Date: 20050418

File: 148-2-391

Citation: 2005 PSLRB 36

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

TREASURY BOARD

Respondent

Indexed as
Professional Institute of the Public Service of Canada v. Treasury Board

Application under section 21 alleging a violation of section 52 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Joseph W. Potter, Vice-Chairperson

For the Applicant: Dougald E. Brown, Counsel

For the Respondent: Richard E. Fader, Counsel

Decision based on written submissions.

[1] This decision concerns an application filed with the Public Service Staff Relations Board and dated December 15, 2004, under Section 21 of the *Public Service Staff Relations Act (PSSRA)*, alleging a violation of Section 52 of the *PSSRA*.

Complaint

[2] On April 1, 2005, the *Public Service Labour Relations Act (*the "new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 39 of the *Public Service Modernization Act*, the Public Service Labour Relations Board continues to be seized with this application, which must be disposed of in accordance with the new Act.

Summary of the evidence

[3] The application was filed by the Professional Institute of the Public Service of Canada (PIPSC) alleging that the Treasury Board (the employer) "…is in violation of the statutory freeze provision found under Section 52 of the PSSRA, by cancelling the payment of the terminable allowance which is a term and condition of employment that existed at the time the notice to bargain was given on September 23, 2004."

[4] On December 21, 2004, the employer replied to the application, stating, in part:

> *It is the Employer's position that the parties intended that the terminable allowance be treated differently than other provisions of the collective agreement as evidenced by the specified expiry date in the MOU. Therefore, preserving and continuing the effect of the agreement between the parties means giving force to the parties' chosen expiry date for the Terminable Allowance of December 21, 2004.*

[5] On January 5, 2005, the parties were informed that the matter would proceed by way of written submissions. Accordingly, the PIPSC submitted its position on January 28, 2005, and the complete submission is on file at the Public Service Labour Relations Board (PSLRB). The employer forwarded its written submission on February 9, 2005, and the complete submission is also on file at the PSLRB. Finally, on February 18, 2005, the PIPSC submitted its written reply to the employer's submission, and the complete submission is on file with the PSLRB. The written submissions which follow have been edited for length and style.

Written Submission of the Applicant

[6] This complaint concerns the Employer's decision to cease payment of the Terminable Allowance to employees in the Computer Systems (CS) bargaining unit, after December, 2004. The Applicant alleges that the Employer's action violates section 52 of the *Public Service Staff Relations Act.*

[7] The applicable collective agreement provides for the payment of a monthly amount known as a Terminable Allowance to employees in the CS bargaining unit. The amount of the Terminable Allowance and the terms with respect to its payment are set out in Appendix "E" to the CS collective agreement.

[8] On September 23, 2004, the Applicant served notice to bargain on the Employer in accordance with section 50 of the *Public Service Staff Relations Act*.

[9] At the outset of bargaining for a new collective agreement, the Employer presented the Applicant with a proposed Memorandum of Understanding which provided that payment of the Terminable Allowance would expire on June 21, 2005, or on the signing of a new collective agreement, whichever occurred first. The Applicant declined the Employer's proposal.

[10] On December 13, 2004, the Employer issued a memorandum to Human Resources staff in all departments setting out the Employer's position:

> *The purpose of this letter is to advise you that the Computer Systems Group (CS) terminable allowance will expire effective December 21, 2004.*
>
> *Within the context of collective bargaining, the Employer proposed to extend the terminable allowance for a period of six months. Unfortunately, the CS bargaining unit did not accept this offer. Public Works and Government Services Canada will stop the allowance effective January 1, 2005. Should the CS bargaining unit accept, prior to December 21, 2004 the Employer's offer to extend the terminable allowance, the Employer will advise PWGSC to reactivate the payment of the terminable allowance for a six month period…*

[11] The Employer has now stopped paying the Terminable Allowance to employees in the CS bargaining unit.

[12] Prior to January 2005, there has never been an interruption in the payment of the Terminable Allowance to employees in the bargaining unit, either during the term of a collective agreement or during negotiations for a new collective agreement.

[13] Section 52 of the PSSRA provides as follows:

> *Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement that may be entered into by the employer and the bargaining agent, until such time as . . .*
>
> *(b) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to conciliation,*
>
> *(i) a collective agreement has been entered into by the parties,*
>
> *(ii) a conciliation board has been established, or a conciliation commissioner has been appointed, in accordance with this Act and seven days have elapsed from the receipt by the Chairperson of the report of the conciliation board or conciliation commissioner, or*
>
> *(iii) the Chairperson has notified the parties pursuant to subsection 77(2) or 77.1(4) of the Chairperson's intention not to establish a conciliation board or appoint a conciliation commissioner and seven days have elapsed from the date of the notice.*

[14] In the case at hand, payment of the Terminable Allowance is an express term of employment which was contained in the CS collective agreement and which was in force on the day the bargaining agent gave notice to bargain. As such, the Terminable Allowance is squarely within the statutory requirements set out in section 52 of the *PSSRA.*

[15] The fact that the Memorandum of Understanding providing for the payment of the Terminable Allowance bears an expiry date of December 21, 2004, does not permit the Employer to circumvent the operation of the statutory freeze. As held by the Federal Court of Appeal in *The Queen v. CATCA*, [1982] 2 F.C. 80, it is irrelevant whether a term of employment is terminable by the Employer. Section 52 of the *PSSRA* operates to freeze the terms and conditions of employment in place as of the date notice to bargain is given. That the Terminable Allowance is labelled as "terminable" has no significance for the operation of section 52 and does not permit the Employer to alter the status quo and avoid the statutory freeze. All collective agreements have a stated expiry date. However, this does not permit the Employer to alter terms of employment that are contained in an agreement after its stated expiry date.

[16] The Applicant requests that the Board grant the following remedies:

(a) a Declaration that the Employer is in breach of section 52 of the *Public Service Staff Relations Act* ;

(b) an Order directing the Employer to immediately reinstate the payment of the Terminable Allowance to employees in the CS group bargaining unit retroactive to December 21, 2004;

(c) an Order directing the Employer to pay any retroactive Terminable Allowance owing to employees in the CS bargaining unit within 30 days of the date of the Board's decision;

(d) an Order requiring the Employer to withdraw the memorandum dated December 13, 2004, sent to the Heads of Human Resources and Directors of Staff Relations throughout the public service;

(e) an Order directing the Employer to post a notice in terms approved by the Board in all work places where there are CS employees for the purpose of informing employees of the remedies imposed by the Board.

Written Submission of the Respondent

[17] The Applicant's argument that the Employer has violated section 52 of the *Public Service Staff Relations Act* ("*PSSRA*") is based on two submissions:

- That the Terminable Allowance ("TA") forms part of the Computer Systems ("CS") collective agreement; and
- That the expiration of the allowance does not fall within the "normal business practice/business as usual" doctrine (borrowing heavily from private sector jurisprudence).

[18] The Employer, however, agrees that the TA forms part of the collective agreement and is not arguing that the expiration of the TA is part of the Employer's normal business practice.

[19] The Employer, however, takes the position that the expiration of the TA does not violate section 52 of the *PSSRA* because it falls within the exception provided for in section 52, specifically that the terms: "…shall remain in force…except as otherwise provided by any agreement that may be entered into by the employer and the bargaining agent…[emphasis added]."

[20] The applicant now suggests that the Employer was using the TA expiration as a "threat" and that, in prior rounds of collective bargaining; there had never been an interruption of the TA.

[21] What the Applicant fails to mention, however, is that the TA extension has been in the past a preliminary step in negotiations, prior to the expiry of the TA and usually taking place on the day of the exchange of proposals. The bargaining agent would request this, to ensure that the employees would continue to receive their TA during collective bargaining. Past practice clearly establishes that the parties treated the TA as being within the section 52 exception. The presumption that the TA would cease clearly indicates that both parties agreed that the TA would not remain in force after the expiry date.

[22] What was unique to this round of collective bargaining was that the Employer had tabled a proposal to delete the TA, for the first time since its creation. The TA was

created for a specific purpose, to address recruitment and retention problems with the CS group. The current labour-market climate, however, no longer demanded the inclusion of the TA.

[23] The Applicant has ignored the specific wording of section 52 of the *PSSRA* and the unique exception contained therein:

> *52. Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement that may be entered into by the employer and the bargaining agent, until such time as … [emphasis added] .*

[24] The Applicant, in its submissions, ignores the phrase "except as otherwise provided by any agreement that may be entered into by the employer and bargaining agent". However, this Board is required to give the phrase its ordinary meaning.

[25] The ordinary meaning of this phrase is that it is open to the parties to provide in an agreement that a specific term or condition of employment should not remain in force after a specific date, in accordance with the exception in section 52.

[26] The only question is whether Appendix "E", the TA, falls within the exception provided in section 52. None of the case law submitted by the Applicant addresses this issue. In fact, the application of this portion of section 52 has never been judicially considered.

[27] When one reviews the collective agreement in its entirety, a number of points emerge:

- The collective agreement has a generic duration clause in Article 49 "Duration". It reads as follows: "49.01 The Duration of this Collective Agreement shall be from the date it is signed to December 21, 2004;"
- There are six appendices to the agreement, including Appendix "E", the TA;
- Only Appendix "E", the TA, provides a specific expiration date. It provides as follows: "This Memorandum of Understanding expires on December 21, 2004";

- The duration of all of the other appendices is captured by the generic duration clause in Article 49.01 of the collective agreement;

- Furthermore, the allowance is referred to as a "Terminable Allowance".

[28] Had the parties merely intended for the generic duration clause in the collective agreement to apply to the TA they wouldn't have specifically added an expiration date in Appendix "E". The question becomes: why would the parties have negotiated a specific expiration date in the TA?

[29] It is interesting to note that the generic clause in the collective agreement uses the term "duration" while the term in Appendix "E" is "expiration". It is respectfully submitted that in using dissimilar terms the parties have intended a different result. The result intended is that the TA expires, in accordance with the exception in section 52.

[30] It is also interesting to note that the duration clause and the expiration provision share the same date (December 21, 2004). The inclusion of a specific, stand alone, expiry date in the TA must be given some meaning. On an ordinary construction of the collective agreement the parties must be presumed to have intended a specific result in including an expiry date in the TA appendix when there is no expiry date in the other appendices.

[31] It is respectfully submitted that the Applicant has failed to meet its burden in establishing that the Employer has violated section 52 of the *PSSRA* and that the within application should be dismissed in its entirety.

[32] In the alternative, should this Board conclude that Appendix "E" is ambiguous and that extrinsic evidence is required, the Employer requests that the matter proceed to oral hearing. It is the position of the employer that competing assertions of the state of negotiation history and/or past practice (as noted above) is a matter that can, in accordance with the rules of procedural fairness, only be resolved by the presentation of *viva voce* evidence.

Written Reply Submitted by the Applicant

[33] Section 52 of the *PSSRA* reflects a strong legislative policy in favour of maintaining the status quo after a notice to bargain is delivered. When it is suggested that the parties have made an agreement that has the effect of avoiding the statutory freeze, such an agreement should clearly reflect an express mutual intention to avoid the operation of the statute.

[34] A clause in a collective agreement that simply specifies the expiry date or duration of the Agreement cannot be construed as an agreement to opt out of the statutory freeze, since this would render the statutory freeze meaningless. Collective agreements are negotiated for a specific term and do not operate in perpetuity; consequently, all provisions in a collective agreement are time-limited. However, the fact that provisions are time-limited does not mean that the parties thereby intended to opt out of the statutory freeze.

[35] Appendix "E" has the same starting date and expiry date as all other provisions in the collective agreement. This reflects the parties' intention to link the Terminable Allowance to the collective agreement and does not support the employer's argument that the Terminable Allowance was intended to operate independently from the other provisions of the collective agreement.

[36] The employer suggests an interpretive inference can be drawn from the use of different terminology in article 49 of the collective agreement and article 4 of Appendix "E": article 49 speaks of "duration" and Appendix "E" uses the term "expires". However, the first page of the collective agreement also uses the term "expiry date". This indicates that the terminology is interchangeable. A clause that defines the length of a collective agreement's life in terms of "duration" is not an agreement to opt out of the statutory freeze; a clause that expresses the same concept in terms of a specific expiry date is also not an agreement to opt out of the statutory freeze.

Reasons

[37] In *The Queen v. Canadian Air Traffic Control Association (supra)*, the Federal Court of Appeal examined Section 51 (as it then was) of the *PSSRA,* and wrote, at paragraph 24:

> *The purpose of section 51 of the Public Service Staff Relations Act is to maintain the status quo in respect of terms and conditions of employment while the parties are attempting to negotiate an agreement. It is a particular version of a provision generally found in labour relations legislation [that] is designed to promote orderly and fair collective bargaining. There must be some firm and stable frame of reference from which bargaining can proceed. The provision should not be given a narrowly technical construction that would defeat its purpose.*

[38] The employer's position, simply stated, is that Section 52 requires the terms and conditions of employment to remain in effect unless the agreement provides otherwise. In this case, the employer states that the Terminable Allowance Appendix contains the following provision, which exempts it from Section 52:

> *"This Memorandum of Understanding expires on December 21, 2004".*

[39] After reviewing the arguments of each party, I must conclude that the fact that the Appendix uses the term "expires" does not mean that the term or condition of employment ceases to operate. As the Applicant noted, the cover page on the Computer Systems Group collective agreement states "expiry date: December 21, 2004". This does not mean that each and every provision in the collective agreement ceases on December 21, 2004, regardless of Section 52. Rather, Section 52 keeps these terms and conditions of employment in force until either the agreement is renewed or the group is in a legal strike situation.

[40] The employer submits that "…the parties must be presumed to have intended a specific result in including an expiry date in the TA appendix when there is no expiry date in the other appendices". Apart from the observation above that the entire collective agreement has an "expiry date", as seen on the cover page to the collective agreement, there can indeed be a specific result to including an expiry date in the Appendix. If no notice to bargain is filed before the collective agreement expires, it

may be possible for any term or condition of employment specified in the collective agreement to expire. However, when notice is given, an expiry date such as exists in the TA appendix may persuade a conciliation or arbitration board (as the case may be) to alter the provision if one side or the other makes a compelling argument to do so. It seems the parties have recognized that, at some point, this particular benefit may need to be amended or eliminated. An expiry date in the Appendix would, I believe, buttress the argument during negotiations for eliminating the benefit.

[41] This is an interesting issue and the employer submits it has never been judicially considered. However, the guidance from the Federal Court of Appeal in *The Queen v. CATCA (supra)*, is useful in saying "The provision should not be given a narrowly technical construction that would defeat its purpose". What is the purpose of section 52? It is, as stated by the FCA (supra) "…to maintain the status quo in respect of terms and conditions of employment while the parties are attempting to negotiate an agreement" (emphasis added).

[42] The written submission of the bargaining agent indicated that, at the outset of negotiations, "…the Employer presented the Applicant with a proposed Memorandum of Understanding which provided that payment of the Terminable Allowance would expire on June 21, 2005 or on the signing of a new Collective Agreement, whichever occurred first". This was an item that, quite clearly, was being negotiated.

[43] Why would the employer table a proposal to delete the terminable allowance if it had the right, as it now suggests it has, simply to delete it on December 21, 2004? The very fact that the employer tabled a proposal wanting to delete the TA in June 2005 indicates, to me, that the TA is an item that the parties intended to negotiate and amend if they so agreed. Section 52 of the *PSSRA* is, I believe, specifically constructed to have provisions like the terminable allowance "…remain in force and shall be observed by the employer".

[44] The employer relies heavily on the fact that the Memorandum of Understanding dealing with the Terminable Allowance contains the words "…expires on December 21, 2004". In my view, given the circumstances of this case, this Memorandum of Understanding would need to contain a much more specific provision exempting it from section 52 of the *PSSRA*, if the parties had intended that to be the case.

[45] The employer submits that past practice establishes that the parties treated the TA as being within the section 52 exception. I do not agree, based on the submissions of the parties. Again, I think it would take specific discussions between the parties to clearly establish that the TA was being dealt with at the outset of negotiations to specifically avoid having section 52 terminate the provision. No such discussions took place at past negotiation sessions that I was made aware of. Indeed, the item was clearly negotiated. In my mind, there is no ambiguity, nor does the negotiating history need to be explored any further than it has been in these written submissions

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

Order

[47] For all of these reasons, this application succeeds, and a declaration is made that the employer has breached Section 52 of the *PSSRA*. The employer is hereby ordered to reinstate the Terminable Allowance benefit to members of the CS bargaining unit retroactive to December 21, 2004, and to pay all those entitled to this benefit accordingly.

[48] I do not believe that it is necessary to order the posting of this decision, as it is a public document when rendered. With respect to the applicant's request for payment within a 30 day time limit, I would simply state that the employer would be expected to action this decision within a time frame as expeditiously as possible. If it is not possible to meet the 30 day time limit, the employer is to meet with the applicant and provide information as to when payment can be made.

April 18, 2005.

Joseph W. Potter,
Vice-Chairperson.