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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 complaints 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.
(PSLRB Translation)

I. Complaints before the Board

[1] On October 18, 2007, the Professional Institute of the Public Service of Canada ("the complainant" or "the bargaining agent") filed two complaints with the Public Service Labour Relations Board ("the Board") against the Canadian Food Inspection Agency ("the respondent"). The first complaint was filed under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). The second complaint was filed under paragraph 190(1)(*c*) of the *Act*. Since both complaints are based on the same set of facts, the Board heard both at the same hearing.

[2] In the first complaint, the complainant alleges that the respondent abolished the positions of four employees after they filed classification grievances, contrary to subparagraphs 186(2)(*a*)(i) and (iii) of the *Act*. The decision to abolish those positions is allegedly a direct consequence of those employees exercising their rights and of their involvement with the bargaining agent.

[3] In the second complaint, the complainant alleges that the respondent did not fulfill its duty, under section 107 of the *Act*, to maintain the terms and conditions of employment of the employees within the bargaining unit (referred to by the parties as the Scientific and Analytical Group ("the bargaining unit")) after notice to bargain was given on or about February 23, 2007. The respondent allegedly failed to fulfill that duty when it abolished the positions of four employees and breached the provisions of Appendix "B" (Employment Transition) of the collective agreement for the bargaining unit. The parties concluded that collective agreement on September 1, 2005 ("the collective agreement").

[4] Although under subsection 191(3) of the *Act* the burden of proof rests with the complainant, for the first complaint and with the respondent for the second, the parties agreed that evidence on both complaints would be submitted simultaneously.

II. Summary of the evidence

A. For the respondent

[5] At the hearing, the respondent submitted 16 exhibits and called as witnesses Ange-Aimée Deschenes, the respondent's associate executive director for the Quebec Region, and Claudia Pasters, the respondent's human resources manager for the Quebec Region.

[6] In 2006, at a date that remained unspecified during the hearing, the respondent decided to revise its operational structure for the Quebec Region for various reasons, including aligning the region's structure to that of its other regions and making the structure of the Plant Division conform to that of the Food Division.

[7] One of the effects of the new organization was that three additional plant inspection manager positions were created. Those three positions, classified IM (Inspection Manager) and excluded from the bargaining unit, were assigned to the Montreal East, Quebec and St-Hyacinthe offices. Furthermore, only three AG-03 positions were maintained, rather than four before the restructuring. Those positions are the subjects of the complaints. When the restructuring was announced, the positions were classified AG-03. However, three of the four employees occupying those positions filed classification grievances in October 2001. Following a lengthy process to which I will return later, the positions were reclassified AG-04 on February 7, 2007.

[8] The AG-03 positions (reclassified AG-04 in February 2007) under the new structure differ from the former AG-03 positions. In effect, the responsibilities of the new positions are more restricted than those of the old positions and do not include responsibility for supervising technological and scientific support staff.

[9] In October 2006, meetings were held in the respondent's various offices in the Quebec Region to announce the restructuring, with supporting documentation. A preliminary schedule was also provided. It was explained at the time that it was possible that an AG-03 would become surplus following the restructuring if the employee did not qualify for an IM position. In that event, the affected employee's salary would be protected.

[10] The four AG-03 positions (reclassified AG-04 in February 2007) affected by the reorganization included those of two bargaining agent representatives, Jacques Audette and Georges Laplante. According to Ms. Deschenes, the restructuring did not have the goal of targeting those positions specifically. Rather, it was supposed to harmonize existing structures The decision to proceed with the restructuring was unrelated to the two employees' classification grievances or activities with the bargaining agent.

[11] In December 2006, the respondent appointed a new executive director for the Quebec Region. AG-03 employees were concerned by the restructuring and voiced their

concerns to the new executive director, who chose to give the project some thought, which delayed its implementation. In late December 2007, the new IM positions were posted with a closing date of January 11, 2008. The employees in the AG-03 positions to be abolished applied for the IM positions and successfully completed the first phase of the selection process thanks to their plant management experience. However, with one exception they failed the "in-basket" test administered by the Psychology Centre of the Public Service Commission (PSC). Following the selection process, the employee who successfully completed the test was appointed to an IM position.

[12] On June 20, 2008, Mr. Audette and Mr. Laplante were informed by letter that they had been declared surplus and that Appendix "B" of the collective agreement applied to their situation. As a transition measure, both employees continue to be paid at the AG-04 level although they perform the duties of the newly created AG-03 positions.

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

[13] The complainant tabled 21 exhibits at the hearing and called Messrs. Audette and Laplante as witnesses, both of whom are regional agronomists for the respondent and active members of the complainant.

[14] Since August 2006, Mr. Audette has been relieved of his normal duties of heading the team dealing with the golden nematode, a plant pest that affects potatoes. He began his career at Agriculture Canada, after which he joined the respondent on its creation in 1997. Mr. Audette has been involved in the complainant's activities for many years. He was president of the bargaining unit from fall 2001 to the end of 2006. He continues to sit on the executive, although he is no longer president. Before the restructuring, Mr. Audette was a regional plant production and protection officer.

[15] Like Mr. Audette, Mr. Laplante was also a regional plant production and protection officer before the restructuring. He too was relieved of his duties for a two-year period and appointed to a senior officer position on the golden nematode project. Mr. Laplante began his career at Agriculture Canada, after which he joined the respondent on its creation in 1997. Mr. Laplante's involvement with the complainant began in 1992. For the past several years, he has been vice-president of the bargaining unit for the Quebec Region.

[16] In October 2001, Mr. Audette, Mr. Laplante and one of their colleagues filed classification grievances demanding an upward reclassification of their AG-03

positions. A lengthy legal saga followed, which that was resolved in February 2007 by a reclassification of their positions to AG-04, retroactive to 1999.

[17] Following the 2001 grievances, an initial classification committee found, in September 2002, that the positions had been correctly classified AG-03. The complainant requested a judicial review of that decision in October 2002. In February 2003, the complainant and the respondent agreed to have the positions' classification reviewed by a new classification committee. In May 2003, the new committee upheld its predecessor's decision, which was that the positions had been correctly classified AG-03.

[18] In June 2003, the complainant filed a new request for judicial review with the Federal Court about the second classification committee's conclusions. In its decision dated September 30, 2004, the Court ordered that a new classification committee be struck to review the grievances. As a result, a third classification committee was formed. It rendered its decision on November 30, 2004, confirming the decisions of the two previous committees, which had found that the positions had been classified correctly at AG-03. In December 2004, the complainant filed a third request for judicial review. The Court heard the case on March 29, 2006 and suggested that the parties attempt to reach an agreement out of court. On October 24, 2006, the parties agreed to submit the classification of the positions to a fourth committee for review. That committee rendered its decision on February 7, 2007, concluding that the positions were improperly classified and requiring their reclassification to AG-04.

[19] Messrs. Audette and Laplante first heard of the restructuring at a meeting the respondent held in the Quebec Region in October 2006. All employees directly affected by the reorganization were there. A second meeting on the matter was held in December 2006. Then, in January 2007, Messrs. Audette et Laplante met with the new executive director for the Quebec Region and took the opportunity to voice their concerns. Following that last meeting, the Executive Director decided to delay the project. Finally, another meeting was held with the executive director at a restaurant in the spring of 2007.

[20] In September 2007, at a meeting that Messrs. Audette and Laplante attended, the respondent officially presented the new organization structure that was to be implemented. It was at that meeting that they were formally advised that their

positions would eventually be abolished. However, they received notice of their surplus status only on June 20, 2008.

[21] According to Messrs. Audette and Laplante, a cause-and-effect relationship existed between their classification grievances and the respondent's decision to restructure the Quebec Region and abolish their AG-04 positions. Although the final classification committee had yet to render its decision when the respondent decided on the restructuring, the Federal Court had handed down several decisions on the matter. The Court had also ordered the parties to seek resolution. Therefore, there was every indication that reclassification to AG-04 was merely a matter of time. Messrs. Audette and Laplante had asked the respondent to await the decision of the fourth reclassification committee before proceeding with the restructuring, although their request was denied.

[22] Messrs. Audette and Laplante testified, each somewhat differently, that the whole affair had left them bitter. They had been involved in the complainant's activities, fought for years defending their right to a just classification, been under pressure over those years, and had finally been successful, only to lose their positions and their responsibilities in the end.

[23] Under cross-examination, Mr. Audette was unable to state that Ms. Deschenes lied in claiming that there was no link between the restructuring and his classification grievances or bargaining agent activities and those of Mr. Laplante. Rather, he is puzzled by the sequence of events.

III. Summary of the arguments

A. For the respondent

[24] With respect to the first complaint, filed under paragraph 190(1)(*g*) of the *Act*, the respondent alleges that the restructuring of the Quebec Region was completely unrelated to classification grievances having been filed or to Messrs. Audette and Laplante having been active members of the complainant. No evidence was adduced to support the complainant's theory. In fact, the theory was denied by the respondent's witnesses. Under cross-examination, Mr. Audette was unable to state under oath that Ms. Deschenes had lied in denying that theory.

[25] The complainant and its witnesses did not refute evidence given by Ms. Deschenes on the reasons for restructuring the Quebec Region and the dates on which it occurred. The restructuring met management's need to align the plant management structure with that of the other divisions in the Quebec Region and those of the respondent's other regions. Documents tabled in evidence also support Ms. Deschenes' testimony.

[26] The restructuring particularly affected the four AG-04s, not just Messrs. Audette and Laplante. If the respondent had intended to take retaliatory measures against the two employees, they would have been the only ones targeted. Further, the respondent would not have waited six years to do so, the grievances having been filed in 2001.

[27] The restructuring also created opportunities for promotion for Messrs. Audette and Laplante to the IM group. The respondent controlled part of the selection process, while another part, i.e., the "in-basket" test, was entrusted to the PSC. The respondent's staffing competitions required plant management experience, which Messrs. Audette and Laplante possessed. That requirement gave them an advantage over other candidates. Therefore, they were successful at the pre-selection phase. However, Messrs. Audette and Laplante both failed the "in-basket" test administered entirely by the PSC. The respondent had no control over that test.

[28] With respect to the second complaint, filed under paragraph 190(1)(*c*) of the *Act*, the respondent recalled its duty, under section 107, to abide by existing terms and conditions of employment once notice to bargain has been given. The respondent fulfilled its duty. It applied and complied with the collective agreement, especially Appendix "B."

[29] As demonstrated by the evidence, senior management and affected employees met on several occasions throughout the restructuring process. Meetings were also held with the bargaining agent and its representatives, including one attended by Messrs. Audette and Laplante.

[30] The complainant has the burden of proving the breach of Appendix "B" of the collective agreement. However, no such demonstration was made, and the complaint must be denied.

[31] The respondent submitted the following decisions in support of its arguments: *Canadian Federal Pilots Association v. Treasury Board*, 2006 PSLRB 86; *Canadian Air Traffic Control Association v. Treasury Board (Transport Canada)*, PSSRB File No. 148-02-149 (19890119); *United Food & Commercial Workers Union Local 1973 v. Staff of the Non-Public Funds, Canadian Forces*, PSSRB File No. 148-18-114 (19860404); *UCCO-SACC-CSN v. Treasury Board,* 2004 PSSRB 38; *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2006 PSLRB 29; and *International Association of Machinists and Aerospace Workers and District Lodge 147*, *National Association of Federal Correctional Officers v. Correctional Service of Canada*, 2006 PSLRB 76.

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

[32] The respondent bears the burden of proof for the complaint filed under paragraph 190(1)(*g*) of the *Act*. The case law is clear: the respondent must prove that, in its actions and decisions, it did not intend to take retaliatory measures against Messrs. Audette and Laplante. The complainant is not required to prove the contrary.

[33] On that last matter, the respondent has not met its burden of proof. It has not demonstrated that the restructuring completely harmonized the management structures of either the Quebec Region or other regions. Nor has it provided direct evidence of the benefits of the restructuring. The respondent merely demonstrated its intent to harmonize its structures.

[34] With respect to reorganizing to create promotion opportunities for those in AG-04 positions, the evidence has shown, rather, that the reorganization abolished positions. Furthermore, when positions had been transferred to the IM group in the past, incumbents of the former positions were automatically appointed to the IM group. That did not happen in this case. Hence, the respondent did not follow its past practices.

[35] When the restructuring began it was clear, following the Federal Court decisions, that the positions of Messrs. Audette and Laplante would be reclassified from AG-03 to AG-04. Ms. Deschenes, who testified for the respondent, did not decide to perform a restructuring. Rather, she joined the project once the decision had been made. Those who had made the decision did not testify, and the original documents, i.e., studies or

memoranda on the reorganization project, were not submitted in evidence at the hearing.

[36] The respondent filed evidence showing that, following the restructuring, Messrs. Audette and Laplante suffered no losses because their AG-04 salary is protected. However, they suffered the loss of some of their duties, since they will now be required to perform the work of an AG-03, with less-extensive responsibilities than their AG-04 duties. That also has a negative impact on the complainant and its members, who will be reluctant to exercise their rights in future for fear of reprisals on the part of the respondent.

[37] On the duty to observe terms and conditions of employment after notice to bargain has been given, the complainant maintained that the respondent had not begun to apply Appendix "B" of the collective agreement at the time the complaint was filed. However, it should have already met this requirement. For that reason, a complaint was filed under paragraph 190(1)(*c*) of the *Act*. Specifically, the respondent breached clause 1.1.10 of Appendix "B" by not consulting the bargaining agent's representatives as soon as the decision to restructure was made.

[38] The complainant submitted the following decisions in support of its arguments: *Noreau v. Canadian Broadcasting Corporation* (1978), 31 di 144 (C.L.R.B.); *Canadian Union of Public Employees, Local 94 v. The Corporation of the City of North York*, [1995] OLRB 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 (Québec)* (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.).

IV. Reasons

[39] A decision on these two complaints requires reviewing the following provisions of the *Act*:

. . .

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

. . .

(c) *the employer, a bargaining agent or an employee has failed to comply with section 107 (duty to observe terms and conditions);*

. . .

(g) *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

. . .

107. *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*

(a) *if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*

(b) *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

. . .

185. *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

. . .

> ***186.*** *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
>
> . . .
>
> *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2 . . .*
>
> . . .

[40] At the outset, the parties agreed that the respondent had the burden of proof regarding the complaint filed under paragraph 190(1)(*g*) of the *Act* that alleges a breach of subparagraphs 186(2)(*a*)(i) and (iii). Therefore, the respondent is required to establish, on a balance of proof, that it did not resort to such an unfair labour practice.

[41] The respondent produced the required proof and explained, with supporting testimony and documentation, that it had reorganized the plant management structure in the Quebec Region to harmonize it with its other management structures in a manner such that its divisions would be managed by incumbents of IM positions. The respondent was only required to demonstrate that harmonization was essential to the proper conduct of its plant protection or production operations in the Quebec Region, that the harmonized structure was more effective or efficient, or that harmonization was the only possible option for its organizational structure.

[42] The respondent was required to demonstrate that it had business reasons for restructuring the Quebec Region, and it did so successfully. It was required to show that the restructuring was in no way linked to the classification grievances that Messrs. Audette and Laplante filed or to their involvement with the bargaining agent. Ms. Deschenes' testimony was clear — the restructuring was in no way related to those

elements. Rather, the intent was to harmonize management structures. Furthermore, that testimony was not contradicted.

[43] The complainant presented no evidence to rebut the respondent's evidence. Indeed, it would have been interesting had the respondent tabled in evidence discussion documents that led to the restructuring project. However, the respondent adduced no such evidence, and I do not believe that it was essential. Additionally, the complainant did not inquire whether such documents existed while the respondent's witnesses were under cross-examination, and the point was raised only when the case was argued.

[44] As the respondent highlighted, restructuring the Quebec Region offered opportunities for promotion to the four incumbents of the AG-04 positions due to the establishment of three IM positions. In fact, one of the IM positions was filled by one of the three incumbents of the AG-04 positions who filed a classification grievance in 2001. The respondent did not eliminate Messrs. Audette and Laplante from the selection process. Rather, they failed the "in-basket" test administered by the PSC and over which the respondent had no control.

[45] I also agree with the respondent's reasoning set out in its explanation of the sequence of events. Staff was informed of the restructuring project at the end of October 2006. The classification grievances had been filed in October 2001. Between 2002 and 2006, new classification committees were set up, and the complainant requested that the Federal Court conduct judicial reviews of the committees' decisions. The last Federal Court ruling is dated March 2006. On October 24, 2006, the parties agreed to strike a fourth committee to review the position classifications. The final committee rendered its decision on February 7, 2007. It is impossible to conclude, based on the sequence of events, that a cause-and-effect relationship existed between the reclassification of positions and the decision to restructure the Quebec Region. In fact, that decision had been made well before the decision to reclassify the positions of Messrs. Audette and Laplante.

[46] I find that the complaint filed under paragraph 190(1)(*g*) of the *Act* is unfounded. Evidence presented by the respondent is sufficient to convince me that its decision to restructure the Quebec Region was not a retaliatory measure against Messrs. Audette and Laplante as a result of the exercise of their right to file grievances or their involvement in the complainant's activities.

[47] With respect to the complaint filed under paragraph 190(1)(*c*) of the *Act*, the complainant was required to demonstrate that the respondent did not observe the terms and conditions of employment in effect after notice to bargain was given on or about February 23, 2007. This complaint deals particularly with a breach of Appendix "B" of the collective agreement during the Quebec Region restructuring. According to the respondent, it had not yet begun to apply Appendix "B"; nor did it consult the complainant when the complaint was filed. Thus, the respondent is alleged to have breached clause 1.1.10 of Appendix "B."

[48] To resolve this complaint, I must first review the following provisions of Appendix "B" of the collective agreement:

. . .

Definitions

. . .

Employment Transition (transition en matière d'emploi) - is a situation that occurs when the President decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work or the discontinuance of a function within the Agency. Such situations may arise for reasons including but not limited to those identified in the Policy section above.

. . .

1.1.10

The Agency shall advise and consult with the bargaining agent representatives as completely as possible regarding any employment transition situation as soon as possible after the decision has been made and throughout the process. The Agency will make available to the bargaining agent the name and work location of affected employees.

. . .

[49] According to the evidence submitted, beginning in October 2006, the respondent held several meetings with affected employees, including Messrs. Audette and Laplante, who were representatives of the complainant. Following those discussions, the new Executive Director of the Quebec Region in fact decided to delay the restructuring.

[50] The complainant has not succeeded in proving that the respondent breached the collective agreement. Furthermore, Messrs. Audette and Laplante were informed only

on June 20, 2008 of the decision declaring that their services were no longer required. While that decision had been made at an earlier date, as demonstrated by the evidence, the matter had certainly not been decided when the complaint was filed in October 2007. Consequently, the respondent was not dealing at that time with employment transition cases within the meaning of Appendix "B" of the collective agreement. As a result, the respondent could not then have breached a duty it was not yet required to fulfill.

[51] I find that the complaint filed under paragraph 190(1)(*c*) is unfounded. The evidence submitted by the complainant is insufficient to convince me that the respondent did not fulfill its duties under section 107.

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

(The Order appears on the next page)

V. Order

[53] The complaints are dismissed.

November 24, 2008.

PSLRB Translation

Renaud Paquet,
Board Member