Date: 20080704

File: 561-32-100

Citation: 2008 PSLRB 50

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Complainant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Indexed as
Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Renaud Paquet, Board Member

For the Complainant: Sean T. McGee, counsel

For the Respondent: Neil McGraw, counsel

Heard at Ottawa, Ontario,
June 10 and 11, 2008.

I. Complaint before the Board

[1] On January 15, 2007, the Professional Institute of the Public Service of Canada ("the complainant") filed a complaint with the Public Service Labour Relations Board ("the Board") under paragraph 190(1)(*b*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"), against the Canadian Food Inspection Agency (CFIA) and the Treasury Board ("the respondents"). The complainant submits that the respondents violated section 106 of the *Act* and breached their duty to bargain in good faith.

[2] The complaint concerns negotiations to renew the collective agreement for CFIA employees in the Informatics (IN) group. The complainant is certified to represent the employees under the *Act*. The collective agreement in question expired on May 31, 2005.

[3] On April 12, 2005, the complainant served notice to bargain on the CFIA, thus beginning negotiations. After several meetings in 2005 and 2006, the CFIA notified the complainant that it was unable to file the economic or salary evidence in support of its position because it had not yet received a mandate to do so from the Treasury Board. Faced with that situation, the complainant filed this complaint.

[4] Before filing the complaint, the complainant referred the dispute to arbitration. Arbitration proceedings were held on January 31 and February 1, 2007. The arbitration board's decision was rendered on February 14, 2007.

[5] The respondents filed two preliminary objections against the complaint. The first objection seeks to remove the Treasury Board as respondent and party to the complaint because it is not the employer; the CFIA is a separate employer within the meaning of the *Act*. The second objection asks the Board to dismiss the complaint for mootness because the arbitration board rendered a decision on February 14, 2007. Moreover, the complaint is inadmissible because of the complainant's request to establish an arbitration board and because of the decision of the Chairperson of the Board to agree to establish a board.

[6] For practical reasons, an oral decision on the respondents' first objection was rendered at the hearing. I decided to remove the Treasury Board as a party. I reserved my decision on the second objection and heard the case on the merits.

II. Summary of the evidence

[7] After the notice to bargain was served on April 12, 2005, the parties met several times, with a view to entering into a new collective agreement. The initial meetings focused on negotiating clauses that did not deal with compensation.

[8] On March 26, 2006, the complainant filed its wage demands. When those demands were filed, the CFIA's spokesperson stated that he was unable to make a counter-offer. In the weeks that followed, no bargaining meetings were held, but the parties' spokespersons maintained frequent communication. The complainant waited for the CFIA to be in a position to make a wage offer.

[9] On August 22, 2006, the parties met again. The CFIA's spokesperson announced to the complainant's representatives that he could not make a wage offer because he had yet to receive the authority from the Treasury Board to make one. As was the case after the meeting on March 26, 2006, no further bargaining meetings were held in the weeks that followed, but the parties communicated frequently.

[10] During the bargaining period, the CFIA tried several times to obtain a mandate to negotiate wages. On June 16, 2006 and again on November 6, 2006, the CFIA wrote to the Assistant Secretary of the Treasury Board to request the required mandate. No mandate was given. On December 21, 2006, the CFIA sent another letter, this time to the Secretary of the Treasury Board, to request a mandate. This final request was successful, and a mandate was received on January 11 or 12, 2007.

[11] The CFIA then contacted the complainant, and a bargaining meeting was held on January 17, 2007. At the meeting, the CFIA submitted its wage offer in accordance with the mandate.

[12] On September 12, 2006, the complainant had filed a request with the Board to have an arbitration board established to rule on the unresolved bargaining issues. On December 5, 2006, the Board rendered a decision in which it established the arbitration board's terms of reference. The arbitration board rendered its decision on February 14, 2007.

III. First objection

A. Summary of the arguments

[13] The respondents' argument is relatively simple. The employer has a duty under section 106 of the *Act* to negotiate in good faith and an obligation to make every reasonable effort to enter into a collective agreement. Section 2 of the *Act* gives a very clear definition of "employer." The Treasury Board is the employer for the departments named in Schedule I to the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*), and those parts of the federal public administration named in Schedule IV to the *FAA*. For those parts of the federal public administration named in Schedule V to the *FAA*, the separate agency is the employer. The CFIA is one of the agencies named in Schedule V and is therefore the employer within the meaning of the *Act*.

[14] According to the respondents, the complaint made under paragraph 190(1)(*b*) of the *Act* cannot name the Treasury Board because it is not the employer. The complaint cannot be made against any employer other than the CFIA since it is the employer within the meaning of the *Act*.

[15] The complainant submits that the Treasury Board, in not giving a wage mandate to the CFIA, prevented the CFIA from bargaining in good faith. The CFIA allegedly wanted to make a wage offer to the complainant but could not do so without a mandate from the Treasury Board.

[16] According to the complainant, the CFIA did not feel free to bargain. Even if it had been ordered to bargain, it could not have done so. The CFIA must receive its mandate from the Treasury Board and cannot put a wage offer on the table until the Treasury Board gives it the authority.

[17] The Treasury Board must therefore be subject to the Board's order. To enforce the *Act*, the Board must be able to make an order against anyone who has committed an offence under the *Act*.

B. Reasons

[18] The complaint was made under paragraph 190(1)(*b*) of the *Act*, which refers to section 106. The two provisions read as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> *(*b*) the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
>
> . . .
>
> ***106.*** *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> *(*a*) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> *(*b*) make every reasonable effort to enter into a collective agreement.*

[19] To dispose of the objection raised by the respondents I must first establish, based on the applicable legislation, who the employer is in this case. Subsection 2(1) of the *Act* defines "employer" as follows:

> *"employer" means Her Majesty in right of Canada as represented by*
>
> *(*a*) the Treasury Board, in the case of a department named in Schedule I to the* Financial Administration Act *or another portion of the federal public administration named in Schedule IV to that Act; and*
>
> *(*b*) the separate agency, in the case of a portion of the federal public administration named in Schedule V to the* Financial Administration Act.

[20] The *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6 (*CFIAA*), under the part dealing with human resources, states the following at subsection 13(2):

> ***13.*** *(2) The President may set the terms and conditions of employment for employees of the Agency and assign duties to them.*

[21] The *FAA*, at paragraphs 7(1)(*e*) and 11.1(1)(*c*), establishes the Treasury Board's powers relating to human resources management. Paragraph 11.1(2)(*a*) sets out the limits of those powers. Those provisions read as follows:

> ***7.*** *(1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to*
>
> . . .
>
> *(*e*) human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it;*
>
> . . .
>
> ***11.1*** *(1) In the exercise of its human resources management responsibilities under paragraph 7(1)(*e*), the Treasury Board may*
>
> . . .
>
> *(*c*) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any related matters;*
>
> . . .
>
> *(2) The powers of the Treasury Board in relation to any of the matters specified in subsection (1)*
>
> *(*a*) do not extend to any matter that is expressly determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers in relation to those matters on any authority or person specified in that Act;*

[22] These statutory provisions leave no doubt that, in this case, the Treasury Board is not the employer. The CFIA is a separate employer named in Schedule V to the *FAA*. Subsection 13(2) of the *CFIAA* confirms that the CFIA is the employer. Finally, subsections 11.1(1) and (2) of the *FAA* limit the Treasury Board's powers such that it cannot exercise the powers of an employer in such cases.

[23] Although the complainant's arguments are especially interesting, the Board cannot hear a complaint naming a third party, in this case the Treasury Board. I therefore allow the respondents' first objection and remove the Treasury Board as a respondent.

[24] The labour relations scheme for separate employers named in Schedule V to the *FAA* thus applies. Bargaining agents duly certified by the Board negotiate with employers who cannot make decisions about wage offers by themselves. The employers must first obtain authorization from the Treasury Board. However, the Treasury Board is not a party to the collective bargaining process under the *Act*. In practice, the bargaining agent is therefore, in a sense, reduced to negotiating an increase in total salary with a "third party" who, under the *Act*, is the employer, while the real decision maker is not present at the bargaining table.

[25] This is a special labour relations scheme, to say the least. It is not within my authority to question the effectiveness of such a scheme; rather, I am responsible for ensuring adherence to its legal framework. According to that framework, in this case, there is no doubt that the CFIA is the employer. For the remainder of this decision, I will therefore use the term "respondent" to refer to the CFIA.

IV. Second objection

A. Summary of the arguments

[26] The respondent notes that sections 135 to 159 of Division 9 of the *Act* concern the arbitration of disputes resulting from collective bargaining. Section 135 sets out the application of the Division. According to paragraph 135(*b*), the provisions under Division 9 of the *Act* apply only where the parties have bargained in good faith with a view to entering into a collective agreement.

[27] According to the respondent, no request to establish or appoint an arbitration board or to hear the parties in arbitration may be made if the parties have not bargained in good faith. Nevertheless, in September 2006, the complainant requested that an arbitration board be established. The Board authorized the establishment of an arbitration board, which then rendered its decision.

[28] The respondent argues that the complainant cannot simultaneously use the dispute arbitration process under the *Act* and file a complaint alleging bargaining in bad faith. By using the dispute arbitration process, the complainant implied that the parties had bargained in good faith.

[29] The respondent also argues that the issue is now moot, given that an arbitral award was rendered on February 14, 2007 and that a new collective agreement was subsequently signed.

[30] The complainant admits that the complaint was filed after the request for arbitration was made. However, the complainant notes that it did not receive a wage offer from the respondent until two days after the complaint was filed.

[31] According to the complainant, if the employer's arguments were true, it would mean that the arbitration board, which heard the dispute on January 31 and February 1, 2007, was not entitled to make its order.

[32] The complainant submits that, based on the respondent's argument, an order regarding bargaining in bad faith could never be made unless the union decided to put everything on hold until the Board ruled on the complaint. Proceeding in this manner would be contrary to the interests of the labour relations community, in that it would draw out the collective bargaining process while fostering disagreements between the parties and hindering the signing of collective agreements.

[33] According to the complainant, the respondent's argument leads to the conclusion that the respondent can refuse to bargain for long periods and then make an offer after a complaint has been filed, thus blocking the Board from ruling on the issue. The employer should never be allowed to say that as long as an offer has been made, no one may subsequently declare that it bargained in bad faith.

[34] According to the complainant, the issue raised in this complaint is still alive and has not become merely moot. Negotiations between the parties will be repeated, and the parties will have to face each other again at the bargaining table in the future. If the complaint is dismissed based on this objection, the respondent will be able to continue dragging its heels in the future by saying that it does not have a mandate and then making an offer at the last minute.

[35] From a practical point of view, according to the complainant, the purpose of bargaining is not to go on strike or to ask a third party to step in and clean things up but rather to arrive at a settlement. Moreover, the *Act* was drafted with this in mind. Obviously, an agreement cannot be reached if one of the parties does not submit its position on wages.

[36] The complainant therefore asks that the respondent's objection be dismissed. Accepting the respondent's position would mean that if a party bargains in bad faith, it can prevent an arbitration board from being established. A party could thus refuse to bargain and then oppose the establishment of an arbitration board. There would be no way to renew the collective agreement.

B. Reasons

[37] Division 9 of the *Act* begins with section 135, which reads as follows:

> ***135.*** *This Division applies to the employer and the bargaining agent for a bargaining unit whenever*
>
> *(*a*) the process for the resolution of a dispute applicable to the bargaining unit is arbitration; and*
>
> *(*b*) the parties have bargained in good faith with a view to entering into a collective agreement but are unable to reach agreement on a term or condition of employment that may be included in an arbitral award.*

[38] Beginning in March 2006, after submitting its wage offer, the complainant expected the respondent to make its own offer. Summer passed, the year came to an end and the respondent made an offer on January 17, 2007. The respondent was unable to make an offer before that date because it did not have a mandate from the Treasury Board.

[39] In the meantime, the complainant opted to pursue two recourses at the same time. On one hand, on September 12, 2006, it requested the establishment of an arbitration board, and on the other hand, it filed this complaint on January 15, 2007.

[40] The *Act* was drafted to make bargaining in good faith a prerequisite to the establishment of an arbitration board. In requesting arbitration on September 12, 2006, the complainant implicitly admitted that the parties had bargained in good faith; otherwise, section 135 of the *Act* would have prevented the complainant from making its request. Later, in a decision dated December 5, 2006, the Acting Chairperson of the Board defined the arbitration board's terms of reference. In acting as he did, the Chairperson implicitly agreed that the parties had bargained in good faith. Finally, the same reasoning applies to the arbitration board when it heard the dispute on January 31 and February 1, 2007 and rendered its decision on February 14, 2007.

[41] The two recourses are, in effect, contradictory. If the complainant had gone about it the other way around, that is, by filing a bad-faith bargaining complaint first, the request for arbitration would have automatically been barred, and the Chairperson could not have established the arbitration board in good conscience.

[42] As shown by *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 185-02-280 (19841203), decided under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, an arbitration board is supposed to be the last resort, to be used once all other possible bargaining avenues have been exhausted. It cannot be used as a process for resolving an impasse. In that case, the Treasury Board had requested that an arbitration board be established. The Professional Institute of the Public Service of Canada objected, arguing that the Treasury Board had not bargained in good faith. Without ruling on whether either party had bargained in good or bad faith, the Board refused to establish an arbitration board because the parties had not bargained enough. Consequently, the first condition, the requirement to bargain in good faith now found in section 135, had not been met. It is worthwhile to quote the following passage from that decision, which is particularly fitting in the present situation:

. . .

> *17. In the Board's view, there can be no doubt but that the whole scheme of the provisions relating to negotiations and requests for arbitration envisages that the parties must negotiate to an impasse on all negotiable items raised by either party before a request for arbitration can properly be made. The principal three provisions relating to this matter are section 50, and subsections 63(1) and 70(3)* [[translation] now 106, 136(1) and 150(2) respectively: duty to bargain in good faith, possibility of requesting arbitration and exclusion from arbitration of terms or conditions of employment that were not the subject of negotiation between the parties]. . .
>
> . . .
>
> *These provisions make it abundantly clear that the parties are expected to resolve their own disputes and are only entitled to shift that responsibility to the Board as a last resort if, notwithstanding their efforts to do so, they have been unable to arrive at a collective agreement. Frustration by either party with what it regards as stalling by the other is not an occasion for submitting a request for arbitration. The proper recourse in such a case is to complain to the*

> *Board of a failure to bargain in good faith or, perhaps more constructively, seek the services of a mediator.*
>
> . . .

[43] In this case, the request for arbitration was uncontested, so the Chairperson established an arbitration board, as provided under the *Act*.

[44] As I mentioned above, I heard the case on the merits. Having declined jurisdiction, I cannot issue a declaration. However, if the complaint had been made in the absence of a request for arbitration, I would have been able to conclude that the employer could have unduly delayed making a wage offer. The curious situation of an employer who cannot respond to a wage demand because it has no mandate opens the door to the conclusion that it has bargained in bad faith. I quote a passage from paragraph 21 of *Professional Institute of the Public Service of Canada* that emphasizes the importance of negotiators having clear mandates:

> . . .
>
> *The Board is also concerned at the failure of the employer to provide a clear mandate to its negotiator, both on the question of joint bargaining and on the question of salary negotiations. The Board shares the view (expressed in Edwards, The Emerging Duty to Bargain in the Public Sector (1973), 71 Michigan Law Review 885, at page 904) that "one element of good faith bargaining is the presence of bargaining representatives on both sides of the bargaining table who have the authority to make genuine proposals".*
>
> . . .

[45] Section 106 of the *Act* requires the parties to bargain in good faith and to make every reasonable effort to enter into a collective agreement. If one of the parties is of the opinion that the other does not comply with that section of the *Act*, it may make a complaint under paragraph 190(1)(*b*). When the Board receives such a complaint, it may make itself available to hear the complaint in a timely manner. It may then make an order that would effectively restart negotiations.

[46] In this case, the complainant waited until January 15, 2007, to file its complaint. By then, it was already too late, since it had requested arbitration four months earlier. A complaint could have been filed as early as June 2006, when the complainant realized that the employer was unable to make a wage offer.

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

(*The Order appears on the next page*)

V. Order

[48] The first preliminary objection is allowed.

[49] The second preliminary objection is allowed.

[50] The complaint is dismissed.

July 4, 2008.

Renaud Paquet,
Board Member