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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agent/Complainant

and

TREASURY BOARD

Employer

and

STUART WATSON AND WAYNE HUMBER

Respondents

RE: Reference under Section 99 and Complaint under section 23 of the *Public Service Staff Relations Act*

Before: Yvon Tarte, Chairperson

For the Bargaining Agent/Complainant: Robert Fredericks

For the Employer/Respondents: Harvey Newman, counsel

Heard at London, Ontario,
23, 24 and 25 November 1999.

INTRODUCTION

[1] Open and meaningful consultations based on trust and mutual respect lie at the heart of successful labour relations. The better the communications between parties are, the better their overall relationship will inevitably be. Conversely, as these cases show, the less parties are able to communicate, the more aggressive and adversarial their relationship unfortunately becomes.

[2] This decision is the result of two proceedings undertaken by the Professional Institute of the Public Service of Canada (PIPSC). PIPSC is the bargaining agent for all employees of Treasury Board in the Auditing Group. On July 13, 1998, PIPSC and Treasury Board entered into a collective agreement for the Auditing Group: Code 204/98. The first proceeding is a reference under section 99 of the *Public Service Staff Relations Act* (*PSSRA*) alleging failure on the part of the employer to observe the provisions of Articles 7.01 and 36 of the Auditing Group (AU) Collective Agreement. The second is a complaint under section 23 of the *PSSRA* alleging a violation by the employer, Stuart Watson and Wayne Humber, of subsection 8.(1) of the *PSSRA*. The events leading up to these proceedings took place at the London Tax Services Office (LTSO). At all relevant times, Stuart Watson was the Director of the LTSO and Wayne Humber was the Assistant Director, Verification and Enforcement, at the LTSO.

[3] At the hearing Mr. Newman argued that the Treasury Board could not be a respondent in the section 23 complaint since it is not a person for the purposes of subsection 8.(1) of the *PSSRA*. I agreed with Mr. Newman and struck out the Treasury Board's name as respondent in the section 23 complaint.

RELEVANT PROVISIONS OF THE *PSSRA* AND THE AU COLLECTIVE AGREEMENT

[4] The relevant portions of sections 99, 23 and 8 of the *PSSRA* are as follows:

> ***99.*** *(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board.*

> ***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;*
>
> *(2) Where, under subsection (1), the Board determines that the employer, an employee organization or a person has failed in any manner described in that subsection, the Board may make an order directing the employer, employee organization or person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate.*
>
> *(3) An order under subsection (2) directed to a person shall*
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> *(a) where that person has acted or purported to act on behalf of the employer, be directed as well*
>
> *(i) in the case of a separate employer, to the chief executive officer thereof, and*
>
> *(ii) in any other case, to the Secretary of the Treasury Board; and*
>
> *(b) where that person has acted or purported to act on behalf of an employee organization, be directed as well to the chief officer of that employee organization.*
>
> ***8.*** *(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*

[5] Articles 7.01 and 36 of the AU Collective Agreement read as follows:

> *7.01 The Employer recognizes the Institute as the exclusive bargaining agent for all employees described in the certificate issued by the Public Service Staff Relations Board on March 13, 1989, covering all employees of the Employer in the Auditing Group of the Scientific and Professional Category.*
>
> *36.01 The parties acknowledge the mutual benefits to be derived from joint consultation and are prepared to enter into discussion aimed at the development and introduction of appropriate machinery for the purpose of providing joint consultation on matters of common interest.*

> *36.02 Within five (5) days of notification of consultation served by either parties, the Institute shall notify the Employer in writing of the representatives authorized to act on behalf of the Institute for consultation purposes.*
>
> *36.03 Upon request of either party, the parties to this Agreement shall consult meaningfully at the appropriate level about contemplated changes in conditions of employment or working conditions not governed by this Agreement.*
>
> *36.04 Without prejudice to the position the Employer or the Institute may wish to take in future about the desirability of having the subjects dealt with by the provisions of collective agreements, the subjects that may be determined as appropriate for joint consultation will be by agreement of the parties.*

THE FACTS

[6] In 1990, PIPSC and Revenue Canada, Customs and Excise, entered into an agreement setting out a "joint policy and procedures for union/management meetings" (Exhibit C-2). At that time the parties to the agreement undertook to maintain a harmonious consultation process to discuss issues of common concern. Discussions were to take place between the parties at all levels. However, issues of concern to either party were to be resolved at the lowest possible level of union/management consultation.

[7] In 1995, a departmental National Committee on Communication (NCC) recommended the creation of regional audit concerns committees (Exhibit C-9). The NCC also recommended that a union representative participate as an active member of such regional audit concerns committees.

[8] Prior to 1998, there existed at the LTSO, regular union/management consultation (UMC) meetings as well as an Audit Concerns Committee (ACC) and a Directors Focus Group (DFG). Prior to late 1997, both the ACC and the DFG had unofficial PIPSC participation. PIPSC was satisfied with this arrangement. John Benbow, a union official, testified on behalf of PIPSC that the consultation process at the LTSO prior to 1998 was effective and working well.

[9] In November 1997 or thereabouts, PIPSC decided to withdraw from all consultative committees as a "job action" during collective bargaining (Exhibit R-4).

This "job action" lasted until mid-1998 at which time PIPSC expected to resume without change, past consultative processes.

[10] At a UMC meeting held on September 17, 1998, the parties discussed the creation of a Verification, Enforcement, Compliance and Research (VECR) focus group to replace the ACC and to be headed by Wayne Humber (Exhibit C-6). In addition, management announced at that meeting the newly minted mandate of a revamped DFG. It is clearly stated in the minutes of the September 17, 1998 meeting that the VECR group and DFG are not management/union groups. According to the respondents, the purpose of these groups is to provide management with an opportunity to discuss issues of interest directly with front line staff.

[11] On April 17, 1999, PIPSC raised the issue of its exclusion from the VECR focus group and the DFG at a UMC meeting (Exhibit C-7). PIPSC indicated at that meeting that, in its view, management/union consultation had diminished since the inception of the new focus groups. The minutes further show that "The Union advised that it is their opinion that the process of not allowing the union to attend the Focus Group meetings is undermining the position of the union and that based on discussions with PIPSC nationally, a grievance or direct complaint to the Public Service Staff Relations Board, would be considered as an appropriate course of action."

[12] The respondents agreed to take PIPSC's comments under advisement. On May 5, 1999, the request for union participation at focus group meetings was denied by the respondents.

[13] John Benbow testified on behalf of PIPSC that the respondents' action in these cases had detrimentally affected the bargaining agent's ability to represent its membership. The minutes of the focus groups indicate that their members were encouraged to continue these discussions with team leaders and colleagues during working hours. This practice was corroborated by the respondents during their testimony.

[14] Subjects covered or discussed during the VECR focus group and the DFG meetings included: employee surveys, training, pay equity, appeals, the status of collective bargaining, leave for union business, the sharing of work stations (hotelling) and teleworking.

[15] Stuart Watson, the Director of the LTSO, testified that he set up the DFG to allow front line employees "to raise anything that gets in the way of them doing their jobs." At the hearing Mr. Watson was adamant in his view that he has the right to meet with employees and discuss their concerns without union presence, bullying or reprisal. The Director indicated that focus group meetings should not be used as a forum for discussing grievances, disparaging unions or negotiating terms and conditions of employment. Mr. Watson expressed the view that all in all, labour relations at the LTSO were pretty good. Wayne Humber gave similar testimony concerning the VECR focus group.

ARGUMENTS

For the PIPSC

[16] Mr. Fredericks argued that the respondents' actions, when looked at in context, constitute serious interference with PIPSC's right to represent its members.

[17] The provisions of the collective agreement must be interpreted broadly and purposively in order to achieve harmonious labour relations. With that in mind, the bargaining agent must have the exclusive right to canvass employees on collective bargaining issues whether during or prior to negotiations. The bargaining agent must have exclusive right to raise problem issues before they become grievances.

[18] The stated purpose of the collective agreement (clause 1.01), to maintain harmonious and mutually beneficial relationships between the employer, PIPSC and employees, can only be achieved through meaningful consultation.

[19] Direct discussions by the employer and employees on matters relating to hotelling, employee surveys, training, staffing and leave for union business give great concern to PIPSC. Many of these issues were raised at the UMC forum and in the focus groups.

[20] Excluding the bargaining agent from the focus group discussions immediately after the PIPSC's "job action" and just before the creation of the new Canada Customs and Revenue Agency sends a strong message that the employer does not want to deal with or consult unions. The requirement for meaningful consultation under section 36 of the collective agreement has obviously been breached.

[21] The union's right to represent its members without interference from management contained in section 8 of the *PSSRA* must also be interpreted broadly. The union must be given the opportunity to represent all of its members. In the world of unfair labour practices the employer's actions are nowhere near the top but they are unfair nevertheless.

[22] Through the VECR focus groups and the DFG, the respondents engaged in direct consultation with employees on union issues without union presence. This inappropriate consultation took place on the employer's time and on the employer's premises. When this is tied to the employer's crackdown on leave for union business, the employer's actions take on the appearance of very serious interference.

[23] Mr. Fredericks discussed the following cases in support of his position: Re *Rubbermaid Canada Inc. and United Automobile Workers, Local 252*, 21 L.A.C. (3d) 168; *Canadian Union of Public Employees v. Canadian Broadcasting Corporation*, 27 CLRBR (2d) 110; *The United Nurses of Alberta v. The Alberta Healthcare Association*, [1995] Alta. L.R.B.R. 37 and *PSAC and Marleau* (Board files 461-HC-10, 461-HC-11 and 461-HC-12).

For the Employer

[24] Mr. Newman argued that no evidence had been presented to show that either section 7 or 36 of the collective agreement had been violated.

[25] The employer has never failed to recognize PIPSC as the bargaining agent for members of the AU group. Furthermore, through the UMC process the employer has been consulting meaningfully with the union in pursuance of clause 36 of the collective agreement.

[26] In *Jackson and Seguin* (Board file No. 161-2-399) then Board Member Muriel Korngold Wexler indicated that the Board should be careful in the interpretation and application of subsection 8.(1).

[27] In keeping with prior decisions (see among others Board file 161-2-127) the Board should require substantial grounds in order to uphold a complaint under section 23 of the *PSSRA*. No such evidence was adduced here.

[28] In a unionized workplace a balance must be struck. The employer does not have an absolute right to communicate directly on all matters with its employees, nor is it prevented absolutely from doing so.

[29] The principles involved in achieving an appropriate balance must be applied judiciously so as not to cast a chill on the employer's ability to deal effectively with workplace issues as it sees fit. The evidence shows that the employer has in these cases always maintained a proper balance in communicating directly with its employees.

[30] The union must recognize and accept that it is important for senior managers to have unfiltered feedback from its employees. The union has always been free to raise at the UMC process any topic discussed in the focus groups.

[31] The employer and respondents believe that PIPSC commenced these proceedings in response to management's position on the leave for union business issue.

[32] Other than the impressions of John Benbow, there is little or no evidence that the exclusion of union participation at the focus groups had any effect on PIPSC. The employer has always sought to show that it is sensitive to the views of its employees and the unions who represent them.

[33] In addition to the case law referred to by Mr. Fredericks, the Board should also look at *PSAC and Treasury Board* (Board file 160-2-503) and *Canadian Union of Public Employees and its Local 2424 v. Carleton University*, [1998] O.L.R.D. No. 357 (Q.L.).

Reply of the PIPSC

[34] The employer's interpretation of the relevant provisions of the collective agreement and the *PSSRA* is far too restrictive.

[35] The case law is clear in similar applications that the complainant need not present actual evidence of negative impact.

[36] The concerns expressed by the union in these cases are heightened by the fact that prior to PIPSC's "job action" the consultation process at the LTSO was so good.

REASONS FOR DECISION

[37] In any unionized workplace, the employer has the right to manage to the extent that that right is not restricted by statute or by collective agreement. Similarly, the union has the right and, indeed, the obligation to represent the employees in the bargaining unit. Conflict and distrust inevitably arise when either side purports to exercise its rights to the exclusion of the other. Exercising and respecting one's rights should never lead to a breakdown in communications between an employer and a union.

[38] I certainly cannot agree with Mr. Watson when he professes that labour relations at the LTSO are good. How can labour relations be said to be good when the conduct of the parties lead them before the Board to argue the merits of an unfair labour practice complaint? How can the relationship between the employer and the bargaining agent at the LTSO be said to be good when the parties cannot even agree on the most basic rules of conduct to govern their relationship?

[39] Even in the thick of collective bargaining, it is inadvisable for a bargaining agent by way of "job action" to withdraw from all consultative processes with the employer of its members. In any relationship communication is the hallmark of success. Success in workplace relations between union and management requires constant, effective and timely communications between the parties. Effective communications must be open and respectful.

[40] Unionized employees represent a common interest which binds the employer and the bargaining agent and requires that they work together in a meaningful and purposive way.

[41] The LTSO management should take note of the very wise 1995 recommendations of the Departmental National Committee on Communication to include union representation on what was then referred to as regional "Audit Concerns Committees". The rationale for that recommendation applies equally well today to the LTSO Director's Focus Group and the VECR Focus Group.

[42] In these cases I am satisfied that some of the topics discussed during focus group meetings particularly as they relate to "leave for Union Business" and other bargainable issues were inappropriate. Although an employer has the right to communicate directly with its employees on many issues, it must do so very carefully.

Such communications must not undermine the bargaining agent's ability to represent its members.

[43] Not all union members will react negatively to the employer's conduct but some will. Nevertheless, I conclude that the respondents' deliberate exclusion of PIPSC representatives from the LTSO focus groups, where bargaining issues were at times discussed, interfered with the bargaining agent's ability to represent its members.

[44] The focus groups were set up to discuss directly with employees and without union participation issues of common interest. Employees participating in these meetings were encouraged to continue discussions on these issues with team leaders and other employees during working hours. Such a practice can only make it more difficult for the union to represent its members and constitutes interference in the representation by PIPSC of these employees contrary to subsection 8.(1) of the *PSSRA*.

[45] I therefore conclude that the respondents have violated subsection 8.(1) of the *PSSRA* and consequently make a declaration to that effect. In the event that the respondents continue with the focus groups at the LTSO in their present configuration, I order them to refrain from further violations of the subsection. In other words, they must not deal with bargainable issues in the absence of the bargaining agents. To avoid continued disputes in this regard, the respondents would be well advised to include the PIPSC in future focus group discussions. Accordingly, this complaint against the respondents, Stuart Watson and Wayne Humber is upheld to the extent indicated.

[46] Finally, I am not satisfied that articles 7 and 36 of the collective agreement were violated in these cases. There was no evidence to show that the employer has failed to continue to recognize PIPSC as the exclusive bargaining agent for all employees in the Auditing Group as is required by article 7 of the collective agreement. Furthermore, the employer has never refused to consult with PIPSC on issues referred to in article 36 of the collective agreement and within the timeframes set out in the clause. The UMC process agreed to and implemented by the parties meets the basic requirements of article 36. Therefore, PIPSC's reference under section 99 of the *PSSRA* is dismissed.

Yvon Tarte
Chairperson

OTTAWA, January 24, 2000