Date: 20091103

File: 425-HC-5

Citation: 2009 PSLRB 144

Parliamentary Employment and Staff Relations Act

Before the Public Service Labour Relations Board

BETWEEN

HOUSE OF COMMONS

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND HOUSE OF COMMONS SECURITY SERVICES EMPLOYEES ASSOCIATION

Respondents

Indexed as
House of Commons v. Professional Institute of the Public Service of Canada et al.

In the matter of an application to review bargaining unit certification under section 17 of the *Parliamentary Employment and Staff Relations Act*

REASONS FOR DECISION

Before: Georges Nadeau, Board Member

For the Applicant: Steven Chaplin, counsel

For the Respondent House of Commons Security Services Employees Associations: Georges Marceau, counsel

Decided on the basis of written submissions filed May 22 and June 26, 2009.

I. Application before the Board

[1] On February 23, 2009, I issued, on behalf of the Public Service Labour Relations Board ("the Board"), a decision dismissing the House of Commons' application (*House of Commons v. Professional Institute of the Public Service of Canada et al.*, 2009 PSLRB 23) under section 17 of *the Parliamentary Employment and Staff Relations Act* R.S.C. 1985, c.33 (2nd Supp.) ("the *PESRA*"), to reconfigure the structure of the House of Commons bargaining units and to amalgamate them into one unit. At the conclusion of my decision, I wrote the following:

> ***644*** *Counsel for SSEA requested that the employer's application be dismissed for lack of evidence and requested that the Board remain seized to hear evidence with regard to the consequence of such a decision, including the possibility of compensating the Association for having been forced to participate in the proceedings. In light of my decision to dismiss the application on the basis that the evidence has not revealed any significant change that would render the bargaining unit structure unsatisfactory, I am prepared to remain seized for 90 days to hear evidence and arguments with regard to the impact on the SSEA of having been forced to participate in these proceedings.*

Consequently, I made the following order:

> ***647*** *I remain seized for 90 days to hear evidence and arguments with regard to the impact on the SSEA of having been forced to participate in these proceedings.*

[2] On April 30, 2009, following a pre-hearing conference, I directed the parties to present their written submissions about the jurisdictional issue of whether the Board has the power to compensate the House of Commons Security Services Employees Association ("the SSEA") under the circumstances and about the threshold to be met to grant such an award.

II. Summary of the arguments

A. For the SSEA

[3] The SSEA indicated that the primary objective of Part 1 of the *PESRA* is to protect employees' collective bargaining rights. It submitted that the Board's role includes performing duties incidental to protecting those rights. In doing so, the Board

upholds rights recognized under the *Canadian Charter of Rights and Freedoms* ("the *Charter*").

[4] The Board has jurisdiction under section 10 of the *PESRA* to award compensation for the prejudice suffered by the SSEA as a result of being forced to participate in the proceedings that the applicant initiated in 2009 PSLRB 23 with no supporting evidence. The SSEA's request for compensation was not punitive in nature but was designed to make the SSEA whole. It was forced to participate in a review application that was completely unfounded.

[5] Although the employer had the right to file an application under section 17 of the *PESRA*, if the Board determines that it has jurisdiction, the SSEA would demonstrate that the employer abused that right. The SSEA would show that, from the beginning, there was no evidence to support amalgamating the security unit with the other bargaining units and that it was only a strategic move, designed to advance the employer's review application.

[6] The Board has jurisdiction to award compensation as part of its duties and under the powers conferred on it by its enabling legislation. The employer's strategic use of a review application in this case was an abuse of its right, which endangered the SSEA'S very existence and put the collective bargaining process in jeopardy.

[7] The SSEA, relying on *Chénier v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 27, and *Sabourin v. House of Commons*, 2006 PSLRB 84, indicated that nothing prevented the Board from awarding damages for the employer's misconduct and that adjudicators have the jurisdiction to award damages. It submitted that the Board and its predecessor, the Public Service Staff Relations Board, were held to have jurisdiction to award requested damages despite the absence of explicit provisions in their enabling legislations allowing them to do so.

[8] In this case, the Board's role in administering the *PESRA* is set out in Part I, section 10. That section allows the Board to make an order ". . . incidental to the attainment of the purposes of, this Part. . .," the main purpose being the provision of collective bargaining and other employment rights.

[9] The SSEA further submitted that, had it not devoted significant financial and human resources to contesting the employer's application, the bargaining unit

structure would have been changed without effective consultation, that the SSEA would have ceased to exist and that the very existence of a meaningful collective bargaining process would have been put at risk. The cost of this defence was to risk the existence of the association and of the collective bargaining. Consequently an order of compensation was appropriate.

[10] Support for the position that the Board may award damages can be found in the case law on the jurisdiction of the Canada Labour Relations Board ("the CLRB"), predecessor to the Canada Industrial Relations Board ("the CIRB").

[11] In *Eamor v. Canadian Air Line Pilots Association*, 96 CLLC 220-039, the Court upheld the CLRB's ability to award damages under its broad remedial powers, provided it established a direct causal link to the breach and as long as the award was not punitive in nature, did not infringe the *Charter* and did not contradict the purposes of the *Canada Labour Code* R.S.C. 1985, c. L-2 ("the *CLC*").

[12] The Supreme Court of Canada also addressed the extent of the CLRB's remedial powers in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369. In that decision, it was found that the employer had endangered the very existence of collective bargaining by engaging in conduct that was unlawful, unjustifiable and contrary to what was permitted in good faith bargaining. The wording of the *CLC* did not place precise limits on the CLRB's jurisdiction so that it would have the necessary flexibility to address the ever-changing circumstances that may arise. The test for the reasonableness of the remedy fashioned by a labour relations tribunal was formulated as follows:

. . .

> *68 There are four situations in which a remedial order will be considered patently unreasonable: (1) where the remedy is punitive in nature; (2) where the remedy granted infringes the* Canadian Charter of Rights and Freedoms*; (3) where there is no rational connection between the breach, its consequences, and the remedy; and (4) where the remedy contradicts the objects and purposes of the Code. . . .*

. . .

[13] The SSEA submitted that the Federal Court of Appeal has since applied that test favourably in its evaluation of remedial orders made by the CIRB and the CLRB.

[14] The SSEA submitted that, in this case, the employer's application was not based on any evidence, that it served a purely strategic purpose and that it jeopardized the SSEA's very existence by ruining it financially. A remedy of compensation would respect the objective of protecting the right to bargain collectively and prevent interference with that right. It would be rationally connected to the unfounded application filed by the employer and would not be punitive. There is no evidence that such a remedy would breach the *Charter*. It does not in any way prevent a party from filing a review application in good faith, based on evidence. A compensation award would protect the right to bargain collectively.

[15] In conclusion, the SSEA submitted that it was appropriate for the Board to take as proven the harm suffered by the SSEA and to conclude that it had the jurisdiction to award compensation in this case. The threshold for awarding compensation is reached when the acts of one party constitute an abuse of a right and pose a risk to the other party's very existence and thus to the right to bargain collectively. Should the Board decide that it does have jurisdiction to award compensation, the SSEA shall demonstrate that this case meets that threshold and that it should be compensated for have been forced to participate in the proceedings in 2009 PSLRB 23.

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

[16] The employer submitted that the Board does not have jurisdiction to award costs or damages in the nature of costs in its proceedings. Since the Board was created by statute, its powers to make any type of award must be found in the *PESRA*. To allow an administrative tribunal to award costs, specific language is required in the tribunal's enabling statute, and no such provision is found in the *PESRA*.

[17] If the Board finds that the *PESRA* does provide it with jurisdiction, there are policy reasons that any such award ought to be made only in extraordinary circumstances. No such circumstances exist in this case. The employer exercised its right to file an application under section 17 of the *PESRA*, and there is no evidence that it did so in bad faith, that it abused its right or that it acted with anti-union animus.

[18] The employer expressed the view that, despite the SSEA's assertion that the compensation sought does not constitute costs, the opposite is clear. The Board recognize that the SSEA was seeking costs in paragraph 396 of *House of Commons* when it characterized the issue as costs.

[19] The employer submitted that costs are separate and distinct from remedies, including damages. Damages are intended to right a wrong or to address the claim (or counter claim) asserted. Costs are the expenses incurred as a result of bringing or defending a legal proceeding. Damages are a pecuniary amount intended to represent the extent of harm one party suffered because of another party. The employer submitted the Nova Scotia Court of Appeal decision in *Williamson v. William*, [1998] N.S.J. No. 498 (QL), in support of that distinction.

[20] Relying on *Canadian Union of Public Employees v. Labour Relations Board (Nova Scotia) et al.*, [1983] 2 S.C.R. 311, *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275, *Bellai Brothers Ltd.*, [1994] OLRB Rep. January 2, and *Bank and Finance Workers' Union v. National Bank of Canada*, 84 CLLC 16,038, the employer submitted that explicit language is required to allow administrative tribunals to award costs. Such powers cannot be inferred from the provisions that specify general remedial powers. This "limitation" on the powers of tribunals has been articulated at all levels of the courts, by several administrative tribunals and by the Board.

[21] The employer noted that section 121 of the *CLC* is virtually identical to section 10 of the *PESRA* and to subsection 21(1) of the *Public Service Staff Relations* Act, R.S.C. 1985, c. P-35, and that the Board came to the same conclusion when it interpreted and applied those provisions in *Nowen et al. v. UCCO-SACC-CSN*, 2003 PSSRB 98. In addition, adjudicators appointed by the Board have found that specific language is required to award costs, as shown in *Dépault v. Canadian Food Inspection Agency*, 2001 PSSRB 97; *McMorrow v. Treasury Board (Veterans Affairs Canada)*, PSSRB File No. 166-02-23967 (19941021); *Lo v. Treasury Board (Treasury Board Secretariat)*, PSSRB File No. 166-02-27825 (19980514); *Matthews v. Canadian Security Intelligence Service*, PSSRB File No. 166-20-27336 (19990218); *Lavigne v. Treasury Board (Public Works)*, PSSRB File Nos. 166-02-16452 to 16454, 16623, 16624 and 16650 (19881014); and *Chong v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-16249 (19861224).

[22] The employer submits that, although section 10 of the *PESRA* provides the Board with very broad discretion to grant remedies, it does not go as far as to provide the Board with the authority to grant costs, and it cannot be read to include the authority to award costs. The powers of the Board conferred for or incidental to attaining the purposes of Part 1 of the *PESRA* are purposive in nature. There must be a

connection between the purpose of exercising of the power and a provision or purpose in the *PESRA*. Any remedy must flow from the application or complaint or breach.

[23] The employer submits that costs are not remedies. Awarding costs does not flow from the application to amalgamate the bargaining units since the remedy sought has nothing to do with the rights at issue under section 17 of the *PESRA*, which was the subject of the application. The remedy does not flow from any alleged breach of the *PESRA* by the employer or any party. The employer had the right to file the application.

[24] The employer submitted that the Nova Scotia Court of Appeal rejected an argument similar to the SSEA's in *Johnson v. Halifax (Regional Municipality) Police Service*, 2005 NSCA 70. The same is true in the Ontario Labour Relations Board's decision in *United Steelworkers Local 1-2693 v. Kimberly-Clark Corporation*, 2008 CanLII 23941 (ON L.R.B.).

[25] The employer submitted that the language of section 10 of the *PESRA* cannot be read to give the Board jurisdiction to award costs or compensation in the nature of costs that constitute expenses related to defending or prosecuting an application under the *PESRA*.

[26] The employer further submitted that there are policy reasons for the Board not to have jurisdiction. It noted that the Ontario Labour Relations Board, in *Repac Construction & Materials Limited*, [1976] OLRB Rep. October 610, expressed the view that the purpose of the Ontario *Labour Relations Act,* would not be well served by a procedure that usually requires identifying a loser or a winner. Similarly, the CLRB, in *Bank and Finance Workers' Union*, set out a number of policy reasons for finding that the Board lacked jurisdiction to award costs based on statutory provisions that are virtually the same as section 10 of the *PESRA*. Those policy reasons were as follows:

- *awarding costs brands a winner and a loser, which is counterproductive in an industrial relations relationship;*
- *the exercise of assessing the reasonableness of costs is not one to which a labour board's processes are well suited;*
- *the exercise of assessing the reasonableness of legal costs would detract from the Board's primary labour relations functions;*

- *the awarding of costs has a punitive connotation which is inappropriate in the context of labour board remedies;*

- *to award costs in certain kinds of cases would raise difficult questions of when to, and not to, order costs;*

- *awarding of costs does not respond to the real harm.*

[27] The Ontario Labour Relations Board, has reiterated analogous policy reasons for not assuming or inferring that it has jurisdiction to award costs. Those reasons have been:

. . .

Costs will discourage parties from pursuing meritorious claims;

It is in the public interest that labour relations disputes be settled and costs will interfere with the settlement process;

Awarding costs will have a negative impact on labour relations by identifying a winner and a loser;

It would detract from the Board's primary task;

The difficulties involved if success is divided between the parties; and

That the Board is ill-equipped to assess and award costs.

(See *Bellai Brothers Ltd.; Local 721 of the Bridge, Structural and Ornamental Ironworkers of America*, [1995] O.L.R.D. No. 654 (QL); *Hill v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938*, [1995] OLRB Rep. October 1249; and *National Grocers Co.*, [2003] OLRB Rep. May/June 467).

[28] The employer submitted that, for the policy reasons outlined in paragraphs 26 and 27 of this decision, ordering the employer to pay costs would produce a result that is opposite to the intention of section 10 of the *PESRA*. It would discourage rather then encourage a party to seek the assistance of the Board and would encourage applicants or respondents to seek costs in all future applications.

[29] The employer noted that all the cases cited by the SSEA show damages as remedies and not costs. Not one case or precedent was presented where legal costs or damages in the nature of costs were awarded under a statutory provision that only grants a Labour board remedial powers. A careful review of the *Sabourin*, *Eamor* and

Royal Oak Mines Inc. cases cited by the SSEA demonstrates that they are consistent with the position that compensation must be granted for damages and not for costs.

[30] The employer submitted that its application under section 17 of the *PESRA* was for a reconsideration of the collective bargaining structure at the House of Commons. There is no rational connection between the issue between the parties and the claimed costs. The amounts claimed are not a remedy based on the application. They are not connected to an employer duty or right found in the *PESRA*. They are not related to the alleged contravention or breach of the *PESRA* at issue.

[31] In the alternative that the Board finds that it has jurisdiction, the employer submitted that the Board should exercise its discretion not to award costs. The Board ought to consider all the factors identified by the labour boards and limit the exercise of discretion only to extraordinary cases where, for example, bad faith, abuse or anti-union animus are clearly demonstrated. In this case, no extraordinary factors are present that would warrant the exercise of discretion to award costs against the employer. None of the respondents, including the SSEA, argued that the Board did not have jurisdiction to hear the application, and jurisprudence was submitted for successful applications that had resulted in the amalgamation of bargaining units following major changes to classification systems.

[32] The employer submitted that, contrary to the SSEA's allegation that the employer sought to infringe collective bargaining rights, the evidence was clear that, in the proposed bargaining unit definition presented in the application, the employer had been careful and that it had seriously tried to include all employees who were members of bargaining units at that time and who therefore had existing collective bargaining rights.

[33] In conclusion, the employer submitted that the SSEA is seeking costs or compensation in the nature of costs; that those costs are not a remedy; that there is no explicit jurisdiction in the *PESRA* for the Board to award costs; that, to award costs, specific statutory language is required, and the Board has no jurisdiction absent such explicit authority; and that the particular language in section 10 of the *PESRA* grants the Board the power to make remedial orders and to make orders that relate to breaches of the *PESRA*. Cost orders are not related to breaches of the *PESRA*, and section 10 cannot be given any reasonable interpretation that would result in the ability to award costs. Assuming that section 10 can be read so broadly as to include

costs, for policy reasons the Board ought not to award costs and, if it does, it should award costs only in extraordinary cases.

[34] The employer submitted that it had the right to file the application in question and that, not only is there no evidence of abuse or anti-union animus, but also the employer ensured that the employees at the time exercised their right to be represented and that they would continue to be able to exercise that right within the proposed bargaining unit structure.

[35] The employer submitted that, for all those reasons, the Board should decline to grant the requested compensation on the basis that it does not have jurisdiction to make the award. If the Board does have jurisdiction, it ought not to exercise its discretion to make an award in this case.

[36] In the event that the Board determines that it does have jurisdiction and that it ought to make an award, the employer reserves the right to make submissions on the amounts requested and on the appropriateness of those amounts as well as any tests that the Board ought to use in making any such assessments.

C. Reply of the SSEA

[37] The SSEA, noting that the employer's submissions are mainly premised on the assumption that the SSEA is asking for an order for costs and not for damages, submitted that it is requesting compensatory damages as a remedy under the *PESRA* and noted that the Board made no reference to costs in its conclusion but for the possibility of compensating the SSEA for having been forced to participate in the proceedings. The Board has left open the question of the nature of the requested compensation in this case. The SSEA submitted that not only does the Board have jurisdiction to award the requested compensation, but the policy reasons cited by the employer support the SSEA's position.

[38] The SSEA submitted that the threshold for awarding compensation is reached when the acts of a party constitute an abuse of a right and pose a risk to the very existence of the other party and thus to the right to bargain collectively. Not one of the authorities cited by the employer involves such a situation.

[39] Noting that labour boards have found that they have jurisdiction to award costs in certain cases, the SEA submitted that the *Bank and Finance Workers' Union* decision,

in its analysis of section 121 of the *CLC* in effect at the time, supports the proposition that a labour board has jurisdiction to award costs when doing so would remedy or counteract a consequence. In the cases cited by the employer, the deciding tribunals did not necessarily deny jurisdiction to award costs. Rather, while jurisdiction may exist, labour boards are traditionally reluctant to award costs for policy reasons. When those policy reasons are applied to this case, they favour the SSEA's position.

[40] Noting that the first policy reasons cited by the employer against awarding compensation relate to the underlying purpose of labour relations legislation, the SSEA submitted that those policy reasons were put forward as a reason to avoid the general practice of awarding costs. The SSEA does not suggest that a compensation award in this case arises from that general practice or that it should give rise to such a practice. The SSEA submitted that the fact situation before the Board in this case is rare. The employer included the SSEA in its section 17 of the *PESRA* application for purely strategic reasons, despite the absence of evidence supporting its inclusion. Should the Board rule that it has jurisdiction, the SSEA will provide evidence that the employer's choice put the SSEA's existence in peril. An award of damages in this case would not lead to requests for similar compensation in the vast majority of cases before the Board.

[41] Reviewing the policy reasons cited by the employer, the SSEA further submitted that, while the underlying purpose of the *PESRA* is to promote harmonious labour relations, subsection 5(1) explicitly protects collective bargaining and other employees rights. The purpose of the *PESRA* provides compelling policy reasons that favour a compensation award in this case.

[42] The SSEA submitted that a compensation award would not create a winner and a loser. The parties are aware that the employer filed its section 17 of the *PESRA* application with respect to the SSEA for purely strategic purposes, and there is no evidence, as recognized in the Board's decision, which could have led the Board to rule in the employer's favour.

[43] With respect to the arguments that the exercise for assessing the reasonableness of costs is not one to which a labour board's processes are well suited, or that it would raise difficult questions as to when, or not, to order costs, the SSEA pointed out the comments of the Supreme Court in the *Royal Oak Mines Inc.* decision

to the effect that no other body will have the requisite skill and experience in labour relations to construct a fair and workable solution.

[44] The SSEA submitted that the exercise of the power to make an award would not detract from the primary function of the Board as it has a duty to protect the right to bargain collectively.

[45] The SSEA submitted that the compensation sought is not punitive but instead that it would place the SSEA in the position that it would have been in were it not for the employer's decision to include it in the section 17 of the *PESRA* application.

[46] The SSEA reiterated the appropriateness of a compensation award in light of the analysis of the circumstances presented in its initial submissions.

[47] The SSEA submitted that a compensation award would not discourage parties from arguing meritorious claims. In this case, a party knowingly pursued a claim that had no merit. While it is in the public interest that labour disputes be settled, there is no evidence before the Board indicating that a compensation award would discourage or interfere with any settlement process between the parties. It would assure the SSEA that, in the future, when a similar event takes place, its survival would not be threatened. The SSEA further submitted that the process to determine compensation should not be time consuming as the damages suffered can be accounted for.

[48] The SSEA submitted that the parties have a duty to avoid exercising their rights under the *PESRA* in a manner that endangers the existence of collective bargaining and that, if such an exercise occurs, a compensation award may have merit.

[49] The SSEA noted that in the final paragraph of its submissions the employer stated that there was no evidence of abuse on its part that would warrant the Board exercising its discretion to award compensation. The SSEA submits that the Board has asked the parties to make submissions only with respect to jurisdiction. Should the Board rule that it has jurisdiction, the SSEA will submit evidence supporting an award in this case.

[50] In conclusion, the SSEA submits that it is seeking damages and not costs and that the Board has jurisdiction to award damages. If the Board decides that the compensation sought is costs, it has jurisdiction to award the requested compensation. The threshold for awarding compensation was described in the SSEA's initial

submission. The policy reasons cited by the employer weigh in favour of the Board ordering compensation to the SSEA for having been forced to participate in the proceedings in 2009 PSLRB 23.

III. Reasons

[51] In *House of Commons*, I issued an order that I would remain seized for 90 days to hear evidence and arguments with regard to the impact on the SSEA of having been forced to participate in those proceedings.

[52] That order arose from the following reason:

> ***644*** *Counsel for SSEA requested that the employer's application be dismissed for lack of evidence and requested that the Board remain seized to hear evidence with regard to the consequence of such a decision, including the possibility of compensating the Association for having been forced to participate in the proceedings. In light of my decision to dismiss the application on the basis that the evidence has not revealed any significant change that would render the bargaining unit structure unsatisfactory, I am prepared to remain seized for 90 days to hear evidence and arguments with regard to the impact on the SSEA of having been forced to participate in these proceedings.*

[53] In doing so I did not rule as to whether the Board had jurisdiction to deal with such a request and, if it did, whether the circumstances were such that it warranted compensation. I was simply prepared to hear the evidence and the arguments about the request.

[54] Having now reviewed the arguments on jurisdiction and the case law submitted by both parties, I have reached the following conclusion.

[55] The case law is clear. In the absence of specific provisions in the legislation, the Board has no inherent jurisdiction to award legal costs. However, it has also been recognized that labour relations boards have the power to award damages that amount to "legal costs" in extraordinary circumstances. As mentioned in *Bellai Brothers Ltd.*:

> *. . . the Board has the power and may find it appropriate to award damages which include things which look like but are not "legal costs" properly so called, or which are "legal costs" but are also damages arising out of a breach of the Labour Relations Act which are deserving of compensation.*

[56] In *National Grocers Co.*, the OLRB declined to award costs on the basis that the union was seeking the legal costs that it had incurred in defending its certification. The Board found that those costs were not damages arising from a breach of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A, in the sense referred to in *Bellai Brothers Ltd.*

[57] In its initial submission, the SSEA took the position that the threshold to award compensation is reached when the acts of a party constitute an abuse of a right and pose a risk to the very existence of the other party and thus to the right to bargain collectively. While I would agree with that reasoning, the circumstances of this case are not such that I have found that the employer's conduct constituted an abuse of a right that is tantamount to a breach of the *PESRA*. I dismissed the original application because the evidence failed to disclose any substantial change warranting a review of the bargaining unit structure. That is far from a conclusion that the employer abused its rights and is surely not a basis on which to award damages in the form of "legal costs."

[58] The SSEA is requesting "make-whole" damages. Its request is in the nature of costs, i.e., legal expenses related to the proceeding before the Board. The Board does not have jurisdiction to award costs since that power appears nowhere in its enabling statute. Damages for a breach of the *PESRA* are another matter entirely and would need to be sought in a separate application as I did not determine that the employer had breached the *PESRA*.

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

(The Order appears on the next page)

IV. Order

[60] The Board is without jurisdiction to deal with this matter as it is not empowered to award legal costs.

November 3, 2009.

Georges Nadeau,
Board Member