**Date:** 20120217

**File:** 561-02-155

**Citation: 2012 PSLRB 22**

*Public Service*
*Labour Relations Act*

Before the Public Service
Labour Relations Board

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BETWEEN

**WILLIAM COMISKEY**

Complainant

and

**PHILIP JENSEN, HÉLÈNE GOSSELIN,
JANICE CHARETTE, DIANE FINLEY AND MONTE SOLBERG**

Respondents

Indexed as
*Comiskey v. Jensen et al.*

In the matter of a complaint made under section 190 of *the Public Service Labour Relations Act*

## REASONS FOR DECISION

***Before:*** Augustus Richardson, Board Member

***For the Complainant:*** Elizabeth Cannon

***For the Respondents:*** Caroline Engmann, counsel

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Heard at Windsor, Ontario,
November 1 and 2, 2011.

## I. Preliminary matters

### A. The complaint

[1] On March 22, 2007, William Comiskey ("the complainant") filed a complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). The complaint was filed against the following persons:

1) Philip Jensen, Assistant Deputy Minister of People and Culture;
2) Hélène Gosselin, Deputy Head of Service Canada;
3) Janice Charette, Deputy Minister of Human Resources and Social Development;
4) Diane Finley, Minister of Citizenship and Immigration; and
5) Monte Solberg, Minister of Human Resources and Social Development.

[2] The complaint alleged that, among other things, the respondents had been doing the following:

> *. . . acting in bad faith, caused unnecessary delays and …* [they] *made deliberate attempts to undermine and derail classification grievances filed by the Income Security Programs (ISP) Service Delivery Agent 2 (SDA2) processing staff in October 1995 and again in March 1996.*

[3] By way of remedy, Mr. Comiskey sought ". . . an investigation into the grievance procedures in HRSDC and Service Canada." In his submissions, he enlarged his remedy to include an order that his classification grievance be dealt with immediately. He also requested the "immediate release" of a May 26, 2006 report authored by the Income Security Programs (ISP) Service Delivery Agent 2 (SDA2) Classification Committee. As it turned out, by the time of the hearing, Mr. Comiskey had been able to obtain a copy of the report by way of an access to information request. Thus, that part of the remedial request is moot.

[4] Mr. Comiskey filed his complaint in his personal capacity. His union – the Public Service Alliance of Canada ("PSAC") – did not support the complaint.

[5] On behalf of the respondents I heard the evidence of Diane McCusker. On behalf of the complainant, I heard his evidence as well as the evidence of Elizabeth Cannon, Anthony Tilley, President, National Health Union (NHU), and Jan Liberty, National Vice-President, Ontario, Canada Employment and Immigration Union (CEIU). Both the

NHU and the CEIU are components of the Public Service Alliance of Canada and neither union supported the complaint.

[6] All witnesses testified fairly and straightforwardly. There was no dispute on the facts. Indeed, most, if not all, of the substantive evidence stemmed from the volumes of filed documents. Accordingly, I see no point in setting out a précis of the testimonies of the witnesses, other than as necessary to illuminate the documentary record. What follows then are my findings of fact, based primarily on the documents filed and secondarily, on the testimonies of the witnesses, in particular, of Ms. McCusker and Mr. Comiskey.

**B. Classification appeals and processes**

[7] It is helpful to briefly describe the procedures and remedies used to classify work descriptions in the federal public service, which will provide the background for this complaint. The parties agreed with the description.

[8] Within the federal public service, there are "occupational groups." Each group is composed of one or more "jobs" or "occupations" related in broad terms by functions.

[9] Each job has its own "work description," which describes its work requirements.

[10] Each group has a "classification standard," which is a set of criteria that defines and distinguishes each group. Those standards also provide the criteria for determining the relative value of the work performed by occupational groups (and hence, ultimately, jobs).

[11] From time to time, employees come to believe that the application of the classification standard that defines their work does not accurately reflect their duties or the value to be attributed to them. Classification complaints are not covered by collective agreements. To deal with such complaints, the employer, as of 1994 if not earlier, established a policy and ". . . redress process for employees who are dissatisfied with the classification of the duties they perform as assigned by the employer" (*Classification Grievances Policy*, "Policy Objective", Exhibits U11 and U12).

[12] Classification appeals, or "grievances," are heard by a three-person committee composed of:

1) a chairperson who is also an accredited classification officer;
2) a Treasury Board grievance officer; and
3) a person from within or outside the department (Exhibit U12).

[13] Those three people must satisfy the following criteria:

1) they did not participate in the original classification decision;
2) they did not supervise the position in question and were not otherwise in a conflict of interest and;
3) they were knowledgeable about classification methods and the relevant classification standard (Exhibits U11 and U12).

[14] The classification grievance procedure was not designed to be adversarial. It was structured as more of an informational exercise, in which the aggrieved employee could present his or her arguments as to why the classification was incorrect (Exhibit U12).

[15] Of note and relevant to the matter before me is that, since classification grievances are heard ". . . at the final level of the grievance process and the decision rendered is final and binding, it is critical that the decision be based on an accurate work description performed by the employee and assigned by management" (Exhibit U12), "On Site Review".

[16] Upon the completion of the committee's review and deliberations, the chairperson prepares a report of the committee's decision and recommendation, which is then submitted to the deputy head or a delegate for approval. The deputy head then either:

1) confirms the committee's recommendation; or
2) rejects it (Exhibit U12).

[17] The deputy head's decision is final and binding. There is no right of appeal. The parties to this dispute agreed that the only remedy available to a grievor at that point is an application to the Federal Court for judicial review.

[18] One last point. As noted, classification grievances are dependent upon work descriptions. Employees can and do file grievances with respect to work descriptions, but those grievances are dealt with under the relevant collective agreements. They are pursued (or not) by the employee's union, which has control over them. This is to be

contrasted with classification grievances, which are outside collective agreements. The procedural rights, if any, of employees with respect to classification grievances must be found outside collective agreements.

**C. <u>Events leading up to the complaint</u>**

[19] In December 1994, all “Benefit Entitlement” and “OAS Analyst” work descriptions were replaced with the SDA2 work descriptions (Exhibit U8, tabs A, A8 and A9). The new work description applied to Mr. Comiskey as well as to roughly 1800 positions across the country (Exhibit U8, tab A8).

[20] Mr. Comiskey filed a classification grievance (REH-44507) on October 13, 1995, as well as a work description and acting pay grievance. A resulting issue about the accuracy of the job content of his work description meant that the classification grievance had to be placed in abeyance pending the resolution of the appropriate work description (Exhibit U8, tab A1). The testimonies of the witnesses, as well as the documents submitted into evidence, established that Mr. Comiskey was not the only person to file a grievance about the new work description. Several thousand were filed, in part because every grievor ended up filing three separate grievances, a work description grievance, a classification grievance and an acting pay grievance.

[21] As noted, Mr. Comiskey’s classification grievance (and those of his peers) was held in abeyance pending the resolution of the work description grievances. This took more than five years, in large part because his employer, the Department of Human Resources and Skills Development (HRSDC) or (“the employer”) embarked on an attempt to forge a “Universal Classification System” (“UCS”). It was thought at that time that the UCS might resolve many if not all the pending grievances. The effort absorbed much of the time and energy of the employer and the different unions that represent public service employees.

[22] On May 4, 2000, Ms. Grace Cotroneo, a classification grievances and UCS officer with the employer, emailed Mr. Comiskey. She noted that he filed a classification grievance in October 1995, that the grievance had been held in abeyance pending the resolution of “the job content issues” about his position of Benefit Entitlement Clerk classified CR-05, and that there had been numerous delays . . . “in processing our grievance workload due to the backlog of classification grievances and heavy workload

regarding the UCS." He was asked whether he was still interested in pursuing his classification grievance. He stated that he was (Exhibit U8, tab A3).

[23] The hearing of Mr. Comiskey's classification grievance was then scheduled for June 6, 2000. However, it became apparent that he was still complaining about the job content of his work description. Accordingly, as Ms. Cotroneo noted at that time, the hearing had to be cancelled pending the resolution of ". . . a job content issue ... which needs to be resolved before we can proceed with the classification grievance" (Exhibit U8, tab A4).

[24] The hearing was rescheduled for August 8, 2000 (Exhibit U8, tab A3). It was then further adjourned a number of times to permit the collection of several materials; see, for example, Exhibit U8, tab A4. It was eventually scheduled for March 13, 2001. At that time, both the PSAC and the National Health and Welfare Union ("NHWU") confirmed that they were not representing Mr. Comiskey in his classification grievance. He agreed to reschedule the hearing to April 24, 2001 (Exhibit U8, tab A4).

[25] The classification grievance committee convened on April 24, 2001. However, at that time, Mr. Comiskey (and other grievors in identical positions) indicated that they still disagreed with the 1995 work description. That being the case, the committee could not proceed. It had to adjourn, pending the resolution of that issue (Exhibit U8, tab A9). The committee chair, Mr. Enns, recommended that the union and the employer work together to settle or agree upon the work description issue (Exhibit U8, tab A9).

[26] On January 9, 2002, Mr. Comiskey inquired as to the status of his work description and "how close we are with receiving" it ". . . so that we can continue with our Classification Grievance of October 1995" (Exhibit U8, tab A5). That same year, the Treasury Board decided to end the UCS project. A new glut of grievances resulted. The large number of them and the resulting overload were such that the employer and the complainant's component began to work together to develop a new generic national work description for SDA2s (see Exhibit U8, tab A7; letter dated October 3, 2006). On October 5, 2005, Mr. Comiskey was advised that a work description had been developed, ". . . which accurately reflects the duties you are currently performing as well as those performed since 1996" (Exhibit U8, tab A6).

[27] The work description then had to be considered and reported upon by a classification committee. In May 2006, a classification committee met to consider the new work description. It submitted a report dated May 25, 2006 to Assistant Deputy Minister Phil Jensen ("the May 2006 report") (Exhibit U8, tab A7). The report was put into evidence; see Exhibit U8, tab A11.

[28] On June 29, 2006, Mr. Jensen rejected the work description recommended in the May 2006 report on the grounds that it did not ". . . adequately consider the work done over the past three to four years to create and build Service Canada and change the type of work done by these employees." He asked the classification committee to ". . . broaden their analysis and return with a recommendation by the end of October 2006" (Exhibit U8, tab A7).

[29] The committee held a meeting and conducted further research, with a view to having a recommendation for the deputy head by fall of 2006 (Exhibit U8, tab A7).

[30] During that time, Mr. Comiskey sent a number of emails to the Honourable Diane Finley, Minister, HRSDC, about his outstanding classification grievance (Exhibit U8, tab A7). He then emailed Prime Minister Stephen Harper on December 17, 2006, to complain about what he felt was the lack of progress with the grievance. He asked the Prime Minister ". . . to immediately release and implement the findings of the May 25, 2006 ISP SDA 2 Classification Committee [the May 2006 report]" (Exhibits U8, tab A7). On December 22, 2006, Mr. Comiskey emailed the Honourable John Baird, President of the Treasury Board, to more or less the same effect (Exhibits U8, tab A7). Mr. Comiskey was trying to get someone ". . . to take hold of my grievance." As he later testified, "I wrote to the minister to ask him to reconvene the classification hearing so we could get the job description classified [. . .] that was my intent" (see Exhibit U8, tab 7).

[31] On March 22, 2007, Mr. Comiskey filed this complaint. Despite this complaint, Mr. Comiskey, along with other employees in the same or a similar position, continued to pursue the status of the 1995 classification grievances. In January 2008, they were advised by Gladys Azzam, a program manager with corporate classification that the 1995 classification grievances remained outstanding. She confirmed that she would ensure that the hearing was reconvened ". . . once I receive an agreed upon work description that addresses the period of August 1995 through 1996" (Exhibit U8, tab A9).

[32] Meanwhile, the employer and the NHU and CEIU had attempted to come up with a solution to the raft of grievances that had arisen out of the 1994 and subsequent classification and work description changes. In July 2011 the unions and the employer entered into a Memorandum of Agreement ("MOA") that was designed and intended to deal with most if not all the work description and classification grievances of "eligible employees" that had been filed since the introduction of the 1995 work description; see Exhibit E4. Ms. McCusker testified that at least one of Mr. Comiskey's classification grievances (the one filed in 1995) and possibly more were not caught by the MOA because he was not an "eligible employee" within the MOA's meaning. It is not necessary for me to decide which of Mr. Comiskey's other grievances were or were not covered by the MOA. It is only necessary for me to decide that the 1995 grievance remained outstanding as of July 2011. I so decide.

[33] With this background, I will now turn to the parties' submissions.

**II. <u>Summary of the submissions</u>**

**A. <u>For the employer</u>**

[34] Counsel for the respondents made two sets of submissions, one with respect to my jurisdiction to hear the complaint and one with respect to its merits.

[35] As for my jurisdiction, counsel for the respondents submitted as follows:

1) the complaint was out of time;
2) the substance of the complaint disclosed on its face that it did not fall within the scope of section 185 of the *Act*; and, in any event,
3) the complaint concerned a classification issue that was outside my jurisdiction as a Board member under the *Act*.

[36] Dealing with the first point, counsel for the respondents submitted that a valid complaint under section 190 of the *Act* had to be filed ". . . not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint". Counsel for the respondents submitted that it was clear on the facts that Mr. Comiskey knew by the time he received Minister Baird's letter of December 12, 2006, if not indeed earlier, of all the facts he complains of in this complaint.

[37] Dealing with the second point, counsel submitted that the complaint referred to and relied upon paragraph 190(1)(*g*) of the *Act*, which provides as follows:

> ***190****(1) The Board must examine and inquire into any complaint made to it that*
>
> *...*
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

[38] Section 185 of the *Act* in turn defines an "unfair labour practice" to be anything that is prohibited by subsection 186(1) or (2), section 187 or 188, or subsection 189(1) of the *Act*. Subsections 186(1) and (2) deal with an employer's participation in or interference with – or discrimination based upon – union activities. Sections 187 and 188 in essence prohibit the same type of conduct by a union with respect to employees in the bargaining unit. Subsection 189(1) forbids anyone from intimidating or compelling an employee from joining or refusing to join a union.

[39] None of those sections deals with the conduct complained of in this case, which in essence is the alleged failure of the respondents to deal with the complainant's classification grievance in a timely fashion. That being the case, the complaint must, on its face, fail.

[40] Dealing with the third objection to jurisdiction, counsel for the respondents submitted that the complainant's complaint in pith and substance related to his classification. Section 7 of the *Act* provides that nothing in the *Act* affects

> *. . . the right or authority of the Treasury Board or separate agency to determine the organization of those portions of the federal public administration . . . it represents ... or to assign duties to* <u>*and to classify positions and persons*</u> *employed in those portions of the federal public administration.*
>
> [Emphasis added]

See also paragraph 11.1(1)(*b*) of the *Financial Administration Act,* R.S.C., 1985, c. F-11. That being the case, an adjudicator appointed under the *Act* has no jurisdiction to consider, review or remedy the procedures of the employer related to the classification or the reclassification of the work of its employees.

[41] Turning to the merits of the complaint, counsel for the respondents submitted that the evidence did not reveal any bad faith on the part of the respondents. The policy and practice of the respondents with respect to classification appeals and grievances was clear and reasonable. No such grievance could proceed in the absence of an agreement as to the work description or content.

[42] Counsel for the respondents submitted that, on the facts, the respondents never denied, rejected or refused to proceed with Mr. Comiskey's classification grievance. The grievance was simply held in abeyance pending the resolution of Mr. Comiskey's parallel grievance concerning his work description. The employer and the respondents acted entirely reasonably. The issue of whether a particular job was properly classified could be addressed only if there was agreement as to what that job entailed. The job was measured against the classification. If the complainant did not agree with the work description, nothing could be measured against the classification. The complainant never agreed with the work description. Until that issue was resolved, his classification grievance could not proceed. That being the case, the grievance was at the very least premature and, at best, not fully made out.

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

[43] With respect to the respondents' objection on timeliness, the complainant's representative relied on subsection 241(1) of the *Act*, which provides that "[n]o proceeding under this Act is invalid by reason only of a defect in form or a technical irregularity."

[44] The complainant's representative submitted that any delay had been caused by the complainant's reliance upon the respondents' repeated assurances over the years that it would deal with the classification grievance. The complainant was entitled to file a classification grievance. He was entitled to have that grievance dealt with. To deny him that right because he had relied upon assurances from the respondents would be to deny him natural justice. It would permit the respondents to defeat the complainant's right to due process.

[45] With respect to my jurisdiction, the complainant's representative acknowledged that the Public Service Labour Relations Board ("the Board") has no power to determine or adjudicate a classification grievance. However, she submitted that the Board does have the jurisdiction to consider and remedy any defects in the respondents'

procedures – especially if those procedures deny an employee due process. On that point, she relied upon *Public Service Alliance of Canada and Demers v. Canada Customs and Revenue Agency and Tucker*, 2004 PSSRB 121 ("*Demers*"), in which the Board, under the *Public Service Staff Relations Act* ruled that the respondent in that case could not frustrate an employee's right to file a classification grievance by creating a grievance procedure that could not easily be complied with (at paragraphs 60 and 70).

[46] The complainant's representative submitted that the complainant's union and his employer agreed in May 2006 to a suitable work description. Once that description was agreed upon, there was no longer anything left to bar the respondents from proceeding with the 1995 classification grievance. The respondents' subsequent refusal to comply with that agreement constituted bad faith on its part. It also constituted a denial of natural justice. By refusing to accept the work description, the respondents in effect made it impossible for the complainant to have his classification appeal dealt with. Thus, his appeal right was frustrated.

## III. Reason

[47] I will first deal with the respondents' preliminary objection about timeliness.

[48] In my opinion, the respondents' timeliness objection must be rejected. Under subsection 190(2) of the *Act*, time begins to run ". . . not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint." On the facts of this case, the respondents never issued any clear and unequivocal statement that it would not process Mr. Comiskey's classification grievance. Instead, ongoing inquiries were made over the years as to whether he wished to pursue it (he always said that he did). They were coupled with repeated assurances from various representatives of the employer that the classification grievance would be heard as soon as the work description issue was resolved, as well as attempts from time to time to hold hearings that were subsequently adjourned through no fault of the complainant. As late as December 12, 2006, Minister Baird informed the complainant that the department apologized for the delay and that it hoped to be in a position to deal with the matter sometime in fall 2006.

[49] Given those assurances, and given that a delay was only to be expected, given the thousands of grievances, it cannot in my view be said that Mr. Comiskey knew or ought to have known by December 12, 2006, or indeed, by his reply of December 22, 2006 that the employer (as he alleges) acted in bad faith. Given the circumstances, it cannot be said that the time period under subsection 190(2) of the *Act*, had begun to run for Mr. Comiskey.

[50] The result is different with respect to the respondents' second jurisdictional argument. The argument in my opinion is not so much about jurisdiction as about the facts. As noted, subsection 190(1) of the *Act* deals with section 185 unfair labour practices. The complaint is that the respondents did not follow or frustrated the classification appeal procedures that it set up. Such conduct, even if it established, would not in my view amount to an unfair labour practice within the meaning of section 185. Moreover, on the facts, nothing suggests bad faith on the part of the respondents or any practice that could amount to an unfair labour practice within the meaning of the *Act*.

[51] I do not agree that the respondents objection merely amounts to a ". . . defect in form or a technical irregularity" that can be saved by subsection 241(1) of the *Act*. This complaint did not arise from a collective agreement. Accordingly, whatever authority I have must be found – and can only be found – in the *Act* and its regulations. If the facts on which this complaint is grounded do not fall within the scope of subsection 190(1) and section 185 of the *Act,* then I am without jurisdiction to order the remedy sought by the complainant. Subsection 241(1) might be able to save the complaint if the facts could ground a violation of some other provision of the *Act* (assuming such a violation was within the jurisdiction of the Board). But no such violation was pointed to by the complainant.

[52] In reaching that conclusion, I am mindful of the complainant's submission based on paragraph 50 of *Demers* wherein the Board, under the *Public Service Staff Relations Act*, ruled that the employer could not frustrate an employee's right to file an individual classification grievance by creating a grievance procedure that could not easily be complied with: see *Demers*, paragraphs 60 and 70.

[53] The difficulty is that *Demers* was based upon an earlier *Act*, one that was worded somewhat differently from the *Act* from which I draw my jurisdiction. In particular, subsection 91(1) of the *Public Service Staff Relations Act* provided an

employee with the right to file a grievance if he or she felt "aggrieved by the interpretation or application, in respect of the employee, of a provision of a statute, or of a regulation, by-law, direction or <u>other instrument made or issued by the employer, dealing with the terms and conditions of employment. . . .</u>" (emphasis added; from paragraph 47 of *Demers*). The emphasized wording provided the Board member with the jurisdiction to review the procedures that the employer had put in place for classification appeals, classification being outside her jurisdiction.

[54] Such wording does not exist to my knowledge in either the *Act* or its regulations. In other words, nothing enables me to avoid the bar against my reviewing any decision or issue respecting a classification complaint.

[55] Nor do I accept the complainant's argument that the respondents failure to proceed with the agreed upon work description recommended in the May 2006 report constituted evidence of bad faith or a denial of natural justice or due process. There was no evidence adduced – and no statute or regulation cited – to the effect that the Deputy Minister was bound or obligated to accept the committee's recommendation. Indeed, as noted, the procedures established under the classification appeal process made it quite clear that the Assistant Deputy Minister was not bound to accept such a recommendation. He was entitled to disagree with it, and to either reject it outright or to ask the committee to reconsider it. Indeed, one would think that his decision to ask the committee to investigate the foundation of its recommendation further rather than to reject it outright was equally consistent with good faith.

[56] However, even if I am wrong on that point, and even if I have jurisdiction to hear the complaint, I was not satisfied on the facts that his due process or natural justice complaint was made out. Yes, the classification appeal has been long outstanding. Yes, such a delay is understandably frustrating. However, the respondents have never denied Mr. Comiskey his right to appeal. The delay was attributable to the fact that his appeal is merely one of thousands and, moreover, is one that can proceed only once the underlying work description is defined and accepted. Indeed, in fairness, one must observe that Mr. Comiskey was to some extent responsible for the delay, inasmuch as his continuing objection to his work description contributed to it. As long as the work description was under review and negotiation, the classification appeal could not proceed. Once that review and negotiation is completed, the appeal can proceed. The respondents never denied Mr. Comiskey his

right to proceed with the appeal. Ms. McCusker testified that that right still exists. The only thing stopping the appeal from proceeding is, as it always has been, the need to have Mr. Comiskey's agreement to the work description. Once that happens, the appeal can and will proceed.

[57] One final point although it is one that was not really raised before me and is not necessary to or part of my decision. The complaint named Philip Jensen, Helen Gosselin, Janice Charette, Diane Finley and Monte Solberg as respondents. Yet no attempt was made to link any of the facts or evidence presented to any of the respondents, with the possible exception of Mr. Jensen. Even here the evidence was that he did no more and no less than what he was entitled to in the discharge of his duties and responsibilities. Complaints that a respondent is interfering with union activities, or has denied the complainant natural justice, are serious complaints. They ought not to be made lightly. They ought not to be made if there is no evidentiary or factual basis for them. Nor should they be made just because, as here, the complainant couldn't find a statutory or regulatory provision that fit his complaint.

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

*(The Order appears on the next page)*

## IV. **Order**

[59] The complaint is denied.

February 17, 2012.

**Augustus Richardson,**
**Board member**