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File: 485-HC-38

Citation: 2009 PSLRB 150

Parliamentary Employment and Staff Relations Act

Before the Public Service Labour Relations Board

IN THE MATTER OF
THE *PARLIAMENTARY EMPLOYMENT AND STAFF RELATIONS ACT*
and a dispute affecting

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA
bargaining agent
and
HOUSE OF COMMONS
employer
in respect of employees in the Technical Group.

Indexed as
Communications, Energy and Paperworkers Union of Canada v. House of Commons

ARBITRAL AWARD

Before: Marie-Josée Bédard, Dale Clark and Ron Leblanc, Members of the Board for the purposes of the arbitration in the above-cited matter

For the Bargaining Agent: David Migicovsky, counsel

For the Employer: Carole Piette, counsel

Heard at Ottawa, Ontario,
September 3, 2009.
(Written submissions filed September 17, 2009.)

I. Application before the Board

[1] On February 27, 2008, the Communications, Energy & Paperworkers of Canada, Local 87-M ("the bargaining agent"), served notice to bargain on the House of Commons ("the employer") on behalf of the Technical Group under section 37 of the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (*PESRA*). The last collective agreement for the bargaining unit expired on March 31, 2008.

[2] The parties met for negotiation sessions on July 9 and October 2 and 3, 2008. On November 25, 2008, the bargaining agent filed for arbitration under section 50 of the *PESRA*. The employer submitted its additional matters in dispute on December 1, 2008 and raised an objection to an arbitration board's jurisdiction concerning the bargaining agent's proposal relating to job-posting language in "Article 8 - Seniority."

[3] The bargaining agent selected Dale Clark from the panel of persons representative of the interests of the employees to be a member of the arbitration board ("the Board"). The employer selected Ron Leblanc from the panel of persons representative of the interests of the employer. The Chairperson of the Public Service Labour Relations Board appointed me as chairperson for these proceedings.

[4] The terms of reference for the Board were forwarded to the Board by the Chairperson of the Public Service Labour Relations Board on January 21, 2009 (2009 PSLRB 4). The following matters were in dispute:

Article 4	*Union rights*
Article 8	*Seniority*
Article 11	*Employee benefits*
Article 13	*Holidays and General Leave*
Article 14	*General matters*
Article 16	*Hours and scheduling of work*
Article 20	*Effective date and duration*
Article 21	*Wages*

[5] On March 12, 2009, the *Expenditure Restraint Act* (*ERA*), enacted by section 393 of the *Budget Implementation Act, 2009*, S.C. 2009, c.2, came into force.

[6] The parties exchanged briefs on May 11, 2009.

[7] In its brief, the bargaining agent withdrew its proposal to amend articles 4 and 8 on a "without prejudice basis." It also amended its proposal to amend article 21 - Wages and Appendix A-1 with respect to rates of pay in order to comply with the provisions of the *ERA*.

[8] In its brief, the employer raised an objection to the Board's jurisdiction to award the bargaining agent's proposals to introduce new clauses to article 11 (clauses 11.1.9 (fitness allowance), 11.11 (personal leave) and 11.12 (volunteer leave)) and to amend articles 13, 14, 16 and 21 on the basis that it would contravene sections 24 and 27 of the *ERA*, which prevent the Board from allowing any additional remuneration for any period that begins during the restraint period.

[9] Also in its brief, the employer amended its proposal to amend article 20 (term of the collective agreement). At the hearing, the bargaining agent raised an objection to the Board's jurisdiction to consider the employer's amended proposal. It was agreed at the hearing that the parties would submit additional written submissions about the jurisdiction issue and about the applicability of subsections 58(1) or 58(2) of the *PESRA*, which they did. For clarification purposes, the parties' respective submissions on that matter are summarized in the reasons section of this decision.

[10] At the start of the hearing, the bargaining agent withdrew its proposals for article 16 (clause 16.10 - call-back; clause 16.15 - shift premium and clause 16.15 - weekend premium) and for clause 21.7 (temporary premium) on a "without prejudice basis" as it conceded that those proposals contravene the provisions of the *ERA*.

[11] During its arguments, the employer withdrew its objection to the Board's jurisdiction with respect to the bargaining agent's proposals for clauses 4.6.2 (leave to attend contract negotiations), 11.4.1 (bereavement leave), 11.11 (personal leave), 11.12 (volunteer leave) and 13.2.1 (annual leave) and conceded that those proposals did not contravene sections 24 and 27 of the *ERA* as they did not involve additional remuneration within the meaning of the definition contained in the *ERA*.

II. Reasons

[12] The *PESRA* sets out the factors that the Board must consider in rendering its award as follows:

. . .

> ***53.*** *In the conduct of proceedings before it and in rendering an arbitral award in respect of a matter in dispute, the Board shall consider*
>
> *(*a*) the needs of the employer affected for qualified employees,*
>
> *(*b*) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations of employees,*
>
> *(*c*) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered, and*
>
> *(*d*) any other factor that to it appears to be relevant to the matter in dispute,*
>
> *and, so far as consistent with the requirements of the employer, the Board shall give due regard to maintaining comparability of conditions of employment of employees with those that are applicable to persons in similar employment in the federal public administration.*

. . .

[13] In addition to those factors, the Board must comply with the provisions of the *ERA*. The following provisions of the *ERA* are particularly relevant to this arbitration:

. . .

> ***2.*** *The following definitions apply in this Act.*
>
> *"additional remuneration" means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments.*

. . .

> *"restraint period" means the period that begins on April 1, 2006 and ends on March 31, 2011.*

. . .

> ***16.*** *Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for*

employees are to be increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:

(a) *the 2006-2007 fiscal year, 2.5%;*

(b) *the 2007-2008 fiscal year, 2.3%;*

(c) *the 2008-2009 fiscal year, 1.5%;*

(d) *the 2009-2010 fiscal year, 1.5%; and*

(e) *the 2010-2011 fiscal year, 1.5%.*

. . .

17.*(1) The provisions of any collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may not provide for increases to rates of pay that are greater that those set out in section 16, but they may provide for increases that are lower.*

(2) For greater certainty, any collective agreement that is entered into, or any arbitral award that is made, after the day on which this Act comes into force and that provides for increases to rates of pay for any period that begins during the restraint period must do so on the basis of a 12-month period.

. . .

24. *No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement, or the arbitral award, as the case may be, becomes effective.*

. . .

27. *No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement or the arbitral award, as the case may be, becomes effective.*

. . .

[14] In rendering this award, the Board considered the provisions of the *PESRA* and the *ERA*.

III. Provisions at issue

A. Clause 4.6.2: Leave to attend contract negotiations

[15] The bargaining agent proposed that the leave provision for contract negotiations be changed from leave without pay to leave with pay. The employer opposed the proposal. The Board has determined that the existing clause 4.6.2 will remain unchanged.

B. Clause 11.1.2(c): Medical examinations

[16] The bargaining agent proposed that the current article permitting the employer to send an employee to a doctor of its choice for a medical examination be changed to an "independent physician preferably a specialist, who shall be agreed upon by the parties." The employer opposed the proposal. The Board has determined that the existing clause 11.1.2(c) will remain unchanged.

C. Clause 11.1.9: Fitness allowance (new)

[17] The bargaining agent proposed that employees be reimbursed by the employer for up to $500 per year for enrolment in a certified fitness centre. The employer reiterated its objection to the Board's jurisdiction to allow the proposal as it would provide for additional remuneration within the meaning of the *ERA* and would contravene section 27 of the *ERA*. In the alternative, the employer opposed the proposal. The Board has determined that this clause will not be included in the arbitral award.

D. Clause 11.2(a): Health and insurance benefits

[18] The bargaining agent proposed to improve the vision care plan and the life insurance benefits. The employer submitted that it has no ability to negotiate any changes to the current health and life insurance and dental benefit plans. The Public Service Health Care Plan and Dental Plan are negotiated in partnership with the National Joint Council, bargaining agent representatives and Treasury Board

employers. In the alternative, the employer opposed the proposal. The Board has determined that the existing clause 11.2(a) will remain unchanged.

E. Clause 11.2.1: Dental plan

[19] The actual clause reads as follows:

> *The Employer undertakes to continue to provide the present dental plan and to maintain the same share of premium costs as is provided by the Employer of those employees in the Public Service of Canada.*

[20] The bargaining agent proposed to amend the clause in the following manner:

> *The Employer undertakes to continue to provide the present dental plan and will maintain the current 100% payment of premium costs as is provided by the Employer of those employees in the Public Service of Canada.*

[21] The employer submitted that it has no ability to negotiate any changes to the current health and life insurance and dental benefit plans. The Public Service Health Care Plan and Dental Plan are negotiated in partnership with the National Joint Council, bargaining agent representatives and Treasury Board employers. In the alternative, the employer opposed the proposal. The Board has determined that the existing clause 11.2.1 will remain unchanged.

F. Clause 11.4.1: Bereavement leave

[22] The bargaining agent proposed that the current provision be changed from five consecutive calendar days of leave to five working days. The employer opposed the proposal. The Board has determined that the existing clause 11.4.1 will remain unchanged.

G. Clause 11.11: Personal leave (new)

[23] The bargaining agent proposed a day of leave for personal needs. The employer opposed the proposal. The Board has determined that the proposal will not be included in the arbitral award.

H. Clause 11.12: Volunteer leave (new)

[24] The bargaining agent proposed a day of leave for volunteer purposes. The employer opposed the proposal. The Board has determined that the proposal will be included in the arbitral award as follows:

> *11.12 Volunteer leave*
>
> *(a) Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, a single period of up to seven (7) hours of leave with pay to work as a volunteer for a charitable or community organization or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign.*
>
> *(b) The leave will be scheduled at times convenient both to the employees and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leave at such times as the employee may request.*

I. Clause 13.2.1: Annual leave

[25] The bargaining agent proposed to accelerate the entitlement to vacation leave and to introduce increased vacation entitlement after 30 years of continuous service. The employer opposed the proposal. The Board has determined that the existing clause 13.2.1 will remain unchanged.

J. Clause 14.4: Severance pay

[26] The bargaining agent proposed to remove the caps on severance pay for layoff, resignation, retirement, death, rejection on probation, and termination for incapacity or incompetence. The employer opposed the proposal. The Board has determined that the existing clause 14.4 will remain unchanged.

K. Article 20: Date and duration

[27] The bargaining agent proposed a duration of two years after the expiry of the most recent collective agreement, meaning an expiry date of March 31, 2010. The employer originally proposed a one-year duration but amended its proposal when it filed its brief and is now proposing an expiry date of three years after the expiry of the most recent agreement, on March 31, 2011.

[28] The bargaining agent objected to the Board's jurisdiction to consider the employer's amended proposal.

[29] The parties also disagreed on the interpretation of subsection 58(2) of the *PESRA* and on the applicability, in this case, of subsection 58(1).

[30] The Board will first deal with the jurisdictional objection.

[31] The bargaining agent argued that the employer's amended proposal did not form part of the terms of reference for the Board and that, therefore, it is outside the Board's jurisdiction. In support of its position, the bargaining agent referred to *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 185-02-300 (19860516) (*Education Group, Scientific and Professional Category*), in which the arbitration board determined that it did not have jurisdiction to consider an amended proposal where the initial proposal did not form part of the terms of reference.

[32] The employer, for its part, argued that nothing prevents the Board from taking jurisdiction over its amended proposal since the terms of reference consist of the subject matters that are in dispute but do not include the specific proposals. The employer distinguished this case from *Public Service Alliance of Canada v. Treasury Board* (*Education Group, Scientific and Professional Category*) and submitted that, in that case, the original proposal that the bargaining agent wished to amend related to a matter that could not be included in a collective agreement and, therefore, could not have formed part of the terms of reference. Moreover, by the amendment it was seeking, the bargaining agent was introducing a new subject matter that had not been subject to negotiations. The employer submitted that the situation is different in this case because the amended proposal did not involve a new subject matter but related to a subject matter that formed part of the terms of reference. In support of its position, the employer referred the Board to *Public Service Alliance of Canada v. Medical Research Council of Canada (Administrative Support Category)*, PSSRB File No. 185-11-344 (19910827).

[33] With respect, the Board believes that it has jurisdiction to consider the employer's amended proposal. The terms of reference comprise the matters in dispute but not the specific proposals per se. Subsection 52(1) of the *PESRA* defines the terms of reference as follows:

> ***52.(1)*** *Subject to section 55, the matters in dispute specified in the notice under section 50 and in any notice under section 51 constitute the terms of reference of the Board in relation to the request for arbitration and the Board shall, after considering the matters in dispute together with any other matter that the Board considers necessarily incidental to the resolution of the matters in dispute, render an arbitral award in respect thereof.* (We underline)

[34] The Board considers that a party cannot introduce a new subject matter in dispute once the terms of reference have been established, but nothing prevents a party from amending its initial proposal on a subject matter that forms part of the terms of reference. However, the Board is of the view that, in analyzing the merit of an amendment, it should consider the justification for the amendment, the prejudice to the other party and any other factor that could be relevant to a case.

[35] In this case, the employer explained the rationale for its initial proposal by the fact that, when the parties entered into negotiations, they were awaiting a decision about a bargaining unit consolidation application that it had filed and that, had the application been granted, it would have wished to facilitate the consolidation by coordinating the expiry of its several collective agreements. The employer further explained that, when the Public Service Labour Relations Board denied the consolidation application on February 23, 2009, it no longer saw the value of a one-year agreement and therefore, changed its proposal to a three-year award that would coincide with the end of the restraint period under the *ERA*. The employer further submitted that both its initial proposal and the bargaining agent's proposal contravene subsection 58(2) of the *PESRA*.

[36] The bargaining agent, for its part, alleged that it is prejudiced by the amendment because it did not have the opportunity to tailor its proposals to the employer's amended proposal. The bargaining agent also alleged that it is prejudiced by the additional delay in obtaining an arbitral award caused by the written submissions process. With respect to the employer's argument about the *ERA*, the bargaining agent submitted that there is no justification for ensuring that the term of the award coincides with the restraint period under the *ERA*. The bargaining agent argued that, to the contrary, the legislator did not suspend all collective bargaining and that, had it intended to freeze all collective bargaining, it would have done so as it did in the past. The bargaining agent further submitted that the *ERA* makes it even more

important for its members to return to bargaining as soon as possible and to attempt to negotiate more favourable non-wage-related benefits.

[37] The Board considers that the employer's justification for tabling an amended proposal is reasonable although it considers that it would have been more prudent for the employer to table a proposal in the alternative at the start of the negotiations. On the other hand, the Board does not give much weight to the bargaining agent's alleged prejudice since it tabled its proposals, including its proposal on the term of the collective agreement, without knowing what the employer would propose with respect to the term of the collective agreement. As for the delays, the Board considers them as being not excessive.

[38] With respect to the parties' respective submissions about the impact of the *ERA*, the Board does not consider that the existence of the *ERA* or the term of the restraint period that it provides should in itself determine the term of the award.

[39] Let us now turn to section 58 of the *PESRA*, which reads as follows:

> ***58.(1)*** *The Board shall, in respect of every arbitral award, determine and specify therein the term for which the arbitral award is to be operative and, in making its determination, it shall take into account*
>
> *(*a*) where a collective agreement applicable to the bargaining unit is in effect or has been entered into but is not yet in effect, the term of that collective agreement; and*
>
> *(*b*) where no collective agreement applying to the bargaining unit has been entered into,*
>
> *(i) the term of any previous collective agreement that applied to the bargaining unit, or*
>
> *(ii) the term if any other collective agreement that to the Board appears relevant.*
>
> *Limitation on term of award*
>
> *(2) No arbitral award, in the absence of the application thereto of any criterion referred to in paragraph (1)*(a) *or* (b)*, shall be for a term of less than one year or more than two years from the day on and after which it becomes binding on the parties.*

[40] Both parties agree that, should the Board apply section 58(2) of the *PESRA*, it could not choose either the employer's initial proposal or the bargaining agent's proposal because either proposal would lead to an award that would be in operation for less than one year.

[41] However, the parties disagree on whether the Board should apply paragraph 58(1)(*b*) of the *PESRA*.

[42] The bargaining agent submitted that the Board must first consider the factors under subsection 58(1) of the *PESRA* and that the Board could turn to subsection 58(2) only if it concluded that the factors in subsection 58(1) do not apply to the circumstances of this case. The bargaining agent further submitted that, in this case, the Board should apply subparagraph 58(1)(*b*)(i) and that it should lead to awarding a two-year term. In support of its position, the bargaining agent submitted that the most relevant collective agreement to consider is the parties' last collective agreement, in which they agreed to a two-year term. The bargaining agent further submitted that the fact that the award would be in effect for less than one year should not be determinative given that the same situation occurred the last time, when the arbitration board set the term of its award to the term agreed to by the parties (March 31, 2008), which led to an award that was in operation for less than two months.

[43] With respect to subparagraph 58(1)(*b*)(i) of the *PESRA*, the employer submitted that the term of the most recent collective agreement is not indicative of a pattern as the parties have agreed in the past to both, two-year and to three-year agreements and that, therefore, it should not apply. The employer, on the other hand, submitted that the three-year agreement that it reached with the Security Services Employee Association is relevant to the application of subparagraph 58(1)(*b*)(ii). On that point, the bargaining agent submitted that, given that the Board has rejected the application for consolidating the parliamentary bargaining units, the terms of collective agreements concluded with other bargaining agents should not be considered relevant.

[44] The Board considers that, in this case, paragraph 58(1)(*b*) of the *PESRA* should not apply. First, no pattern can be identified from the parties' negotiation history given that they have agreed to both two-year and three-year agreements, and the Board fails to see why it should rely only on the last agreement. Second, the Board does not

consider that the only collective agreement reached with another parliamentary bargaining agent is relevant with respect to subparagraph 58(1)(*b*)(ii) of the *PESRA*.

[45] Therefore, the Board considers that subsection 58(2) of the *PESRA* should apply to this case. Subsection 58(2) provides that, when subsection 58(1) does not apply, an arbitral award cannot be for a term of less than one year or of more than two years from the day on and after which it becomes binding on the parties. Subsection 57(1) provides that an arbitral award becomes binding and effective on and after the day on which the award is rendered or such later day as the Board may determine. The bargaining agent proposed an alternative term of one year from the date of this award, which would lead to a an expiry date of November 12, 2010.

[46] The Board has determined that an award with an expiry date of March 31, 2011 is appropriate. First, this date respects the parameters set by subsection 58(2) of the *PESRA* and is less than five months from the earliest possible expiry date that the Board may consider. Second, although not determinative, the expiry date will coincide with the end of the restraint period provided under the *ERA*, and therefore, the parties will have the opportunity to start their negotiations without the restrictions imposed by the *ERA*.

[47] The Board will remain seized of this matter for a period of two months in the event that the parties encounter any difficulties in implementing the arbitral award.

November 13, 2009

Marie-Josée Bédard
Vice-Chairperson
Chairperson of the arbitration board