

Date: 20120224

File: 548-02-7
XR: 566-02-1162 to 1164,
1362 to 1364, 1434,
1482 and 1593

Citation: 2012 PSLRB 24

*Public Service
Labour Relations Act*



Before the Public Service
Labour Relations Board

BETWEEN

RACHEL EXETER

Applicant

and

**DEPUTY HEAD
(Statistics Canada)**

Respondent

Indexed as
Exeter v. Deputy Head (Statistics Canada)

In the matter of a request for the Board to exercise any of its powers under section 36 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Casper M. Bloom, Q.C., Ad. E., Chairperson

For the Applicant: Herself

For the Respondent: Adrian Bieniasiewicz, counsel

Decided on the basis of written submissions,
filed August 17 and September 29, 2011.

REASONS FOR DECISION

Request before the Board

[1] Rachel Exeter requests that the Public Service Labour Relations Board (“the Board”) remove the adjudicator seized of her grievances in PSLRB File Nos. 566-02-1162 to 1164, 1362 to 1364, 1434, 1482 and 1593 and that it refer her grievances to another adjudicator.

Positions of the parties

[2] In support of her request, Ms. Exeter alleges that the adjudicator has a personal interest in the outcome of her grievances and that natural justice and procedural fairness require that her grievances be heard by another adjudicator.

[3] The deputy head of Statistics Canada opposes the request, alleging that it is “. . . trivial, frivolous, vexatious, and made in bad faith” The deputy head denies that the adjudicator has an interest in the outcome of Ms. Exeter’s grievances.

Reasons

[4] The Board is a statutory tribunal created by legislation, and as such, its powers are only those that legislation confers upon it. In her request, Ms. Exeter relies on section 36 of the *Public Service Labour Relations Act* (“the Act”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, which provides as follows:

36. The Board administers this Act and it may exercise the powers and perform the functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, regulations made under it or decisions made in respect of a matter coming before the Board.

[5] The powers and functions that are conferred or imposed on the Board by the Act in relation to grievances are few, as opposed to those given to adjudicators. They are found in Part 2 of the Act, which deals with grievances, specifically in sections 223, 235, 237 and 238. For instance, subsection 223(1) provides that the Board receives notices of reference to adjudication and the effect of subsection 223(2) is that the Board, in turn, provides those notices to the Chairperson of the Board. Subsections 223(1) and (2) read as follows:

223. (1) A party who refers a grievance to adjudication must, in accordance with the regulations, give notice of the

reference to the Board and specify in the notice whether an adjudicator is named in any applicable collective agreement or has otherwise been selected by the parties and, if no adjudicator is so named or has been selected, whether the party requests the establishment of a board of adjudication.

(2) On receipt of the notice by the Board, the Chairperson must

(a) if the grievance is one arising out of a collective agreement and an adjudicator is named in the agreement, refer the matter to the adjudicator;

(b) if the parties have selected an adjudicator, refer the matter to the adjudicator;

(c) if a board of adjudication has been requested and the other party has not objected in the time provided for in the regulations, establish the board and refer the matter to it; and

(d) in any other case, refer the matter to an adjudicator designated by the Chairperson from amongst the members of the Board.

[6] In subsection 235(2), the Act gives the Board the power to approve those parts of the costs of adjudication that the Executive Director may determine must be borne by a bargaining agent and grants the Board the power to receive payment of any part of the costs of adjudication that the Executive Director has determined, and that the Board has approved, must be borne by a bargaining agent. Subsection 235(2) states what follows:

235. (2) If an aggrieved employee is represented in the adjudication by a bargaining agent, the bargaining agent is liable to pay and must remit to the Board any part of the costs of the adjudication that may be determined by the Executive Director of the Board with the approval of the Board.

[7] For its part, subsection 237(1) of the Act confers on the Board the power to make regulations respecting the processes for dealing with grievances. It provides as follows:

237. (1) The Board may make regulations respecting the processes for dealing with grievances, including regulations concerning

-
- (a) *the manner and form of presenting a grievance and, in the case of group grievances, the form of the consent of the employees concerned;*
 - (b) *the maximum number of levels in each grievance process;*
 - (c) *the manner in which employees are to be advised of the names of the persons whose decision on a grievance constitutes a level in the grievance process, including the final level;*
 - (d) *the time within which a grievance may be presented at any level in a grievance process;*
 - (e) *the circumstances in which any level below the final level in a grievance process may be eliminated;*
 - (f) *the manner in which and the time within which a grievance may be referred to adjudication after it has been presented up to and including the final level in the grievance process;*
 - (g) *the establishment of rules of procedure for the hearing of a grievance;*
 - (h) *the specification of the time within which and the persons to whom notices and other documents must be sent or given under this Part, and when the notices are deemed to have been sent, given or received; and*
 - (i) *the manner of giving notice of an issue to the Canadian Human Rights Commission under this Part.*

[8] Finally, paragraph 238(a) of the Act allows the Board to make regulations respecting the manner of giving notice of reference to adjudication and the time for making objections to the establishment of a board of adjudication, and paragraph 238(b) enables the Board to make regulations respecting the manner in which and the time within which boards of adjudication are to be established. Section 238 reads as follows:

238. *The Board may make regulations respecting*

- (a) *the manner of giving notice under subsection 223(1) and the time for making objections under paragraph 223(2)(c); and*
- (b) *the manner in which and the time within which boards of adjudication are to be established.*

[9] As shown, the powers that the *Act* confers on the Board in relation to grievances do not specifically include that of removing an adjudicator from hearing a grievance with which he or she is seized.

[10] There remains the question of whether the Board can remove an adjudicator from hearing a grievance with which he or she is seized, on the basis that such removal is “. . . incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, regulations made under it or decisions made in respect of a matter coming before the Board.” I do not consider that the Board has such power.

[11] Although the allegation of conflict of interest made by Ms. Exeter calls into play rules of natural justice and procedural fairness, it raises no issue of compliance with the *Act* or with the regulations made under the *Act*. Further, Ms. Exeter made her allegation in the context of grievances before an “adjudicator,” not about a decision made in respect of proceedings before the “Board.” An adjudicator and the Board are distinct decision makers that deal with different matters and that exercise separate jurisdictions, as provided for by the *Act*.

[12] Finally, I agree in principle that the allegation of conflict of interest made by Ms. Exeter could call into play the attainment of the objects of the *Act*, in the sense that impartial decision making is crucial to the objectives stated in the preamble to the *Act*, especially that of “. . . fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment” However, I do not agree that the Board removing an adjudicator from hearing a grievance with which he or she is seized is a power incidental to achieving that objective. To the contrary, I find that the Board’s interference in matters otherwise properly before an adjudicator would run counter to the objective of fair, credible and efficient adjudication proceedings. That said, there is no doubt that an adjudicator is bound by the rules of natural justice and procedural fairness when deciding a grievance. Any such failure is subject to judicial review by the Federal Court once the adjudicator has rendered his or her final decision on the grievance.

[13] For all of the above reasons, Ms. Exeter’s request is denied because section 36 of the *Act* does not give the Board the power to remove an adjudicator from hearing a grievance with which he or she is seized. In the event that I am incorrect, I will address

whether the Board should remove the adjudicator from hearing Ms. Exeter's grievances if it has such a power.

[14] Basically, Ms. Exeter's request is for the recusal of the adjudicator who is seized with her grievances. There is no doubt that an adjudicator has the jurisdiction to decide a request for his or her own recusal; any decision maker has that power. Case law under the *Act*, as well as case law under the previous *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, contains instances in which a party requested the recusal of the adjudicator hearing his or her grievance. In all cases, the request for recusal was decided by the adjudicator. Further, an adjudicator is the master of his or her own process, subject to the rules of natural justice and procedural fairness.

[15] Even if the Board had jurisdiction under section 36 of the *Act* to remove the adjudicator from hearing Ms. Exeter's grievances, I find that it would be inappropriate for the Board to exercise that power. I find that it is more appropriate to let the adjudicator seized with Ms. Exeter's grievances decide the request for recusal.

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

(The Order appears on the next page)

Order

[17] The request to remove the adjudicator seized of Ms. Exeter's grievances is denied.

February 24, 2012.

**Casper M. Bloom, Q.C., Ad. E.,
Chairperson**