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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ALFRED BARTLETT, PAUL BOURGOIN, MARC DUBÉ, STEPHANE LEBEL, GUY MCCLUSKEY, ANDRÉ OUELLETTE, MOREL PAGE, MARIO PELLETIER, RONALD PYNE AND MARK THIBODEAU

Grievors

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Bartlett et al. v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievors: Tiffani Murray, Public Service Alliance of Canada

For the Employer: Maryse Bernier, Treasury Board Secretariat

Decided on the basis of written submissions
filed December 14, 2011 and January 12, 20 and 26, 2012.

I. Individual grievances referred to adjudication

[1] In November 2008, Alfred Bartlett, Paul Bourgoin, Marc Dubé, Stephane Lebel, Guy McCluskey, André Ouellette, Morel Page, Mario Pelletier, Ronald Pyne and Mark Thibodeau ("the grievors") grieved the Canada Border Services Agency's ("the employer") decision to prohibit them from wearing one centimeter wide "union bracelets" during working hours. The grievors alleged that the employer's decision violated article 19 of the collective agreement between the Public Service Alliance of Canada ("the bargaining agent" or "the union") and the employer for the Program and Administrative Services group, expiry date June 20, 2007 ("the collective agreement").

[2] The parties and the adjudicator agreed that the grievances would be dealt with on the basis of written submissions. Within that process, the parties submitted the following agreed statement of facts:

> *The Public Service Alliance of Canada (the "Union") and Treasury Board/Canada Border Services Agency (the "Employer") agree to the following facts for the purposes of the adjudication of these grievances:*
>
> *1. The Public Service Alliance of Canada is certified as the exclusive bargaining agent for the Program and Administrative Services, which includes the Border Services Officers (FB).*
>
> *2. The Grievors are employed as Border Services Officers (FB-03) with the Employer and as such are required to wear a uniform as per the Uniform Policy (a copy is attached as Annex A.*
>
> *3. The Grievors' work locations are Saint-Leonard (Bourgoin, McCluskey, Page, Pelletier, and Thibodeau) and Grand Falls (Bartlett, Dubé, Lebel, Ouellette, and Pyne), New Brunswick.*
>
> *4. During the events which gave rise to the grievances, Rock Ouellette was the Acting Superintendent in Grand Falls, Michel Saucier the Chief of Operations for the Northwest New Brunswick District, and Daniel Soucy the Superintendent in Saint-Leonard.*
>
> *5. During the events which gave rise to the grievances, Guy McCluskey worked in Saint-Leonard and Stéphane Lebel in Grand Falls.*
>
> *6. The PSAC/FB negotiation process occurred during the period from February 21, 2007 to January 28, 2009. The FB Collective Agreement was signed on January 29, 2009.*

7. In support of these negotiations, in October, 2008, the Union provided their members with green bracelets bearing a Public Service Alliance of Canada logo and reading: "support the bargaining team/support à l'équipe de négociation" (the "bracelet"). The Grievors wore these bracelets while on duty.

8. By email dated October 23, 2008, Mr. Ouellette indicated to Mr. Saucier that he had met with Mr. Lebel and ordered him and the Grand Falls Grievors to remove the bracelets.

9. Mr. Lebel requested that Mr. Ouellette order removal of the bracelets in writing to the Grand Falls Grievors. Mr. Ouellette agreed to do so.

10. By email dated October 23, 2008, Mr. Saucier told Mr. Soucy that wearing the bracelets was unauthorized, and asked that action be taken.

11. By email dated October 30, 2008, Mr. Soucy told Mr. McCluskey that wearing the bracelet violated the Uniform Policy, and ordered the Saint-Leonard Grievors to remove the bracelets.

12. By email dated November 12, 2008, Mr. Ouellette sent Mr. Lebel a link to the Uniform Policy and ordered the bracelets be removed by the Grand Falls Grievors. Mr. Ouellette indicated that wearing the bracelet would be seen as an act of insubordination.

13. In November, 2008, the Grievors filed identical grievances with the Employer contesting the Employer's decision to prohibit them from wearing Union bracelets during working hours.

14. The Grievors allege in their grievance that the Employer violated Article 19.01 Activity in the Union of the Program and Administrative Services Collective Agreement, expiry June 20, 2007.

15. The Employer issued Level 1 Replies to the Grievors denying their grievances. These Replies were identical in all material ways, save and except for the date on which management received the grievances.

16. The Employer issued identical Level 2 Replies to the Grand Falls Grievors, denying their grievances.

17. The Employer issued Level 3 Replies to the Saint-Leonard Grievors and to Grand Falls Grievors, Dubé, Lebel, and Ouellette, that were identical in all material ways, save and except for the date on which management received the grievances. The grievances were denied.

> *18. The Employer issued identical Final Level Replies on December 22, 2009, to all Grievors denying their grievances indicating that wearing the bracelets was contrary to the Employer's Uniform Policy and Standards of Appearance.*
>
> *19. The Union referred the Grievors' grievances to adjudication on May 6, 2010, under subsection 209 of the* Public Service Labour Relations Act.
>
> *20. The details and corrective actions are identical in the grievances. All replies from the Employer are identical, except for some dates.*
>
> [Sic throughout]

[3] The grieved provision of the collective agreement reads as follows:

> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*
>
> …

II. Summary of the arguments

A. For the grievors

[4] The grievors argued that the employer relied solely on its *CBSA Uniform Policy and Standards of Appearance* ("Uniform Policy") when it asserted that the bracelets breached the requirement that the uniform be devoid of all ornaments not part of it. The Uniform Policy does not supersede the collective agreement, or section 5 of the *Public Service Labour Relations Act* ("the *Act*"). An employee's right to participate in union activities is protected under the collective agreement and the legislation. The bracelets and their message were legitimate union activity. The employer prohibited that activity and thus discriminated against the grievors on the basis of their membership or their activity in the union.

[5] Many cases and commentaries outline the threshold requirement for union buttons, pins or bracelets worn by employees in the workplace. According to those criteria, the employer can order employees to not wear union material if it is derogatory, damaging or detrimental to the employer. That is not so in this case. The

employer indicated only that wearing the bracelet was contrary to its Uniform Policy. It did not claim that a detrimental impact occurred on its operations or reputation.

[6] The Uniform Policy requires that border services officers (BSOs) wear their uniforms according to the employer's requirements and that the uniform must be devoid of all ornaments not part of it. Bracelets are worn around a BSO's wrist, not on the uniform. The Uniform Policy authorizes the wearing of watches. Watches are akin to bracelets, since they are worn on the wrist and do not form part of the uniform. The Uniform Policy also authorizes the wearing of religious jewelry that does not pose a health or safety risk. Wearing a bracelet does not pose such a risk. In addition, the Uniform Policy makes exceptions for the donning of decorative items on the uniform. For example, it allows poppies, green ribbons in support of missing children, and anniversary, commemorative and service pins. Given those exceptions, material that can be worn on the uniform and watches that can be worn on the wrist, the prohibition against wearing the union bracelet discriminates against the BSOs, based on their union activity.

[7] As corrective action, the grievors requested that the grievances be upheld, that I declare that the employer's order contravened the collective agreement and discriminated against them, and that in the future, the employer comply with the collective agreement and their right to wear similar bracelets. The grievors also asked that the employer be required to post this decision for 90 days at the workplace in an appropriate location. Finally, they asked that the employer be ordered to pay each of them $500.00 and that it pay $5000 to the bargaining agent.

[8] The grievors referred me to the following decisions: *Public Service Alliance of Canada v. Treasury Board*, 2011 PSLRB 106; *Quality Meat Packers Ltd. v. United Food and Commercial Workers Canada, Locals 175 and 633* (2003), 115 L.A.C. (4th) 409; *Bodkin et al. v. Treasury Board (Employment & Immigration Canada)*, PSSRB File Nos. 166-02-18108 to 18116, 18183 to 18188, 18190, 18209 to 18217, 18242 and 18243 (19890525); *Quan v. Canada (Treasury Board)*, [1990] 2 F.C. 191 (C.A.); *Andres et al. v. Canada Revenue Agency*, 2009 PSLRB 36; *White Spot Ltd. V. C.A.I.M.A.W., Food and Service Workers, Local 112* (1991), 21 L.A.C. (4th) 421; and *Gateway Casinos G.P. Inc. v. U.F.C.W. Local 401,* 2007 CLB 12173.

B. For the employer

[9] The employer argued that it did not discriminate against the grievors when it prohibited wearing the union bracelets. The Uniform Policy is fundamental to the identification of a BSO. The uniform and the badge are the traditional symbols of identifying an officer; they demonstrate vested authority. The uniform fosters immediate recognition, and only approved apparel is to be worn while on duty. A BSO's general appearance must be one of objectivity, neutrality and impartiality from the traveller's perspective. Altering that general appearance by wearing a bracelet might affect that perception and create a misconception among travellers about the BSO's authority to enforce the law.

[10] The grievor's allegation that bracelets are not part of the uniform as they are worn on the person is not valid. For the employer, the scope of the Uniform Policy covers the BSOs' general appearance and is not limited to the uniform's components. As an example, the Uniform Policy addresses hairstyle and colour, fingernails and polish, makeup, tattoos, etc.

[11] The grievors established a parallel between the bracelets and wearing watches and religious jewelry, which might be allowed under certain criteria of the Uniform Policy. The employer submitted that fundamental distinctions exist between those items and the union bracelets in terms of appearance and neutrality. In addition, the Uniform Policy imposes several conditions for wearing jewelry. For example, the BSOs are allowed to wear a necklace, but it must be concealed and not visible, only certain colours of watchbands are allowed, and watches must be conservatively styled. Furthermore, plastic bracelets are not part of the objects that a BSO can wear with the uniform.

[12] The employer submitted that the jurisprudence presented by the grievors cannot be applied to their cases. In those cases, the grievors either were non-uniformed employees or were clearly not in the same position of authority as the BSOs. Therefore, the impact of wearing a union button was different and was deemed acceptable.

[13] The employer argued that the grievors did not establish that its practice of denying the wearing of the union's plastic bracelets was discriminatory. The grievances should be dismissed, and no damages should be awarded.

III. Reasons

[14] The facts of these grievances are quite simple. The grievors are BSOs, working at two ports of entry from the United States of America, Saint-Léonard and Grand Falls, New Brunswick. At the time of the grievances, the employer and the bargaining agent were negotiating the renewal of the collective agreement. The bargaining agent distributed green bracelets to its members with the following message: "I support the bargaining team / J'appuie mon équipe de négociation." The employer ordered the grievors to remove the bracelets. The grievors obeyed the order and grieved it.

[15] In a nutshell, the grievors argued that the employer violated the collective agreement by ordering them to remove their bracelets because the bracelets and their message were a legitimate union activity. The employer argued that it did not violate the collective agreement by ordering the grievors to remove their bracelets. Wearing that type of bracelet is not allowed under the Uniform Policy because it might create a misperception among travellers about the BSOs' authority to enforce the law.

[16] There is abundant jurisprudence on wearing or posting union material in the workplace. I disagree with the employer, which argued that that jurisprudence does not apply because it does not involve uniformed employees in the same position of authority as the BSOs. Jurisprudence is rarely based on facts similar to the case at hand. This does not, however, mean that principles cannot be inferred from the jurisprudence and applied to a new set of facts. That is what adjudicators, and I should add, the parties, do most of the time. Having said that, I recognize that BSOs performing traveller examinations must adhere to higher standards of appearance than workers in a government warehouse not accessible to the public with respect to the wearing of union material.

[17] Wearing a union bracelet is a legitimate union activity. In *Bodkin*, the adjudicator concluded that a union button with the inscription "I'm on strike alert" was a legitimate union activity based on collective agreement language comparable to that of the collective agreement in this case. That adjudicator's conclusion was affirmed by the Federal Court of Appeal in *Quan*. In *Bodkin*, the adjudicator also concluded that the no-discrimination clause of the relevant collective agreement, as far as union activities were concerned, provided at least as much protection to employees as section 6 of the *Public Service Staff Relations Act (PSSRA)* did at that time. That section of the *PSSRA* has been replaced by section 5 of the *Act*, which reads as follows:

> ***5.*** *Every employee is free to join the employee organization of his or her choice and to participate in its lawful activities.*

[18] Section 5 of the *Act* and section 6 of the *PSSRA* are not worded exactly the same but, for the purpose of this case, they have the same meaning. Section 6 of the *PSSRA* reads as follows:

> ***6.*** *Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which the employee is a member.*

[19] Even if wearing union bracelets is a legitimate activity, and legitimate union activities are allowed by the collective agreement and by the *Act*, it does not necessarily mean that all union activities are permitted in the workplace during working hours. In any discussion of what constitute permissible or legitimate union activities, the content of any message must be examined. On that point, I wrote the following in *Public Service Alliance of Canada*:

> …
>
> *[29] As stated in* Quality Meat Packers Ltd.*, the content of the message needs to be examined. Further, as stated in* Canadian Union of Postal Workers (19781221)*, valid criteria are required to censure the union, including the illegality of the message, its abusive nature, the inclusion of defamatory or fraudulent statements, and non-compliance with the standards governing labour relations. Obviously, those criteria are far from being met in this case. That petition simply asked, using some fairly soft union rhetoric, for protection for federal public service pensions and improvements to old age security and the guaranteed income supplement for all retirees.*
>
> …

[20] The message on the union bracelets was neither illegal nor abusive. It did not contain any defamatory or fraudulent statements or suggest non-compliance with the collective agreement or the *Act*. It simply stated that the grievors supported their bargaining teams.

[21] The impact of the message on the employer should also be considered in cases such as this. As stated in *Bodkin*, the employer should not have to tolerate statements that are detrimental to its operations or that impinge on its authority. I must add that

the employer does not have to tolerate statements or union material in the workplace that would negatively impact employees' capacities to perform their duties.

[22] The employer submitted that altering a BSO's general appearance by a bracelet might affect the perception of neutrality or objectivity from the traveller's perspective, and create a misconception among travellers about the BSO's authority to enforce the law. In that sense, it would have negatively impacted the employer's operation. However, the employer did not submit anything to support that argument, such as specific incidents or complaints from the public, or other facts. Instead, it argued that doing so was contrary to the Uniform Policy.

[23] The grievors argued that the Uniform Policy implicitly allows wearing the bracelets, and the employer argued to the contrary. Whether the bracelets are captured by the Uniform Policy does not matter much since wearing the bracelets, which is a union activity, cannot be compared with a particular hairstyle or colour, a specific type of fingernails, the number of tattoos on a person, or the type of jewellery being worn. Neither the *Act* nor the collective agreement provides employees the right to have blue hair, long fingernails, earrings in the lower lip or tattoos on the forehead. That absence of specification in the collective agreement allows the employer to adopt a policy that regulates those types of personal preferences. However, the situation is different with union activities. The employer cannot, by virtue of its own unilateral policy, remove employees' rights granted by the *Act* or the collective agreement. What really matters in this case is not the wording of the policy but whether the bracelets negatively impacted the grievors' capacity to perform their duties.

[24] Contrary to what the employer argued, I do not believe that the union bracelets impacted the perception of neutrality of the BSOs or their authority as law enforcement officers. That situation had certainly no more impact on the public than employees of Employment and Immigration Canada wearing "I'm on strike alert" buttons (see *Bodkin* and *Quan*) or employees of the Canada Revenue Agency wearing buttons declaring "You'll miss us when we're gone ! 2006" (see *Andres*). Those messages directly implied that services could be interrupted in the future. Further, aside from the employer's bald allegation that the public's perception of neutrality could be impacted, I was provided with no evidence on this issue.

[25] The bracelets in issue here simply stated that the BSOs supported their bargaining team. Collective bargaining is a right protected by the laws of this country

and by the *Canadian Charter of Rights and Freedoms*. For the BSOs to state through a message on a bracelet that they support their team, absolutely does not undermine their authority as law enforcement officers or the neutrality that they project in the eyes of the public. It would not be reasonable for a traveller to perceive that the BSOs are not neutral because they wear that type of bracelet.

[26] The grievors asked that I order the employer to pay each of them $500.00 and to pay $5000.00 to the bargaining agent. Nothing in the parties' submissions could lead me to make such an order. First, I do not think that the employer acted in bad faith and that it violated the collective agreement on purpose to stop the bargaining agent in its campaign. Second, no link between the requested payments and the consequences of this violation of the collective agreement have been proven.

[27] It is now too late to repair the damage caused by the violation of the collective agreement since the collective agreement being bargained at the time in question was ratified three years ago. However, I find it important and appropriate to order whatever is possible to reduce the risks of further violations of the collective agreement. The grievors asked that the employer be required to post my decision in the workplace for 90 days. I agree with that request because I believe that it is important that all employees of the two work sites become aware that it is legal to wear such bracelets.

[28] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IV. Order

[29] The grievances are allowed.

[30] I declare that the employer violated the collective agreement when it ordered the grievors to not wear the union bracelets.

[31] I order the employer to post this decision for a 90-day period at appropriate locations visible to all employees in its Saint-Léonard and Grand Falls work sites.

[32] I will remain seized for a period of 90 days to intervene should any difficulties arise in implementing this decision.

February 17, 2012.

Renaud Paquet,
adjudicator