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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

ROBERT DESPRÉS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

RE: Complaint under section 23 of the
Public Service Staff Relations Act

Before: [Yvon Tarte, Chairperson](#)

For the Complainant: [The Complainant himself](#)

For the Respondent: [Cécile La Bissonnière, Public Service Alliance of Canada](#)

(Decision rendered without an oral hearing,
on the basis of the written submissions of the parties.)

DECISION

[1] The complainant, Robert Després, has been retired since May 27, 1999. When he worked for the federal government, he was a member of the Public Service Alliance of Canada (PSAC or the Alliance) and was an employee in Montréal of the Department of the Solicitor General, Correctional Service of Canada. On September 13, 1990, Mr. Després's position was reclassified from CR-05 to AS-02. In accordance with the *Public Service Employment Regulations*, the reclassification of his position from CR-05 to AS-02 was treated as a promotion and his salary was adjusted accordingly.

[2] Between 1985 and 1989, the PSAC and the Treasury Board undertook a joint union-management pay equity study. Following the study results, the PSAC filed a complaint with the Canadian Human Rights Commission demanding full adjustment on the basis of the compensation study. A Tribunal was appointed and in July 1998 rendered a decision in favour of the union. The employer appealed and in October 1999 the court of appeal dismissed the appeal, and the parties decided to settle the complaint between themselves. The PSAC and the Treasury Board concluded the pay equity agreement on October 29, 1999, and it was subsequently endorsed by the Canadian Human Rights Commission. On December 13, 1999, the agreement was filed in the Registry of the Federal Court pursuant to section 57 of the *Canadian Human Rights Act*.

[3] Following the signing of the pay equity agreement between the PSAC and the Treasury Board in October 1999, Mr. Després asked that his salary at the time of his promotion be recalculated. In his view, the employer should recalculate his salary taking into account the lump sums paid under the agreement, and should therefore raise his promotion salary to the next increment, again in accordance with the *Public Service Employment Regulations*. The employer refused his request, citing paragraph 9.5 of the pay equity agreement. Paragraph 9.5 of the pay equity agreement reads as follows:

Overtime, Acting and Promotion Situations

9.5 The parties agree that for overtime, acting and promotion situations, a 5% lump sum of the total pay equity adjustment will cover the retroactive period from March 8, 1985 to March 31, 1994. For the period from April 1, 1994 to July 29, 1998, the re-calculation for those items will be on an event basis.

[4] In the complainant's view, the agreement applies only to employees who were promoted to one of the groups covered by the agreement. In support of his argument, the complainant adduced paragraph 13 of the agreement, which reads as follows:

[Translation]

The parties agree that the provisions of this agreement settle all matters of phase II and phase III of the complaints with respect to the CR, ST, DA, LS, HS and EU groups.

[5] Since the AS group is not covered by the agreement, the complainant demanded that his new salary be calculated pursuant to the *Public Service Employment Regulations*. In the face of his employer's refusal, Mr. Després informed his union of his dissatisfaction, and the union told him that he had been treated in accordance with the agreement and that the union could do nothing. He also submitted his case under the error examination process provided for by paragraph 11 of the agreement, but again the employer replied that paragraph 9.5 of the agreement had been applied in his case in accordance with the intention of the parties.

[6] On November 19, 2002, he filed a complaint with the Public Service Staff Relations Board (PSSRB) pursuant to section 23(1) of the *Public Service Staff Relations Act (PSSRA)*. The complainant alleged that the union did not observe the prohibition set out in section 10(2) of the PSSRA. The complaint reads as follows:

[Translation]

This complaint concerns paragraph 9.5 of the pay equity agreement between the Treasury Board and my union, the Public Service Alliance of Canada. The employer's decision, supported by my union, the PSAC, to pay me 5% of the pay equity adjustment discriminated against me. I consider that my bargaining agent, by signing the agreement, violated section 10(2) of the Public Service Staff Relations Act.

[7] The evidence shows that he made written requests to the Correctional Service of Canada and the Treasury Board to assert his point of view. As remedy, he asked the PSSRB to determine that [translation] "this agreement discriminates against me." The Alliance objected that the PSSRB had no jurisdiction to hear the complaint, and the parties agreed to discuss the matter in writing.

[8] The Alliance raised the preliminary issue of the PSSRB's jurisdiction to hear the complaint in its response to the complaint dated December 18, 2002. According to the

PSAC, the PSSRB has no jurisdiction to hear the complaint or to grant the corrective action requested. In its final submission dated July 11, 2003, the Alliance writes:

[Translation]

Notwithstanding the above, since Mr. Després's complaint is based on the pay equity agreement, which was concluded following a decision by the Human Rights Tribunal, and which was endorsed by that Tribunal, the Public Service Staff Relations Board has no authority to determine the merits of the complaint. Mr. Després has a more appropriate recourse, namely a complaint to the Human Rights Commission.

[9] The Alliance therefore asks the PSSRB to dismiss the complaint without a hearing.

[10] The complainant wrote to the PSSRB on January 19, 2003, to say that he did not contest the pay equity agreement, but only the interpretation and application of paragraph 9.5 of the agreement, since that section is prejudicial to him and constitutes, in his opinion, discriminatory treatment toward him on the part of his bargaining agent.

[11] On June 16, 2002, Mr. Després submitted his written representations to the PSSRB. His letter reads as follows:

[Translation]

As required in your letter of May 27, 2002, I am hereby sending you a statement of facts regarding the Public Service Alliance of Canada (PSAC) and its failure to represent me as required. A copy of the agreement is enclosed.

The PSAC concluded a pay equity agreement with the Treasury Board on October 29, 1999, for the employees in the groups mentioned in paragraph 13.

I received all the money I was entitled to under the agreement until I was promoted from CR-05 to AS-02 on September 14, 1990. I asked my employer in writing to recalculate my AS-02 salary in accordance with the Public Service Employment Regulations. The Treasury Board refused my request on the pretext that the agreement had been concluded with my bargaining agent and that my employer had no need to recalculate my new promotion salary.

I then turned to the PSAC, so that the union of which I was a member could represent me to assert my request. The PSAC also replied negatively on the pretext that the agreement that it had negotiated had been complied with.

I conclude from reading the agreement that only the groups mentioned in paragraph 13 are subject to the provisions of the agreement. By confirming and interpreting the agreement, my bargaining agent acted in an arbitrary, discriminatory manner toward me and by that fact did not negotiate fairly for all its members. It failed to take into consideration the negative salary repercussions on employees who were appointed to positions in groups other than those mentioned in paragraph 13 of the agreement. In my own case, the fact that my salary was not recalculated in accordance with the Public Service Employment Regulations deprives me of a significant amount of income and thereby cancels out the monetary advantages gained through the pay equity settlement.

[12] The complainant submitted his final position in writing to the PSSRB on September 5, 2003. In his opinion, his bargaining agent should have been aware of the discriminatory repercussions of applying the agreement. Mr. Després alleges that the Alliance acted in bad faith as regards fair representation of all the members affected by the implementation of the agreement. He criticizes the Alliance for not negotiating provisions [translation] “required to counteract the discriminatory effects of paragraph 9.5.” He submits again that in his view the agreement concerns only those groups mentioned in paragraph 13, namely the CR, ST, DA, LS, HS and EU groups. Finally, Mr. Després submits that his complaint is not based on the agreement but rather on the fact that his bargaining agent had the legal obligation to represent him in a non-arbitrary, non-discriminatory way during the negotiation and implementation of the pay equity agreement.

Reasons for decision

[13] The statutory provisions relevant to this complaint are sections 23(1)(a) and 10(2) of the PSSRA:

23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed

(a) to observe any prohibition contained in section 8, 9 or 10;

10. (2) No employee organization, or officer or representative of an employee organization, that is the bargaining agent for a bargaining unit shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit.

[14] The burden is on the complainant to show that his union acted in a manner that was arbitrary, discriminatory or in bad faith toward him personally with respect to negotiating the pay equity agreement. I find on the basis of the evidence presented in this matter that the complainant has failed to establish that the Public Service Alliance of Canada acted in a manner that was arbitrary, discriminatory or in bad faith toward him.

[15] As pointed out by the Supreme Court of Canada in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, local 5007* [1990] 1 S.C.R. 1298, page 1328: “In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by [...] improper motives [...] and as long as it turns its mind to all the relevant considerations.” In the complainant’s case, the union preferred to settle the pay equity complaint. The union had the right to act as it did. Although an employee organization must take into consideration the interests of all its members, when those interests diverge, it may and should make choices that are often difficult. Its discretion in this area, however, under the very terms of section 10(2), may not be tainted by arbitrary, discriminatory actions, or bad faith. Nothing in this file indicates to me that the decision to settle the pay equity complaint was motivated by inappropriate discrimination based on factors such as race, sex, or political or religious beliefs. In short, an employee organization’s decisions cannot be aimed at harming or attacking a member, otherwise they would be considered to have been made in bad faith. There is no evidence that the Alliance tried to harm the complainant or was aware of the complainant’s situation—or even that he existed—when it signed the pay equity agreement.

[16] The PSSRB has already ruled on allegations of discrimination in matters concerning collective bargaining. In *Le Syndicat des contrôleurs aériens du Québec* (143-2-164), the following observation is found:

The fact that particular majority decisions or policies are not to the liking of the minorities who oppose them is not, in itself, indicative of discrimination. The legitimacy of a

majority decision in a democratic society is not contingent on its rightness, but on the legitimacy of the procedures for arriving at that decision, provided that the decision is not incompatible with the fundamental rights and shared values of that society.

[17] Although the complainant does not agree with his bargaining agent's decision to settle the pay equity complaint the way it did, the evidence in no way shows that the settlement is incompatible with the fundamental rights of our society.

[18] Mr. Després submits that the agreement concerns only employees who were promoted to a group covered by the agreement. In his view, since he was promoted outside one of the groups covered, paragraph 9.5 should not apply to his situation. This is a matter of the interpretation of the agreement and therefore outside the jurisdiction of the PSSRB. In March 2001, the Alliance filed a section 99 reference with the PSSRB, contending that following the signing of the pay equity agreement, all benefits, perquisites and allowances contained in various relevant collective agreements for the complainant groups and which were tied to rates of pay found to be discriminatory by the Tribunal must now be adjusted on an event basis for the whole of the retroactive period unless otherwise agreed to by the parties. The Treasury Board objected that enforcement of the Consent Order lies in the Federal Court since the Consent Order was filed as a judgment of the Court. In my decision, *Public Service Alliance of Canada v. Treasury Board*, 2001 PSSRB 81, at paragraph 26, I wrote:

The imprecision of the language used in the Consent Order can give rise to differing views and interpretations. I do not believe that this Board should attempt to correct the ambiguity contained in the order of the CHRT. Unless the parties agree on this issue, the matter must go back to the Federal Court and eventually to the CHRT.

[19] The agreement was signed by the Treasury Board and the PSAC and endorsed by the Canadian Human Rights Commission, since it was an agreement on a complaint concerning pay equity. The agreement was subsequently filed in the Registry of the Federal Court pursuant to section 57 of the *Canadian Human Rights Act*. The PSSRB has no jurisdiction to rule on the interpretation or application of the agreement.

[20] Section 10(2) of the PSSRA prohibits bargaining agents from acting in a manner that is arbitrary, discriminatory or in bad faith "in the representation of any employee in the unit." When he filed his complaint, the complainant had already been retired for

several months and thus was not a member of the bargaining unit represented by the Alliance when the agreement was signed. Nevertheless, by negotiating the agreement, the Alliance found itself settling rights belonging to the complainant when he was still a member of the bargaining unit. The PSAC did not raise the matter of the complainant's right to file a complaint under section 10(2) of the PSSRA. Given my decision, I do not need to rule on this matter.

[21] Accordingly, and for all these reasons, the complaint must be dismissed.

**Yvon Tarte,
Chairperson**

OTTAWA, October 2, 2003

P.S.S.R.B. Translation