Date: 20081003

File: 561-32-188

Citation: 2008 PSLRB 78

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: Christopher Rootham, counsel

For the Respondent: Karen Clifford, counsel

Heard at Ottawa, Ontario,
August 26 to 29, 2008.

I. Complaint before the Board

[1] On October 18, 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* ("the *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, against the Canadian Food Inspection Agency ("the respondent"). The complainant submits that the respondent violated section 106 of the *Act* and breached its duty to bargain collectively in good faith.

[2] The complaint relates to collective bargaining to renew the collective agreement for what the parties call the Scientific and Analytical Group bargaining unit ("the bargaining unit"). The complainant is certified under the *Act* to represent the bargaining unit. The collective agreement expired on June 13, 2007. The complainant served notice to bargain collectively on the respondent on February 23, 2007, thus beginning collective bargaining.

[3] The complaint alleges that the respondent failed to meet its obligation to bargain in good faith for the following reasons: it did not provide, in a timely manner, payroll data requested by the complainant; it cancelled or caused to be cancelled several bargaining sessions; it threatened to act unilaterally to implement its proposal on vacation carry-over; and it abolished four bargaining unit positions, two of which belonged to active bargaining agent representatives.

[4] In July 2008, the parties agreed that the complaint would be amended to include a further allegation about a bargaining proposal tabled by the respondent on January 23, 2008. That proposal concerned making the collective agreement available only in electronic format.

II. Preliminary objection

A. Positions of the parties

[5] The respondent argues that, after the complaint was filed, collective bargaining continued and mediation took place between the parties. Then, on April 3, 2008, the complainant requested that an arbitration board be established. The respondent alleges that the complainant cannot simultaneously make use of the arbitration process and of the complaint process to allege bad-faith bargaining.

[6] The respondent further argues that the issue of bad-faith bargaining is moot since the complainant has requested arbitration. The complaint no longer has a purpose since the goal, which is to enter into a collective agreement, will be achieved through arbitration.

[7] In support of its argument, the respondent mainly refers to *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 50. In that decision, the Board established that a complainant could not request that an arbitration board be established and file a complaint of bad-faith bargaining at the same time. In that case, the complainant had filed a complaint four months after having requested the establishment of an arbitration board.

[8] In the present case, the complainant first filed a complaint and then later requested arbitration. Even if the sequence of events is different from that of 2008 PSLRB 50, the respondent argues that the complainant cannot pursue its complaint because it later filed a request for arbitration. In filing that request, it admitted that the parties had been bargaining collectively in good faith.

[9] The complainant argues that the situation in 2008 PSLRB 50 is different from that of this case. When this complaint was filed, the complainant had not yet requested the establishment of an arbitration board. Furthermore, at the time of the hearing, an arbitration board had not yet been established. In 2008 PSLRB 50, the complainant had already applied for arbitration when it filed a complaint, and the arbitration board had issued its arbitral award when the complaint was heard.

[10] According to the complainant, in this case, the Board is not bound by 2008 PSLRB 50, as the doctrine of *stare decisis* does not apply to Board decisions. The jurisprudence has established that an administrative tribunal can render contradictory decisions on the same issue.

[11] The complainant also argues that the *Act* must be interpreted as a whole and that a section of the *Act* cannot be interpreted in isolation. In 2008 PSLRB 50, the Board interpreted section 135 of the *Act* in isolation. Rather, that section should be interpreted in light of the preamble of the *Act*, which reaffirms the central place of collective bargaining in the labour relations system. Any provision of the *Act* that is ambiguous should be interpreted by taking into consideration the objective and the preamble of the *Act*.

[12] The complainant argues that the obligation to bargain in good faith begins after the notice to bargain collectively has been given, and it continues after one of the parties has requested arbitration. If the obligation continues, then the recourse to ensure its fulfilment, namely, the right to file a complaint of bad-faith bargaining still exists.

[13] The complainant also argues that the Board should not prevent an innocent party from exercising its rights under the *Act*. According to 2008 PSLRB 50, if one party bargains collectively in bad faith, the other cannot request arbitration. The *Act* must be interpreted in a way that allows a party to request arbitration and to file a bad-faith bargaining complaint in parallel.

[14] To support its arguments, the complainant referred me to *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *Breau et al. v. Treasury Board (Justice Canada),* 2003 PSSRB 65; *Calgary Fire Fighters Association, Local 255 I.A.F.F. v. Calgary (City)*, [2005] Alta. L.R.B.R. LD-026; *Universal Workers Union, Labourers' International Union of North America, Local 183 v. Dagmar Construction Inc.*, [2003] OLRB Rep. November/December 1029; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles),* [1993] 2 S.C.R. 756; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Colombia*, 2007 SCC 27; *International Association of Machinists and Aerospace Workers, Local 2413 v. General Aviation Services Ltd.* (1982), 51 di 71 (C.L.R.B.); and *United Nurses of Alberta v. Provincial Health Authorities of Alberta*, [2003] Alta. L.R.B.R. 376.

B. Ruling

[15] 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.*

[16] To dispose of the objection raised by the respondent, I must also examine section 135 of the *Act*. Division 9 of Part 1 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.*

[17] The respondent objects to the complaint filed on October 18, 2007, on the basis that the complainant requested arbitration on April 3, 2008. According to the respondent, both processes cannot be used simultaneously. In requesting arbitration, the respondent argues, the complainant admitted that the conditions of section 135 of the *Act* had been met. In support of its argument, the respondent mostly relies on the following extract of 2008 PSLRB 50:

> . . .
>
> *[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.*
>
> . . .

I am mindful of the fact that 2008 PSLRB 50 is currently under judicial review: Federal Court of Canada File No. T-1188-08.

[18] In 2008 PSLRB 50, arbitration was requested four months before a bad-faith bargaining complaint was filed. Furthermore, an arbitration board had already been established by the Chairperson of the Board when the complaint was filed. Finally, when the complaint was heard, the arbitration board had rendered its arbitral award.

[19] As argued by the complainant, the schedule of events differentiates this case from 2008 PSLRB 50. In that case, when the complaint was filed, the complainant had already requested arbitration. In this case, the request for arbitration was made several months after the complaint and the incidents that gave rise to it.

[20] To decide on the objection, the Board needs to look at the situation as it was in October 2007, when the complaint was filed, and as it was on January 23, 2008, the date of the incident that is the subject of the amendment. At those times, the complainant had not yet requested arbitration. If the complaint had been heard before April 2008, this objection could not have been made.

[21] Considering the above, I reject the objection raised by the respondent. Bad faith could have existed on October 18, 2007 and on January 23, 2008 and the parties may have bargained in good faith afterwards and until the complainant filed its request for arbitration. The complaint needs to be heard on its merits to decide whether the respondent had made ". . . every reasonable effort to enter into a collective agreement . . ." as of October 2007 and January 2008. Furthermore, I do not feel that it is necessary at this stage to comment on the other arguments raised by the complainant on the objection.

III. Summary of the evidence

A. For the complainant

[22] The complainant tabled 21 exhibits at the hearing and called as witnesses Jamie Dunn, negotiator for the complainant, André Thibodeau, chairperson of the bargaining unit and a member of the complainant's bargaining team, and Terry Peters, another member of the complainant's bargaining unit. Jacques Audette and Georges Laplante, both regional agronomists with the respondent and officers of the complainant, were called as witnesses regarding the allegation specific to the abolishment of positions.

[23] According to the witnesses, collective bargaining to renew the previous collective agreement was very difficult. It lasted about 20 months. Most of the time the respondent was not prepared, and the complainant experienced a lot of frustration with the process. To improve the process for the current round of bargaining, the issue was brought up at a meeting between the complainant and the respondent on April 10, 2006.

[24] To facilitate the collective bargaining process, Mr. Dunn prepared a protocol that he submitted to his then counterpart, Tom McShane. For the complainant, it was important that the protocol be signed before bargaining started. After several exchanges, the protocol was signed on June 12, 2007.

[25] The first collective bargaining session was scheduled for April 25 to 27, 2007. At that time, the complainant had not yet received the payroll data that it had requested from the respondent on February 23, 2007. Furthermore, the respondent had not yet signed the collective bargaining protocol. As a result, the complainant decided to cancel that bargaining session.

[26] The next collective bargaining session was scheduled for the third week of June 2007. Mr. McShane informed Mr. Dunn that he was retiring shortly and that another negotiator would be hired to replace him. Mr. McShane felt that it would be more productive to wait for his replacement and to postpone the bargaining session to early July 2007. Mr. Dunn agreed to the postponement, and the bargaining session was rescheduled for July 4 and 5, 2007.

[27] At the July 2007 collective bargaining session, the respondent's negotiator was still Mr. McShane, and a new negotiator had not yet been hired. During that session, the parties exchanged and discussed their bargaining proposals. The tone of the discussions was very positive, and the bargaining was off to a very good start.

[28] The next collective bargaining session took place on August 14, 15 and 16, 2007. The respondent was represented by its new negotiator, Denis Trottier. On the first day, Mr. Trottier tabled the respondent's proposal on the carry-over of vacation leave. He indicated that this was a major concern for the respondent, which wanted to cap the number of days of annual leave that could be carried over from one year to the next. After some discussion, he announced that if the parties could not agree on the issue, the respondent would implement it on its own. Mr. Trottier then asked to caucus with the respondent's negotiating team, and the complainant's representatives left the room. The complainant's negotiating team was very upset by Mr. Trottier's remark and by his tone and body language.

[29] After caucus, the parties resumed bargaining, and Mr. Trottier tried to correct what he had said by adding that the respondent would find a solution to the problem if an agreement could not be reached at the bargaining table. The complainant's representatives were not satisfied with Mr. Trottier's explanation.

[30] The next collective bargaining session was scheduled for September 4 to 6, 2007. The respondent cancelled the meeting to have time to prepare. The parties next met from October 23 to 25, 2007. At that time, the respondent was no longer open to movement on some issues that it had previously indicated were open for discussion.

[31] The next collective bargaining session took place from November 20 to 22, 2007. The complainant decided to bundle issues, to withdraw some proposals and to amend others. The parties met again from January 22 to 24, 2008 with the assistance of a mediator from the Board. After hard work, they were able to settle some minor issues. However, late during that session, the respondent tabled a new proposal to the effect that the collective agreement would not be distributed in a paper format but would be made available only in an electronic format. For the complainant, this signalled that the respondent no longer wanted to bargain collectively, and, at that time, the complainant understood that bargaining was over.

[32] The complainant also presented evidence on the respondent's restructuring in the Quebec Region. In October 2006, Mr. Audette and Mr. Laplante were informed that the respondent was restructuring its operations in the Quebec Region. As a result of the reorganization, three Inspection Management positions for the Vegetal Division would be created, but four would disappear, including those occupied by Mr. Audette and Mr. Laplante. A document outlining the restructuring was tabled at that meeting.

[33] In early 2007, Mr. Audette and Mr. Laplante met with the respondent's executive director for the Quebec Region to express their concerns about the reorganization. Later, in the spring of 2007, an informal meeting was held in a restaurant where Mr. Audette and Mr. Laplante again expressed their concerns. Another meeting was held in September 2007, and Mr. Audette and Mr. Laplante were informed that their positions would be abolished. Finally, on June 20, 2008, they received letters declaring them surplus employees.

B. <u>For the respondent</u>

[34] The respondent tabled 16 exhibits at the hearing and called as witnesses Mr. Trottier and Marc Lapierre, who was a collective bargaining analyst for the respondent in 2007. Ange-Aimée Deschênes, Associate Executive Director, Quebec Region, and Claudia Pasters, Manager of Human Resources, Quebec Region, were also called as witnesses regarding the allegation specific to the abolishment of positions.

[35] From the respondent's perspective, the payroll data requested by the complainant on February 23, 2007 was far more extensive than what was normally requested. The respondent had no objection to providing the data but needed some time to compile it. Mr. Lapierre was the only collective bargaining analyst, and he had other work to do. Furthermore, he was on parental leave for one month during the spring of 2007. Part of the payroll data was provided on May 11, 2007, and the rest was provided to the complainant on July 31, 2007. At no time did the complainant complain to the respondent that the information was incomplete. Also, at no time during collective bargaining did the complainant express concerns about the payroll data.

[36] Mr. Trottier admits that his statement on the vacation carry-over issue was unclear. It was his first collective bargaining meeting as a new negotiator, and he was nervous. He said that the respondent could ultimately manage the cap on carry-over

vacation even with the actual wording of the collective agreement. Immediately after his statement, he called a caucus. When he came back to the bargaining table, he apologized for what he had said earlier, and bargaining resumed on another issue.

[37] The respondent admits that it asked to cancel the September 2007 collective bargaining session. The respondent's negotiating team needed time to prepare and to further analyze the complainant's proposals. On August 20, 2007, Mr. Trottier sent an email to Mr. Dunn, informing him of that cancellation. Mr. Dunn did not reply.

[38] Mr. Trottier admits that in January 2008, he tabled a late proposal to have only an electronic version of the collective agreement. For him, that proposal would give the complainant the opportunity to have its logo on the collective agreement and a link to its website. This proposal also contained a request that the complainant withdraw five of its proposals. That approach was being used to get the complainant to reduce the number of its proposals. At the beginning of the process, the respondent had 5 proposals, and the complainant had 40.

[39] The Quebec Region restructuring was never discussed at the bargaining table. The objective of the restructuring was to harmonize the structure of the Vegetal Division with the other divisions and to harmonize the Quebec Region's structure with that of the other regions. The new structure was developed in 2006 and was communicated to employees in October 2006. The restructuring was implemented in compliance with the existing collective agreement.

IV. Summary of the arguments

[40] In its first argument, the complainant alleges that the respondent violated section 106 of the *Act* by cancelling or postponing collective bargaining sessions. After a notice to bargain collectively had been served on February 23, 2007, the complainant had to cancel the bargaining session scheduled in April. During the bargaining session that took place on August 14 to 16, 2007, Mr. Trottier spent most of the first day meeting with the respondent's negotiating team. Then, the respondent cancelled the bargaining session scheduled for September 4 to 6, 2007. The reason for cancelling was that the respondent's negotiating team needed to meet to examine the complainant's proposals that were tabled in early July 2007. In delaying collective bargaining, the respondent was not making ". . . every reasonable effort to reach a collective agreement."

[41] In its second argument, the complainant alleges that the respondent violated section 106 of the *Act* by not disclosing information in a timely fashion. On February 23, 2007, the complainant requested payroll data from the respondent along with other information that it felt was necessary for bargaining purposes. The respondent provided part of the information on May 11, 2007 and the rest on July 31, 2007.

[42] In its third argument, the complainant alleges that the respondent did not bargain collectively in good faith when it threatened to act unilaterally on the vacation carry-over issue.

[43] In its fourth argument, the complainant alleges that the respondent did not bargain collectively in good faith in undertaking a restructuring during bargaining. The respondent did not raise the issue at the bargaining table, and it acted unilaterally. This resulted in the abolition of positions, two of which were occupied by officers of the complainant. Furthermore, the complainant had tabled a proposal on staffing asking that "[t]he employer shall not act arbitrarily or unreasonably in matters relating to staffing." Consequently, the respondent introduced a change to terms and conditions of employment while a related issue was being discussed at the bargaining table.

[44] In its fifth argument, the complainant alleges that the respondent did not bargain collectively in good faith by introducing a last-minute proposal during mediation on January 23, 2008. That late proposal requested an end to the printed publication of the collective agreement by replacing it with only an electronic version. In that proposal, the respondent also asked the complainant for more concessions. This is an indication that the respondent was not making an effort to enter into an agreement.

[45] To support its arguments, the complainant referred me to *Eastern Provincial Airways Ltd. v. CLRB*, [1984] 1 F.C. 732 (C.A.); *Canadian Union of Public Employees (Airline Division), Local 4027 v. Iberia Airlines of Spain* (1990), 80 di 165 (C.L.R.B.); *Canadian Air Line Employees' Association v. North Canada Air Ltd.* (1981), 43 di 312 (C.L.R.B.); *Syndicat des travailleuses/eurs de la Banque Nationale (CNTU) v. National Bank of Canada*, [2000] CIRB No. 101; *Graphic Arts International Union Local 12-L v. Graphic Centre (Ontario) Inc.*, [1976] 2 C.L.R.B.R. 118 (Ont. L.R.B.); *Noreau v. Canadian Broadcasting Corporation* (1979), 31 di 144 (C.L.R.B.); *Canadian Union of Public*

Employees, Local 94 v. The Corporation of the City of North York, [1995] OLRD Rep. September 1170; *Public Service Alliance of Canada v. National Capital Commission et al.*, PSSRB File Nos. 148-29-218 and 161-29-761 (19951016); *Canadian Auto Workers Union v. Air Atlantic Limited* (1986), 68 di 30 (C.L.R.B.); *Guay v. Cablevision du Nord de Québec Inc., Val d'Or, Quebec* (1988), 73 di 173 (C.L.R.B.); *Carr v. Halifax Grain Elevator Limited* (1991), 86 di 97 (C.L.R.B.); and *Dionne v. Conseil de la Nation huronne-wendat* (1998), 107 di 29 (C.L.R.B.).

[46] The respondent argues that it bargained collectively in good faith at all times and that it respected its obligations under section 106 of the *Act*.

[47] The respondent objects to the fact that some events or incidents raised by the complainant in its evidence and in its arguments were not specified in the complaint filed on October 18, 2007. Section 4 of form 16, which is used to file complaints, requires a concise statement of each act or omission. This was not completely respected by the complainant. In doing so, the complainant unilaterally amended or expanded its complaint during the hearing. Such amendments should not be accepted as per *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[48] In response to the complainant's first argument, the respondent argues that the evidence does not support the allegation that the respondent cancelled several collective bargaining sessions. The evidence shows that there were two bargaining sessions cancelled: one by the complainant and one by the respondent. In June 2007, the respondent also postponed a bargaining session by two weeks.

[49] In response to the complainant's second argument, the respondent argues that the payroll data requested by the complainant was far more extensive than the data that is normally requested. The respondent agreed to provide the data. Part of it was provided in May 2007 and the rest in July 2007. Considering his workload, Mr. Lapierre could not have produced the data any faster. Furthermore, the complainant introduced no evidence as to how the lack of data impaired collective bargaining.

[50] In response to the complainant's third argument, the respondent admits that Mr. Trottier did not express himself clearly on the issue of vacation carry-over. Immediately realizing that he could have been misunderstood, he apologized to the complainant's negotiating team. After that incident, collective bargaining continued for the balance of the day.

[51] In response to the complainant's fourth argument, the respondent argues that its restructuring, which had nothing to do with collective bargaining, was initiated in 2006, well before notice to bargain collectively was given. No positions were abolished at the time of the complaint, and surplus notices were sent in June 2008. Contrary to what the complainant is arguing, these issues were not the subject of collective bargaining. Furthermore, the respondent did not change its policy. It simply applied the existing policy or the relevant part of the collective agreement.

[52] In response to the complainant's fifth argument, the respondent argues that it did not violate the *Act* by bringing up a late proposal on having the collective agreement available only in an electronic format. The proposal was tabled "without prejudice" during mediation. Furthermore, considering collective bargaining as a whole, the respondent had 5 proposals, and the complainant had 40. In an effort to even things out, the respondent wanted the complainant to reduce the number of its proposals.

[53] To support its arguments, the respondent referred me to *Canadian Federal Pilots Association v. Treasury Board*, 2006 PSLRB 86; and *Professional Institute of the Public Service of Canada v. Treasury Board,* PSSRB File No. 148-02-189 (19910507).

V. Reasons

[54] The respondent objected to the fact that the complainant introduced evidence about events that were not raised in the complaint. In doing so, the respondent argues, the complainant amended its complaint, and the Board should not accept such amendments, based on the rule established in *Burchill*.

[55] The rule established in *Burchill* is irrelevant to this case. In *Burchill*, the Court states that a grievance presented at adjudication cannot differ from the one that was discussed in the internal grievance process. The issue to be considered by an adjudicator must be stated in the grievance or should have been discussed between the parties. This is a complaint filed with the Board, not a grievance. There was no internal process in which the complaint was discussed. In fact, the Board is the first and only level at which to discuss the issue. Furthermore, the essence of the complaint has not been altered, and the respondent had the opportunity to react to the evidence presented by the complainant.

[56] There is also abundant jurisprudence to support the argument that the evidence admissible in a bad-faith bargaining complaint can go well beyond the facts raised at the time of the complaint, the goal being to examine the behaviour of the parties during collective bargaining. This jurisprudence is well summarized in the following excerpt from *Iberia Airlines of Spain*, at page 170:

. . .

> *The continuous and ongoing nature of the duty to bargain in good faith therefore gives the Board authority, in hearing a complaint, to examine the entire collective bargaining process and to hear evidence of all facts that are relevant to such bargaining, at whatever time these facts may have arisen. The Board has recognized and applied these rules consistently since the case referred above. . . .*

. . .

[57] Most of the evidence presented was not contradicted. In a nutshell, the respondent took several weeks to provide the payroll data, cancelled one collective bargaining session, took almost one full day of prescheduled bargaining to hold its own caucus, introduced a late proposal on an electronic-only collective agreement, and announced a restructuring in October 2006, which ultimately resulted in the abolition of positions. In addition, on August 14, 2007, Mr. Trottier announced to the complainant's negotiating team that the respondent could act unilaterally on the issue of carry-over of vacation leave. It is not clear if Mr. Trottier apologized, but the complainant's witnesses admitted that he made an effort to clarify his statement.

[58] There is nothing in the evidence presented that leads me to believe that the restructuring in the Quebec Region had anything to do with collective bargaining. In fact, the restructuring was announced in October 2006, well before collective bargaining began. There is nothing in the *Act* or in the collective agreement that prevents the respondent from restructuring when and how it wishes, as long as the relevant provisions of the collective agreement are respected. The complainant tabled the following proposal during negotiations: "The employer shall not act arbitrarily or unreasonably in matters relating to staffing." This did not prevent the respondent from restructuring, and the respondent did not bargain collectively in bad faith by doing so, even if that proposal was on the table.

[59] Mr. Trottier's comments with respect to the carry-over of vacation leave were not appropriate, which the respondent itself recognized. But Mr. Trottier returned to the complainant's bargaining team and tried to correct the situation, which the complainant admitted. This is not bargaining collectively in bad faith; rather, it should be qualified as a mistake made by a person in performing his duties.

[60] This is also how I would qualify the proposal on the electronic version of the collective agreement. The proposal was late; it should have been introduced earlier in the process, and it was poorly presented. The respondent asked the complainant to give up its right to a printed version of the collective agreement and, at the same time, to drop five of its proposals. This is "take and take," not "give and take." Using such a tactic in isolation is not bad-faith collective bargaining as per the meaning of the *Act*. It is simply a poor bargaining tactic.

[61] However, the cancellation of one collective bargaining session, the use of bargaining time for preparation and the delays in providing the payroll data are more serious incidents.

[62] Based on the evidence presented at the hearing, there is no doubt in my mind that the respondent's actions, or lack of actions, contributed to a delay in collective bargaining. The complainant cancelled the April 25 to 27, 2007 session, partly because it did not receive the payroll data from the respondent. The June 2007 session was postponed by two weeks at the respondent's request, although with the complainant's agreement. There was no face-to-face collective bargaining for part of the August 2007 session because Mr. Trottier, being newly appointed as the respondent's negotiator, needed time to meet the respondent's bargaining team in caucus. Finally, the respondent cancelled the September session.

[63] The respondent explained that the September collective bargaining session was cancelled because its newly appointed negotiator, Mr. Trottier, needed time to meet with its bargaining team to prepare and to study the 40 proposals tabled by the complainant in early July 2007. Even if it is more difficult to set meeting dates during the summer months, the respondent had plenty of time between Mr. Trottier's arrival and early September 2007 to meet, prepare and study the complainant's proposals. In not using that time, it delayed bargaining and did not ". . . make every reasonable effort to enter into a collective agreement."

[64] As a result, when the parties met for their bargaining session on October 23, 2007, they had met face-to-face for a total of four days over a period of eight months since notice to bargain collectively had been given on February 23, 2007. It is a stretch of imagination to qualify this as ". . . making every reasonable effort to enter into a collective agreement." The complainant is responsible for a small part of it. The rest belongs to the respondent.

[65] I consider that the respondent did not meet its legal obligation under section 106 of the *Act* by taking so long to provide payroll data to the complainant. The data was requested on February 23, 2007, the same day that notice to bargain collectively was given. On May 11, 2007, the respondent provided part of the data, mostly dealing with different types of leave. On July 31, 2007, the respondent provided the rest of the data, mostly dealing with a breakdown of employees per classification, pay level, gender, age, annual leave entitlement and overtime worked.

[66] I could not find any jurisprudence from the Board on the obligation to provide payroll data. However, the Canada Industrial Relations Board in *Society of Professional Engineers and Associates v. Atomic Energy of Canada Limited*, [2001] CIRB no. 110, clearly established that an employer must provide such data to fulfill its obligation to bargaining in good faith under the *Canada Labour Code*, R.S.C., 1985, c. C-6. The wording of the *Canada Labour Code* and the *Act* is very similar on the obligation to bargain in good faith.

[67] In collective bargaining, it is essential for a bargaining agent to have extensive payroll data. A bargaining agent is not in a position to cost its monetary proposals without that data. It cannot estimate the financial impact of each of those proposals. In a nutshell, it cannot bargain intelligently.

[68] The *Act* specifies that, after notice to bargain collectively has been given, the parties have 20 days to begin to ". . . make every reasonable effort to enter into a collective agreement" unless they agree otherwise. Considering that it is very difficult to enter into serious bargaining without payroll data, I find that the *Act* implies that the respondent had to provide the payroll data diligently after the respondent had requested it.

[69] The task of preparing payroll data might be onerous considering that the bargaining unit is composed of approximately 1000 employees. The respondent

explained that the data was not directly available and that it needed to be compiled. The task might have required several days' work by an analyst.

[70] Collective bargaining comes at a regular pace, usually every two or three years, at dates that are known by the parties well in advance. Paragraph 105(2)(*b*) of the *Act* specifies that notice to bargain collectively shall be given in the four months preceding the expiry of the collective agreement. Employers know that, in most cases, if not in every case, bargaining agents will request payroll data. Employers themselves also need payroll data to enter into serious bargaining. The respondent, as an employer, knows that every time it bargains it must meet its legal obligation. Consequently, there is no reason that the respondent could not put in place the systems and dedicate the resources beforehand, so as to be in a position to provide the payroll data shortly after it had been requested by the complainant.

[71] The respondent took 77 days to provide part of the data and another 81 days to provide the rest of the data. That is clearly too long. The respondent explained that Mr. Lapierre is the only collective bargaining analyst, that he was also busy on other tasks and that he was on leave for one month in the spring of 2007. Obviously, this does not excuse the respondent from satisfying its good-faith bargaining obligation under the *Act*. If there is a lack of human resources, the solution is quite simple: allocate sufficient resources.

[72] From what I have heard at the hearing, I believe that some good-faith collective bargaining took place after bargaining resumed in September 2007. Progress was very slow, but at least the parties were able to settle minor issues.

[73] At the time of the hearing, the payroll data had been provided. Also, the complainant had requested arbitration. For the present round of collective bargaining, an order of specific performance would not be of great use.

[74] The previous round of collective bargaining between the parties lasted 20 months. The current round started on February 23, 2007. It has already lasted more than 20 months. This is not healthy for labour relations. Obviously, the respondent is not entirely to blame for it.

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

(The Order appears on the next page)

VI. Order

[76] The preliminary objection of the respondent is denied.

[77] The complaint is allowed in part. I declare that the respondent has failed to comply with section 106 of the *Act* by not making every reasonable effort to enter into a collective agreement.

October 3, 2008

Renaud Paquet,
Board Member