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Public Service Labour Relations Act

Before the Chairperson
Public Service Labour Relations Board

IN THE MATTER OF
THE *PUBLIC SERVICE LABOUR RELATIONS ACT*
and a dispute affecting
the Professional Institute of the Public Service of Canada, as bargaining agent,
and the Treasury Board, as employer,
in respect of the Research Group bargaining unit

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

TERMS OF REFERENCE OF THE ARBITRATION BOARD

To: Ken Norman, chairperson of the arbitration board;
Brian Switzman and Gray Gillespie, arbitration board members

Before: Michele A. Pineau, Vice-Chairperson

For the Bargaining Agent: Michel Gingras, Professional Institute of the Public Service of Canada

For the Employer: Josée Lefebvre, Treasury Board Secretariat

Issued on the basis of written submissions
dated April 25, May 6, 21 and 27, July 2 and 28, and August 6, 2008;
and heard at Ottawa, Ontario, August 12, 2008.

Requests before the Chairperson

[1] By letter of April 25, 2008, the Treasury Board ("the employer") requested arbitration in respect of the Research Group bargaining unit. The Research Group is composed of the following: employees in Historical Research, Mathematics, Scientific Research and Defence Scientific Services. Along with its request, the employer provided a list of the terms and conditions of employment that it wished to refer to arbitration. Those terms and conditions of employment and supporting material are attached as schedule 1.

[2] By letter of May 6, 2008, the Professional Institute of the Public Service of Canada ("the bargaining agent") provided its position on those terms and conditions of employment that the employer wished to refer to arbitration. The bargaining agent objected to the employer's referral of the terminable allowances as they had not been discussed during collective bargaining. The bargaining agent also provided a list of additional terms and conditions of employment, among which the DS Pay Plan Study, that it wished to refer to arbitration. That letter and supporting material are attached as schedule 2.

[3] By letter of May 21, 2008, the employer responded that the terminable allowances had indeed been discussed during collective bargaining. The employer also provided its position on the additional terms and conditions of employment that the bargaining agent wished to refer to arbitration. The employer objected to the referral the DS Pay Plan Study to arbitration, on the basis that paragraph 150(1)(*c*) of the *Public Service Labour Relations Act* ("the *PSLRA*") prohibits an arbitral award to deal with a term or condition of employment that ". . . relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees . . . ." That letter is attached as schedule 3.

[4] By letter of May 27, 2008, the bargaining agent confirmed that it did not object to the employer's request to refer the terminable allowances to arbitration. Further, by letter of July 2, 2008, the bargaining agent withdrew its objection to the referral of the terminable allowances to arbitration. Those letters are attached as schedule 4.

[5] Pursuant to section 45 of the *PSLRA*, the Chairperson of the Public Service Labour Board has authorized me, in my capacity as Vice-Chairperson, to issue the present terms of reference to the arbitration board.

[6] Under my directions, the parties were informed that the employer's objection to the referral of the "DS Pay Plan Study" to arbitration would be decided by way of a formal hearing.

[7] By letter of July 28, 2008, the bargaining agent requested to amend its May 6, 2008, letter to refer the Work Force Adjustment (WFA) appendices to arbitration. The bargaining agent explained that as the result of a protocol, the employer and the bargaining agent were negotiating the WFA appendices at a common table for all of the employer's employees represented by the bargaining agent. At the end of June 2008, negotiations about the WFA appendices reached an impasse, and as provided in the protocol, unresolved issues were referred back to bargaining-unit-specific bargaining tables. The bargaining agent clarified that the WFA appendices that it wishes to refer to arbitration were still being discussed at the common table at the time of the employer's request for arbitration and the bargaining agent's reply of May 6, 2008. However, in view of the intervening events, the bargaining agent was now requesting to amend its reply in order to request that the WFA appendices be referred to arbitration. That letter is attached as schedule 5.

[8] By letter of August 6, 2008, the employer responded to the bargaining agent's request to refer the WFA appendices to arbitration, but objected to the bargaining agent's proposal to include a new clause concerning term employees. The employer's position was that this proposal pertained to staffing, a matter within the exclusive purview of the employer under the *Public Service Employment Act* ("the *PSEA*") and, therefore, excluded from the jurisdiction of an arbitration board. That letter and supporting material are attached as schedule 6.

[9] Under my directions, the parties were informed that I would hear them on both the employer's objections at the same time. The hearing of August 12, 2008, proceeded by way of oral submissions and the filing of exhibits without any witnesses being heard.

Arguments of the parties

[10] The employer argues that the proposed DS Pay Plan Study was discussed with the bargaining agent, but that the employer eventually decided against holding such a study; therefore, referring this issue to arbitration has become moot. The employer also insists that the DS Pay Plan concerns appointment, appraisal, promotion and

classification processes, matters that are (a) excluded from collective bargaining under the *PSEA*, (b) within the exclusive authority of the employer in accordance with section 7 of the *PSLRA*, and (c) excluded from the jurisdiction of an arbitration board under paragraph 150(1)(*c*) of the *PSLRA*. The employer refers to articles 4 to 6, 8 and 9, 12 to 14, 16 to 19 and Appendix A of the DS Pay Plan in support of its position. The employer submits that the DS Pay Plan Study referred to arbitration by the bargaining agent cannot be considered in isolation from the appointment, appraisal, promotion and classification processes, since this would make the plan meaningless for arbitration purposes. As these matters are clearly excluded from collective bargaining, the DS Pay Plan Study cannot be the subject of an arbitral award. The employer suggests that there are other fora available to discuss it, such as the Union-Management Consultation Committee, the DS Consultation Sub-Committee or the Research Community Advisory Committee.

[11] The employer further argues that the bargaining agent's proposal for a new clause in the WFA appendices with respect to term employees also relates to staffing under the *PSEA,* since it proposes to restrict the employer's ability to staff vacant positions. Such a matter is excluded from the jurisdiction of an arbitration board pursuant to section 7 and paragraphs 150(1)(*a*) and (*b*) of the *PLSRA*.

[12] The employer requests that both its objections be upheld.

[13] The bargaining agent argues that all it asks is that a consultation process be established with respect to identifying improvements to the DS Pay Plan. The bargaining agent points out that the DS Pay Plan is but a policy that the employer may amend at any time and consequently is not subject to the prohibitions contemplated by the *PSEA*. The bargaining agent takes the position that, contrary to the employer's view, the DS Pay Plan Study deals first and foremost with compensation and pay administration, just as its title implies, and as such may be a matter referred to an arbitration board. The bargaining asks that the *PSLRA* be as broadly interpreted as was the legislation at issue in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27.

[14] Furthermore, the bargaining agent takes the position that the DS Pay Plan Study is a subject of common interest. The collective agreement, at clause 37.01, recognizes the mutual benefits to be derived from joint consultation on matters of common interest. This being said, the bargaining agent submits that all it is requesting is that

there be a study — an issue that does not engage the employer's authority over staffing matters. The bargaining agent rejects the employer's argument that the DS Pay Plan Study can be effectively discussed in another forum.

[15] With respect to the WFA appendices, the bargaining agent argues that it is requesting that term employees be eligible to be considered for vacant positions, not that there be a requirement for positions to be staffed by term employees. The bargaining agent underscores that term employees constitute 23 percent of the federal public service and that the bargaining agent has a duty to represent these employees by insisting that they have certain rights. The WFA appendices do not exclude the employment of term employees, nor are there any restrictions in the protocol limiting the subject matter that can be discussed or referred back to individual bargaining tables.

[16] The bargaining agent requests that the DS Pay Plan Study and the WFA appendices be included in the terms of reference of the arbitration board.

Reasons

[17] I agree with the employer that an arbitration board cannot deal with a term or condition of employment that may affect the organization of the public service or appointment, appraisal, promotion and classification processes. Paragraph 150(1)(*c*) of the *PSLRA* clearly provides this exclusion from the arbitration process:

> ***150.*** *(1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> . . .
>
> *(*c*) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*

Moreover, section 7 of the *PSLRA* provides that:

> ***7.*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to*

> *and to classify positions and persons employed in those portions of the federal public administration.*

I do not agree, however, that either of these provisions prevents an arbitration board from dealing with the bargaining agent's request with respect to the DS Pay Plan Study or the WFA appendices.

[18] The bargaining agent's proposal with respect to the DS Pay Plan Study relates to identifying problems and making recommendations:

> *The parties agree to undertake a study of the DS Pay Plan Study as to its structure, examine, evaluate and discuss its real operation or administration in relation to the principles established by the Plan, identify problems or anomalies, and make recommendations.*
>
> *The Study will be composed of an equal number of TB and DND representatives on the one hand, and those selected by the Institute on the other; the Study will be co-chaired; the parties may call on the expertise of other resources.*
>
> *The study will begin within 6 months following the date of signing of the RE collective agreement or the arbitral award; the 'Study' will table a report with joint recommendations, and minority issues should the case be. The report will be tabled no later than six months before the expiry of the collective agreement.*
>
> *Employees participating in the Study, will be considered as being on duty status, and costs will be borne by the employer.*
>
> [*Sic* throughout]

[19] I find nothing in the bargaining agent's request relating to the DS Pay Plan Study that interferes with the employer's exclusive powers to organize the public service or to conduct appointment, appraisal, promotion and classification processes. I am mindful that the employer did not contradict the bargaining agent's argument that the DS Pay Plan Study is an employer policy that makes no reference to the provisions of the *PSEA*.

[20] The employer stated that it had rejected a proposal to modify the DS Pay Plan, and, therefore, this was no longer a subject that it wished to discuss at the bargaining table. The merits of this concern, however, are not mine to determine. My task is to decide whether the term or condition of employment that the bargaining agent wishes

to refer to arbitration may be included in an arbitral award. Having affirmatively decided that this is the case, I am referring this term or condition of employment to the arbitration board, which will decide whether the bargaining agent's proposal should form part of the arbitral award. It is before the arbitration board that the employer must raise the issue of mootness of the bargaining agent's proposal of a DS Pay Plan Study.

[21] With respect to the bargaining agent's request concerning the WFA appendices, its proposal reads as follows:

> *Term employees, will be considered for vacant positions for which they are qualified or suitable, and for which no indeterminate employee is available or qualified.*

[22] The employer has taken the position that this clause would inhibit its right to staff vacant positions, contrary to the provisions of the *PSEA* and section 7 and paragraphs 150(1)(*a*) and (*b*) of the *PSLRA*, to the extent that it would have to consider term employees first, before considering casual employees or other types of employees.

[23] It should be mentioned that the proposed new clause to which the employer objects is part of a larger proposal concerning the reference to term employees in the WFA appendices:

> *Definition: A term employee is an employee who does not hold indeterminate status and who normally benefits from the collective agreement.*
>
> *1- Term employees will receive the greater of 50% of the TSM* [Transition Support Measure] *applicable to an indeterminate employee, plus severance pay if applicable, to the nearest 6 months of employment from their last date of hiring or that of continuous employment.*
>
> *2- Term employees, will be considered for vacant positions for which they are qualified or suitable, and for which no indeterminate employee is available or qualified.*

[24] The employer did not explain why it was raising an objection to the second paragraph of the proposal, but not to the inclusion of a definition of term employee or the payment of a transition support measure, given that this proposal would be new language. It is my view that the second paragraph flows logically from the definition

and from the first paragraph with respect to term employees. Nor have I been convinced that the proposal that is the subject of the objection impinges on the employer's exclusive powers to organize the public service or to conduct appointment, appraisal, promotion and classification processes.

[25] Therefore, I have also decided that the bargaining agent's request for arbitration concerning the WFA appendices relates to a term or condition of employment that can be referred to the arbitration board, which will decide whether the bargaining agent's proposal should form part of the arbitral award.

[26] Accordingly, pursuant to section 144 of the *PSLRA*, the matters in dispute on which the arbitration board shall render an arbitral award are those set out in schedules 1 to 6 inclusive, which are attached to this decision.

[27] Should any jurisdictional question arise during the course of the hearing before the arbitration board as to the inclusion of a matter in these terms of reference, the question must be submitted without delay to the Chairperson of the Public Service Labour Relations Board, who is, according to subsection 144(1) of the *PSLRA*, the person authorized to make such a determination.

September 23, 2008

Michele A. Pineau,
Vice-Chairperson
Public Service Labour Relations Board