Files: 161-2-791
169-2-584

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant/Bargaining Agent

and

TREASURY BOARD, PETER V. HARDER AND PUBLIC SERVICE COMMISSION, RUTH HUBBARD

Respondents/Employer

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

Before: I. Deans, Chairperson, M. Korngold Wexler and Y. Tarte, Deputy Chairpersons

For the Complainant/Bargaining Agent: Andrew Raven, Counsel

For the Respondents/Employer: Harvey Newman and Jock Climie, Counsel

Heard at Ottawa, Ontario,
April 1 and 2, 1996.

On January 26, 1996, the Public Service Alliance of Canada (PSAC) presented a complaint under section 23 of the *Public Service Staff Relations Act (PSSRA)* (Board file 161-2-791) naming the Treasury Board attention Peter V. Harder, the Public Service Commission attention Ruth Hubbard as respondents; in addition, the PSAC filed a reference under section 99 of the *PSSRA* naming the Treasury Board as employer (Board file 169-2-584).

The PSAC alleges that the respondents have violated subsections 8(1) and (2) of the *PSSRA* and provisions of the NJC Work Force Adjustment Directive which forms part of the Master Agreement signed between the Treasury Board and the PSAC. The PSAC is also relying on the Agreement in Principle Concerning Human Resource Adjustment in the Federal Public Service signed between all the bargaining agents, including the PSAC, and the Government of Canada as represented by the Treasury Board, on May 30, 1995 (Exhibit 1, Tab 1).

The PSAC is requesting the same result in both proceedings, namely, the production of the names and addresses of all persons affected as envisaged by the Agreement in Principle. The evidence and the arguments submitted by the parties related solely to the Treasury Board as the employer. No evidence was adduced that would bring the Public Service Commission and Ms. Hubbard under the jurisdiction of this Board pursuant to section 23 of the *PSSRA.* Accordingly, the complaint is dismissed insofar as it relates to them. This decision addresses only the merits of the complaint under section 23 of the *PSSRA* and only as it relates to Mr. Harder and the Treasury Board.

The complaint was filed under section 23 of the Act and named as respondents the Treasury Board, attention Peter V. Harder, Secretary; and the Public Service Commission, attention Ruth Hubbard, President. In this complaint, the PSAC alleges that "*the Respondents have engaged in conduct contrary to the prohibitions contained in subsections 8(1) and (2) of the Public Service Staff Relations Act".*

The complainant requested that the Board issue the following orders:

> *(a) abridge the time limits prescribed under the Act for the delivery of a reply by the Respondents to this complaint pursuant to section 6 of the P.S.S.R.B. Regulations and Rules of Procedure, 1993;*

> *(b) direct that a hearing, on an expedited basis, proceed, in Ottawa, for adjudication of this complaint, and that this hearing be heard at the same time as the hearing of the section 99 reference presented by the Alliance pursuant to section 99 of the Public Service Staff Relations Act;*
>
> *(c) declare the Respondents and persons acting on behalf of the Respondents to have acted in violation of section 8 of the Act;*
>
> *(d) direct that the Respondents cease and desist all activities contrary to section 8 of the Act;*
>
> *(e) direct the Respondents to provide the information required by the Alliance as identified herein;*
>
> *(f) direct the Respondents to post a copy of the Board's order herein including its reasons therefor in conspicuous places throughout the workplace; and*
>
> *(g) such further and other relief as the complainant may request.*

On February 9, 1996, Mr. Harvey Newman, counsel for the respondents, replied that the respondents had not engaged in conduct contrary to sections 6, 8 and 10 of the *PSSRA*. Furthermore, he submitted that none of the respondents occupied a managerial or confidential position and therefore they were not subject to subsection 8(1) of the *PSSRA*. The Board notes that the complaint was directed to the attention of Mr. Peter V. Harder and Ms. Ruth Hubbard. In light of the definition of "managerial or confidential position" under section 2 of the *PSSRA*, the Board is satisfied that Mr. Harder as Secretary of the Treasury Board and Ms. Hubbard as President of the Public Service Commission do occupy managerial or confidential positions. They are persons employed in a managerial or confidential capacity. The Board finds, furthermore, that they are respondents in this complaint. Moreover, in his opening remarks, Mr. Newman indicated that he was withdrawing his objection that the respondents did not fall under subsection 8(1) of the *PSSRA*.

The issue before the Board is whether the employer and Mr. Harder have an obligation to provide the bargaining agent with names and addresses of employees who are affected and likely to face lay-off due to the Federal Government downsizing.

The principal facts are not in dispute. The employer entered into an Agreement in Principle (Exhibit 1, Tab 1) which establishes a regime which can best be described as co-management of the downsizing process as it affects employees.

The agreement states in part:

> *INTRODUCTION*
>
> *It is proposed that a national joint labour-management process be developed to assist in the employment transition challenge that will be faced by the Public Service in the next three years and beyond.*
>
> *This Agreement in Principle establishes the mandate and membership of the National Joint Labour-Management Steering Committee and the mandate of Joint Regional/Local Adjustment Committees.*
>
> *...*
>
> *PRINCIPLES*
>
> *A) Joint Labour-Management Process*
>
> *A joint labour-management process that ensures a co-operative effort and commitment from all departments and unions involved to develop a consensus on managing the support services to affected employees.*
>
> *B) Coordinated Effort*
>
> *A coordinated effort that is federal government wide, interdepartmental and national, regional and local in scope. Since change is best managed by the people involved, delivery is through locally driven initiatives involving affected employees and coordinated by local/regional union and employer representatives.*
>
> *C) Transparent Process*
>
> *The process is transparent, inclusive and equitable. Services, including the dissemination of accurate and timely information, will be offered to all those affected.*
>
> *...*
>
> *Joint (Regional/Local) Adjustment Committees will:*
>
> - *Facilitate and coordinate the work of local workforce adjustment activities.*

- *Support the identification of internal/external placement opportunities.*

- *Assist employees in making informed transitions within and from the Public Service.*

- *Conduct their activities under the same principles as those outlined in this agreement.*

The complainant through its witnesses, Susan Giampietri, Mike Wing and John Gordon, each of whom is directly involved in the downsizing process on its behalf, stated that the committees set up under the agreement were unable to fulfill their obligations without knowing the names and addresses of the affected employees. The bargaining agents can do very little to assist without this information. This is particularly important in light of the fact that the Agreement in Principle requires the equal participation by the employer and the bargaining agents in these committees. Thus, this information is critical and essential to the proper functioning of these committees.

The employer's witness, Mr. Raymond Springer, agreed with the PSAC that this information is important. Mr. Springer added that there was no administrative problem in giving this information to the complainant and that it was the *Privacy Act* which was the principal and overriding issue. He indicated that if this issue was resolved, the complainant would get this information. Mr. Springer declared that the employer was of the opinion that to divulge the names and addresses was a violation of the *Privacy Act*. Counsel for the respondents submitted that the employer wanted to co-operate and was willing to provide the information requested if it was not for the possibility that to do so would violate the *Privacy Act*. Counsel stated further that they were willing to provide the requested information if each employee consented in writing to its release.

Counsel for the complainant argued that the employer had an obligation to provide the requested information and that the refusal to do so was detrimental to the needs of the affected employees. He cited numerous precedents to support his arguments and, in particular, the thesis that the bargaining agent as a matter of right is entitled to this information to carry out its duty under the *PSSRA.* Moreover, the *Privacy Act* cannot be used as a defense by the respondents because the legislation is

clear. This is not information that is prohibited from disclosure under the P*rivacy Act.* Mr. Raven referred to the following decisions:

> *Canada Post Corporation and Canadian Union of Postal Workers, (Arbitrator Picher) October 7, 1993*
>
> *Société canadienne des postes et Syndicat canadien des postiers, (Arbitrator Bergeron) 31 janvier 1995*
>
> *Forintek Canada Corp., and Jacques Carette and Public Service Alliance of Canada (1986), 14 CLRBR (NS) 1 (OLRB)*
>
> *Plaza Fiberglas Manufacturing Ltd. and U.S.W.A. (1990), 6 CLRBR (2d) 174 (OLRB)*
>
> *OPSEU (Cheong) and The Crown in Right of Ontario (Ministry of Government Services), Ontario Crown Employees Grievance Settlement Board File # 1895/90, decided May 30, 1991*
>
> *CUPE and The Crown in Right of Ontario (Worker's Compensation Board, Ontario Crown Employees Grievance Settlement Board File # 2111/91, decided April 20, 1993*
>
> *Public Service Alliance of Canada and Canada Post Corporation, Ottawa, Ontario, December 30, 1985, CLRB Decision No. 544*
>
> *F.W. Woolworth Co. and U.F.C.W., Local 1400 (1994), 22 CLRBR (2d) 123 (Sask. L.R.B.)*
>
> *Labourers' International Union of North America, Local 1059 v. Co-Fo Concrete Forming Construction Limited, [1987] OLRB Rep. October 1213*
>
> *McLeod et al. v. Egan et al. (1974), 46 D.L.R. (3d) 150 (S.C.C.)*
>
> *Dagg v. Canada [1995] 3 F.C. 199*
>
> *Linetsky (Board file 161-2-316 and Federal Court of Appeal file A-1482-84 (unreported))*

Counsel for the respondents submitted that there is nothing under section 8 or any other section of the *PSSRA* which imposes upon the respondents an obligation to provide the names and addresses of affected employees. The respondents conceded that the applicant need not go as far as to show anti-union animus in a case where the employer interferes with the employee-union relationship. However, counsel submitted that this provision required evidence of some positive act of interference.

Counsel added that none of the witnesses even suggested that the respondents were somehow actively interfering with the PSAC's ability to represent its members. Furthermore, the respondents' actions in no way restrain an employee from exercising any of his or her rights under the *PSSRA*. The respondents' position vis-à-vis this release of personal information does not in any way prevent an employee from participating in the lawful activities of the PSAC.

Counsel for the respondents added that the respondents are not acting maliciously or capriciously. On the contrary, their position is based on rational policy in addition to sound legal principles. The principal motivation is the role the *Privacy Act* plays in any consideration of this issue. The respondents are acting out of a legitimate concern for the employees' private interests. Whether the complainant or the respondents are correct in their interpretation of the *Privacy Act* is irrelevant. At most, there is an arguable issue and the fact that the respondents take the view that consents must be secured before any information is released ineluctably demonstrates that the respondents are not engaged in an unfair labour practice. Counsel argued that proof of this assertion is the respondents' offer to settle this dispute.

Concerning the *Privacy Act,* counsel for the respondents submitted that the respondents will be in breach of this *Act* should they release the names and addresses of the affected employees without their consent because of subsection 3(j) and sections 7 and 8 of the *Privacy Act.* In this regard, counsel for the respondents referred to the Federal Court, Trial Division, decision in Sutherland v. Canada (T-2573-93 (unreported)). In addition, counsel sought to distinguish the applicant's case law.

Mr. Raven, on behalf of the complainant, replied that the "act" which is the subject of the complaint is the refusal of the respondents to provide to the complainant information which the respondents possess and which is essential in order for the complainant to fulfill its obligations, both statutory and in terms of the Work Force Adjustment Directive (Exhibit 1, Tab 3) and the Agreement in Principle of May 30, 1995. Whether the refusal is regarded as active or passive interference, it is nonetheless interference. In this regard, Mr. Raven cited the Linetsky decision (supra).

The position advanced by the respondents as to the application or non-application of the *Privacy Act* is misplaced. If the complainant is entitled, as it

maintains it is, as a matter of law, to the information which it is presently seeking from the respondents as to names and addresses of affected and surplus employees, then the Board must examine the stated basis for the respondents' refusal to provide it. The *Privacy Act* is not raised by the complainant in support of either its complaint or section 99 reference but, to the contrary, is offered by the respondents as alleged justification for their refusal to provide this crucial information to the certified bargaining agent regarding employees prejudicially affected by the employer's downsizing.

Counsel added that it is therefore significant that, in the two pages devoted to the respondents' submissions on the *Privacy Act*, no authority is cited in support of the position that, however meritorious or unmeritorious the respondents' position is, the Board may not examine it and determine whether it is a proper defense to a reference under section 99 of the *PSSRA* or a complaint under section 23 of the *PSSRA* alleging a violation of section 8. Moreover, the Sutherland decision (supra) has no application to this case.

Determination

The Board concludes that, in failing to provide the requested information to the complainant, Mr. Harder is interfering in the representation of employees by the complainant contrary to subsection 8 (1) of the *PSSRA*. The question that remains is whether Mr. Harder and the employer are justified in refusing to provide the information by virtue of the provisions of the *Privacy Act*. We are of the opinion that that question has been asked and answered by various other labour boards. The jurisprudence is well-established and covers in almost all details the issue before us.

The relevant provisions of the federal *Privacy Act* are practically identical to the provisions in the Province of Ontario *Freedom of Information and Protection of Privacy Act*, 1987, and when the same issue was put before the Ontario Labour Relations Board (OLRB) in Labourers' International Union of North America, Local 1059 v. Co-Fo Concrete Forming Construction Limited (supra), they decided the issue as follows, at page 1222:

> *28. A trade union's entitlement to the names and hourly rates of employees in the bargaining unit for which it is*

> *negotiating is well settled: DeVilbiss (Canada) Limited, [1976] OLRB Rep. Mar. 49; Radio Shack, [1979] OLRB Rep. Dec. 1220 (jud. rev. denied, in Re Tandy Electronics Ltd., and United Steelworkers of America et al. (1980), 30 O.R. (2d) 29, 80 CLLC 14,017 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused March 10, 1980); Globe Spring & Cushion Co. Ltd., [1982] OLRB Rep. Sept. 1303; Northwest Merchants Ltd., [1983] OLRB Rep. July 1138, 83 CLLC 16,055; Consolidated Bathurst Packaging Ltd., [1983] OLRB Rep. Sept. 1411; The Windsor Star, [1983] OLRB Rep. Dec. 2147; The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic); [1985] OLRB Rep. May 705; and, Forintek Canada Corp., [1986] OLRB Rep. Apr. 453. Once certified with respect to a bargaining unit, a trade union is the exclusive bargaining agent of and for all of the employees who fall within that unit from time to time, not just the employees who wish to be represented by it. With that right comes the obligation to fairly represent all employees in the bargaining unit, both in collective bargaining and in the administration of any collective agreement. It necessarily follows that it has both the right and the need to know the names and existing terms and conditions of employment of each of those employees.*

The OLRB stated further at page 1223:

> *29. ...In making informed decisions and effectively performing its statutory responsibilities, information from the employees it represents can be as important to the trade union as the information the employer supplies. A trade union may need to communicate with some or all of the employees in the bargaining unit, including non-members of the union, in order to properly represent their interests; to get their input, to verify information supplied by the employer or to give notice of a strike or ratification vote (see ss. 72(4), (5) and (6) of the Act), for example. Information about how bargaining unit employees can be contacted is, thus, information to which the union is prima facie entitled.*

Similarly, in Forintek Canada Corp. and Jacques Carette and Public Service Alliance of Canada (supra) the OLRB said the following at page 26:

> *33. A belief that some number of bargaining unit employees did not wish the requested information disclosed to the union is no answer to a complaint that the failure to disclose it violates s. 15 of the Act, any more than a belief that some number of employees did not wish the union to represent them would justify a refusal to bargain with a union which is entitled by law to act as exclusive bargaining*

> *agent for a bargaining unit which included those employees. The union's right to and need for the requested information were and are concomitants of the rights and obligations which flow from its status as exclusive bargaining agent, a status which continues until its bargaining rights are abandoned by the trade union or terminated by vote of a majority of employees in the bargaining unit. Although the union has not made a separate complaint about the past survey on which the employer relied during bargaining when it refused to provide requested information, we are bound to observe that it is quite inconsistent with recognition of a trade union as exclusive bargaining agent of all employees in a bargaining unit for the employer to have asked those employees individually (or collectively) whether they approved of the employer's giving information about their salaries to their bargaining agent. The respondent's demand for individual written authorizations was equally inconsistent with its obligation to recognize the union as exclusive bargaining agent, and neither the union's delay in providing nor its attempts to obtain such authorizations can in any way excuse the respondent's conduct. The fact that Forintek had refused to provide requested particulars of existing terms and conditions of employment during the bargaining which led to previous collective agreements without its refusal then becoming the subject matter of an unfair labour practice complaint is no answer to this complaint that its refusal to do so during these negotiations violated s. 15 of the Act.*

In Société canadienne des postes et Syndicat canadien des postiers (supra), the employer attempted to use the federal privacy legislation to prevent the disclosure of personal information concerning members of the bargaining unit. The arbitrator flatly rejected this argument. The jurisprudence in support of the complainant's position in this complaint under section 23 of the *PSSRA* is overwhelming.

These decisions found that the bargaining agent had a right to the names, salary and other information in the employer's control regarding the employees in the bargaining unit and that it was not a violation of the *Privacy Act* to provide such information to the union as this was a use which was consistent with the purpose for which the information had been obtained.

The Work Force Adjustment Directive and the Agreement in Principle of May 30, 1995 confirm the partnership role which the PSAC fulfills with the employer in implementing them. It is the Board's opinion that the disclosure of the information at issue in this case will benefit the individuals to whom the information relates. In

this regard, the Board adopts the reasoning of Arbitrator Bergeron in Société canadienne des postes et Syndicat canadien des postiers (supra). Arbitrator Bergeron found that the disclosure of the address and social insurance number of employees to the bargaining agent did not constitute a violation of the *Privacy Act* on the grounds that such a disclosure was compatible with the purpose for which this information had been obtained. Such information had been gathered by the employer for employment purposes. Since the bargaining agent is legally obliged to protect the rights of the employees in the bargaining unit it represents, it must possess all the relevant information identifying these employees. Thus, Arbitrator Bergeron concluded that such information is not only authorized under paragraph 8(2)(a) of the *Privacy Act*, but also under subparagraph 8(2)(m)(ii) of that same statute. Moreover, the jurisprudence has recognized that, where the employer has refused to provide the bargaining agent with relevant information, such as in the case here, such action constitutes interference in the representation of employees by the bargaining agent. In this regard, the Board refers to the decision in F.W. Woolworth & Co. and U.F.C.W., Local 1400 (supra), Forintek Canada Corp. and Jacques Carette and Public Service Alliance of Canada (supra) and Plaza Fiberglass Manufacturing Ltd. and U.S.W.A. (supra).

The employer's argument that the timely release of the information sought by the complainant would likely violate the provisions of the *Privacy Act* cannot stand. As the sole bargaining agent, the complainant already has access to personal information relating to all employees who are members of the bargaining unit. This is in keeping with the labour relations regime established by the *PSSRA* which gives to bargaining agents the exclusive right to represent employees in the units they represent and which imposes on bargaining agents the duty to represent fairly all members of the bargaining units for which they have been certified.

In the final analysis, the complainant must be given the information it needs to properly represent the employees in the bargaining unit. Failure to provide this information constitutes a violation of the prohibition contained in subsection 8(1) of the *PSSRA.* In making this finding, the Board is not stating that the employer and Mr. Harder were in any way motivated in their actions by an "anti-union animus". We are simply stating that in the circumstances of this case, the concerns of the employer and Mr. Harder about privacy issues cannot impede the proper flow of information

which the complainant requires for the proper execution of its responsibilities under the *PSSRA* particularly when subsection 8(2) of the *Privacy Act* specifically allows the disclosure of personal information under the control of a government institution for the purpose for which the information was compiled or for a use consistent with that purpose.

In view of what precedes, the Board finds no need to decide the issues raised by the bargaining agent in its reference under section 99 of the *PSSRA.* In particular, we make no finding as whether the Agreement in Principle referred to earlier is a collective agreement for the purposes of the *PSSRA.*

For these reasons, the Board upholds the complaint against Mr. Harder and orders him to provide the information requested by the complainant as indicated earlier in this decision.

Ian Deans
for the Board

OTTAWA, April 26, 1996.