6 and 34(1) of the FPSLREBA*
>
> …

[23] Earlier, in his January 11, 2019, response to the union's summary dismissal request, the complainant had also stated his intention to make a constitutional challenge, although only to ss. 187 and 190 of the *Act*, as follows:

> …
>
> **THE NORMAL RECOURSE AGAINST THE UNION'S DECISION IS A JUDICIAL REVIEW**
>
> *15. As the directly affected party, the complainant's normal recourse against the union's decision is a judicial review at the Div. Ct., the provincial superior court. Such recourse is constitutionally protected.*
>
> *16. However, the Parliament having passed a legislation, the PSLRA, the complainant has to first exhaust the recourse available under the PSLRA before proceeding to courts.*
>
> *17. By establishing this Board and providing complainant's* [*sic*] *with recourse against their unions, Parliament intended to create a more accessible and economic forum than superior courts.*
>
> **SECTIONS 187 AND 190 ARE UNCONSTITUTIONAL**
>
> *18. However, if this Board accepts the union's arguments regarding the standards of review of the union's decision, then the complainant submits that sections 187 and 190 of the PSLRA are unconstitutional.*
>
> *19. While parliament has passed the PSLRA and provided administrative recourse against unions at this Board, it has limited the scope of review of unions' decisions, and the complainant submits that the two sections 187 and 190 are unconstitutional and the complainant will bring a constitutional challenge against these provisions at the hearing of this complaint.*
>
> …

[24] Even before this, in his October 5, 2018 complaint, the complainant mentioned a constitutional issue, as follows:

…

> *26. The complainant submits that s. 190 and s. 187 are in lieu of an administrative review of the union's decision, the right of review is constitutional and cannot be revoked by passing a legislation, PSLRA, to oust it. Otherwise, these two sections are unconstitutional.*

…

[25] After receiving the opportunity on August 30, 2022, to make additional submissions to his January 11, 2019 submission, and after receiving two month-long extensions of time in which to make them, the complainant asked for yet more time, to allow him to raise a constitutional challenge, not only to ss. 187 and 190 of the *Act*, but also to ss. 6 and 34(1) of the *FPSLREBA*.

[26] In addition to the three months between August 30 and November 30, 2022, the complainant had the four previous years to file and serve notice of constitutional question and to prepare the constitutional challenge that he first alluded to in 2018 and confirmed as his stated intention in 2019. The complainant had more than enough time to do what he had to do to raise a constitutional challenge. For these reasons, his request for a further extension of time to do so is denied.

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

(The Order appears on the next page)

III. Order

[28] The respondent's request for summary dismissal is granted, with the exception of the allegations listed in *Abi-Mansour v. Public Service Alliance of Canada*, 2023 FPSLREB 28 at paragraph 7, which will be heard and determined by another Board member.

[29] The complainant's request for an extension of time to raise a constitutional challenge is denied.

December 5, 2024.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board