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File: 561-02-124

Citation: 2008 PSLRB 63



*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

FERMIN GARCIA MARIN

Complainant

and

TREASURY BOARD
(Department of Public Works and Government Services)

Respondent

Indexed as

Garcia Marin v. Treasury Board (Department of Public Works and Government Services)

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: [Himself](#)

For the Respondent: [Sean F. Kelly, counsel](#)

Heard at Ottawa, Ontario,
July 15, 2008.

REASONS FOR DECISION

I. Complaint before the Board

[1] On September 22, 2006, Fermin Garcia Marin (“the complainant”) filed a complaint under paragraph 190(1)(e) of the *Public Service Labour Relations Act* (“the Act”) against the Treasury Board (“the respondent”).

[2] The complainant occupies an excluded position classified PG-06 at the Department of Public Works and Government Services (“the DPWGS”). The complaint submitted to the Public Service Labour Relations Board (“the Board”) reads as follows:

...

The Treasury Board has failed to comply with section 157 of the Act by not implementing the provisions of the arbitral award of April 2005 for the PG-06 level in accordance with the employer’s interpretation of 1 step equals 2 increments in the scale of rates for PG-06 as stated in the attached Personnel Communication Communiqué #92-07, dated January 27, 1992 (see page 1, Purpose and page 3, Calculation)

This approach has the perverse effect of making the increase for PG-06 about half the amount awarded to PG-05 thereby significantly eroding the spread between the 2 levels which is counter to section 67 of the PSSRA.

...

[3] The complainant is seeking an order from the Board to correct the situation described in his complaint retroactively to June 22, 2003.

[4] The respondent objects to the complaint on the basis that the complainant occupies an excluded position and is not covered by the arbitral award under which he refers in his complaint. Furthermore, the respondent submits that the complaint is not timely because it refers to an issue that dates back to April 2005.

II. Summary of the evidence on the objections

[5] The respondent tabled 11 documents, and the complainant tabled 10 documents. The respondent called Normand Masse as a witness. The complainant testified on his own behalf.

[6] Mr. Masse is Director General, Services and Specialized Acquisitions Management, DPWGS. In 2005, when the events leading to the complaint occurred, he was managing a group of about 100 employees. There were five managers reporting to

Mr. Masse including the complainant, who was the manager of the clothing and textile division.

[7] The complainant's position was managerial and confidential. He was managing 20 to 25 employees. His position was excluded from the bargaining unit in 1996 and was still excluded when the complaint was filed. The complainant admitted at the hearing that he occupied an excluded position when he filed his complaint.

[8] As an excluded employee, the rates of pay applicable to the complainant are set out in a Treasury Board document entitled *Rates of Pay for Certain Excluded and Unrepresented Employees*.

[9] On April 11, 2005, the Board issued an arbitral award for the Audit, Commerce and Purchasing (AV) Group. The complainant felt that because of the award, the salary spread between employees classified PG-06 and those classified PG-05 was significantly eroding. That concerned him greatly, and he raised the issue with Mr. Masse on various occasions. The complainant also brought his preoccupations to the attention of his PG-06 colleagues, senior management of the DPWGS, the Treasury Board and the bargaining agent for the AV group. The evidence shows that he did this between April 2005 and May 2006.

[10] None of the persons in the organizations he contacted agreed to do something about the issue he raised. He received the last answer from the Treasury Board on June 26, 2006, signed by H el ene Laurendeau, Assistant Secretary, Labour Relations and Compensation. Faced with the fact that the issue could not be resolved through internal processes, the complainant filed this complaint with the Board.

III. Summary of the arguments on the objections

[11] The respondent argues that the complainant occupies an excluded position that falls under the *Terms and Conditions of Employment Policy* and the *Public Service Terms and Conditions of Employment Regulations* and not under the collective agreement or the arbitral award referred to in the complaint.

[12] According to the respondent, the complainant is not a party to the arbitral award or the collective agreement. Furthermore, he is not an employee as defined in section 2 of the *Act*. Consequently, the Board does not have jurisdiction to hear his complaint.

[13] The respondent also argues that the complaint was not made within the 90-day period specified in subsection 190(2) of the *Act*. The evidence shows that the complainant knew about the arbitral award by the end of April 2005, but the complaint was filed only in September 2006.

[14] To support his arguments, counsel for the respondent referred me to *Richmond v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 22; *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78; and *Dumont et al. v. Department of Social Development*, 2008 PSLRB 15.

[15] For the complainant, there is no ambiguity in subsection 190(1) of the *Act*. Anyone can file a complaint, and the use of that recourse is not restricted to employees as defined in section 2 of the *Act*. Furthermore, sections 13 and 14 of the *Act* do not specify that the Board's adjudication services are limited to employees as defined in section 2.

[16] The complainant argues that changes to an arbitral award or to a collective agreement affect excluded employees because the *Terms and Conditions of Employment Policy* set out by the Treasury Board is directly affected by such changes.

[17] On the question of timeliness, the complainant explains that he first exhausted all possible internal means to resolve the issue before going to the Board. Within 90 days of the last response received from the Treasury Board, he filed this complaint with the Board.

IV. Reasons

[18] I will begin by addressing the first objection raised by the respondent. The objection refers to the following provisions of the *Act* :

...

2. (1) *The following definitions apply in this Act.*

...

"employee", except in Part 2, means a person employed in the public service, other than

...

(i) a person who occupies a managerial or confidential position; or

...

190. (1) The Board must examine and inquire into any complaint made to it that

...

(e) the employer or an employee organization has failed to comply with section 117 (duty to implement provisions of the collective agreement) or 157 (duty to implement provisions of the arbitral award);

...

157. Subject to the appropriation by or under the authority of Parliament of any money that may be required by the employer, the parties must implement the provisions of the arbitral award within 90 days after the day on which the award becomes binding on them or within any longer period that the parties may agree to or that the Board, on application by either party, may set.

...

[19] The evidence presented to me establishes that the complainant occupied a managerial and confidential position when he filed the complaint. He was not an employee as defined in section 2 of the *Act*. He was not a member of a bargaining unit, and he was not represented by a bargaining agent.

[20] Subsection 190(1) of the *Act* does not specify that the recourse it sets out is limited to employees as defined in the *Act*. However, the complaint was filed under paragraph 190(1)(e), which refers to sections 117 and 157 of the *Act*. The complainant is not a party to the arbitral award or to the collective agreement. He is not part of the bargaining unit on behalf of which the bargaining agent submitted a request for arbitration which resulted in the arbitral award dated April 11, 2005.

[21] The arbitral award may well have an impact on the Treasury Board policy concerning the remuneration of excluded employees, as the complainant argues. However, legally, there is no obligation for the employer to import into the policy the provisions of the arbitral award. Section 157 compels the employer to implement the arbitral award. It does not extend the application of the arbitral award to those outside the bargaining unit.

[22] Even if the complainant is right in arguing that the Board's services are not limited to employees as defined in section 2 of the *Act*, it does not change the fact that he cannot exercise a recourse under paragraph 190(1)(e) of the *Act*.

[23] Considering that I am allowing the first objection raised by the respondent, I need not rule on the second objection, regarding timeliness.

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

(The Order appears on the next page)

V. Order

[25] The objection raised by the respondent regarding the Board's jurisdiction is allowed.

[26] The complaint is dismissed.

August 6, 2008.

**Renaud Paquet,
Board Member**