Date: 20120327

File: 469-HC-13

Citation: 2012 PSLRB 41

Parliamentary Employment and Staff Relations Act

Before an adjudicator

BETWEEN

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

Bargaining Agent

and

HOUSE OF COMMONS

Employer

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

In the matter of a reference under section 70 of the *Parliamentary Employment and Staff Relations Act*

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Bargaining Agent: David Migicovsky, counsel

For the Employer: Steven Chaplin, counsel

Heard at Ottawa, Ontario,
February 27 and 28, 2012.

I. Reference to the Public Service Labour Relations Board

[1] The Communications, Energy and Paperworkers Union of Canada, Local 87-M ("the bargaining agent") alleged that the House of Commons ("the employer") violated clauses 2.2 and 4.3.1 of their collective agreement for the Technical Group bargaining unit (expiry date: March 31, 2011) ("the collective agreement").

[2] Specifically, the bargaining agent alleged that the employer violated clause 2.2 of the collective agreement by hiring a term employee to avoid posting and filling an indeterminate television technician position and by using a term appointment for reasons other than those specified in clause 2.2. The bargaining agent also alleged that the employer violated clause 4.3.1 by failing to provide it with the information required by that clause.

[3] Those two clauses of the collective agreement read as follows:

> *2.2 Short-term or long-term employees will not be hired to avoid posting and filling indeterminate position(s) in the bargaining unit. However, term appointments may be used to meet operational and organizational requirement* [*sic*] *to cover leaves specified in the collective agreement, additional requirements during peak periods, requirements for projects, contracts and service agreements, while a vacant position is being staffed or when backfilling a position to replace employees on assignments. Where term appointments are to exceed (12) twelve months, the Employer will, upon request, give the reasons to the Union.*
>
> …
>
> *4.3.1 The Employer shall provide the Union with a monthly document in a suitable electronic format list detailing the following information:*
>
> *(a) employee name;*
>
> *(b) employment status;*
>
> *(c) classification, salary and seniority;*
>
> *(d) the amount of gross dues deducted for each employee; and*
>
> *(e) the names of employees who have been hired, resigned, retired, dismissed, promoted, transferred in or out of the bargaining unit,*

> *and the name of any employee going on or returning from child care leave since the past payment of dues.*

[4] In its opening statement, the bargaining agent asked that I declare that the employer violated the collective agreement and that it should have posted a notice for an indeterminate television technician position, not a term position. It also asked that the employer be ordered to reimburse three months of lost union dues. The bargaining agent asked that I remain seized of the grievance to resolve any difficulties implementing the remedies.

[5] On May 25, 2010, the employer responded to this reference to the Board. It stated that, in view of the television technician position vacancy, it took the occasion to reassess its operational requirements and to determine that it needed to reorganize the work. The employer stated that the television technician position would be abolished and that its duties would be devolved to a new coordinator position. In the meantime, the television technician position needed to be staffed on a term basis. In its response, the employer also explained in detail why clause 4.3.1 of the collective agreement had not been violated.

II. Summary of the evidence

[6] The parties adduced 13 documents in evidence. The bargaining agent called Denise Cyr as a witness. Ms. Cyr has been a television technician with the employer for approximately 18 years. For the past six or seven years, she has been Unit Chair (local president) for the bargaining agent. The employer called Elaine Diguer and Bruno Laroche as witnesses. Ms. Diguer is Director, Multimedia Services and ISD Business Planning for the employer. At the time of the grievance, she occupied that same position. Mr. Laroche is Human Resources Strategic Advisor for the employer. He was not in that position when the grievance was filed.

[7] Within Multimedia Services, headed by Ms. Diguer, is a section called Business Planning and Client Services. That section counted nine employees in 2010 and in 2011, including three television technicians. Nathalie Hannah is its manager. Television technicians record, on video, House of Commons proceedings and the work of its committees. They ensure live coverage of parliamentary press conferences. They also perform some video duplication, editing, publication and cataloguing work.

[8] Since approximately 1990, there have always been three television technicians in in Multimedia Services. That number was increased to four for approximately two years in 2006, but it was later brought back to three. Before 2010, the three positions had been occupied by the same three indeterminate employees for a long period. In summer 2009, one of those three employees announced that he would retire in early 2010. He retired on January 15, 2010.

[9] In late October 2009, the employer posted a notice to fill a television technician position because of the upcoming retirement. The poster was for a 12-month temporary vacancy. Shortly after seeing the poster, Ms. Cyr informally met with Ms. Hannah to enquire as to why the position was opened only on a term basis. According to Ms. Cyr, Ms. Hannah stated that it was to make sure that the person would be a good fit and that a term appointment would give more flexibility to the employer. The employer had experienced difficulties in 2006, and it wanted to have more leeway this time around. However, Ms. Diguer testified that she disagreed with Ms. Hannah on that point because that was not the employer's intention. Ms. Diguer was not present when the discussion between Ms. Hannah and Ms. Cyr took place and does not know what was said.

[10] On November 10, 2009, Brian Martin, Unit Vice-Chair (local vice-president) for the bargaining agent, emailed Ms. Hannah, requesting a discussion about the employer's decision to fill the television technician position on a term basis as opposed to on an indeterminate basis. In his email, Mr. Martin expressed that the bargaining agent had some issues with the fact that the employer was using a term so that the probation period would be extended. A meeting took place a few days later, and according to Ms. Cyr, the information then provided by the employer was unclear as to why it was staffing the position on a term basis, other than its reference to a coming reorganization.

[11] As a result of that staffing process, Kristian Larivière was hired as a term television technician from March 1, 2010 to February 25, 2011. On January 7, 2011, that term appointment was extended to November 22, 2011, and on October 20, 2011, it was extended again, to November 21, 2012. Mr. Larivière is doing exactly the same work as that performed by the two indeterminate television technicians and by the employee who retired.

[12] On June 4, 2010, the employer posted a job offer for an indeterminate coordinator of live and on-demand services classified at the TKG-E group and level. That is one level higher than the television technician position. According to the job description, the coordinator ensures the planning, development and delivery of the services associated with "ParlVu" and oversees application development while also playing a management role of streamlining business processes. That job description clearly differs from the television technician job description, which states that the technician ensures the live coverage, recording and verification monitoring of Chamber meetings, committees, special events and press conferences. Furthermore, the technician's job description indicates that he or she reports to the coordinator of live and on-demand services. Following the June 2010 staffing process, an individual was hired in late November 2010 as the coordinator.

[13] Ms. Cyr testified that there has been no reduction in the television technicians' workload in the past few years, specifically since the retirement of the individual whose position is now in issue and since the hiring of the coordinator. The workload remains fairly high and stable. The employer's witnesses did not contradict Ms. Cyr's testimony on that fact. Ms. Cyr also testified that, since his hiring in November 2010, the coordinator has rarely done any technician work. Ms. Cyr testified that he might have performed some technician duties for three days, as a replacement. Ms. Diguer confirmed that comment.

[14] Ms. Diguer testified that the employer decided to use the opportunity created by the retirement to reorganize and reassess the need for three indeterminate television technicians. The employer decided that a full-time equivalent (FTE) position would no longer be attached to the third television technician position, and that that FTE would be used to staff another indeterminate position. Because, as explained by Ms. Diguer and Mr. Laroche, the employer has a general rule that an FTE is required to fill a position on an indeterminate basis, Ms. Diguer decided to fill the television technician position on a term basis in October 2009.

[15] According to Ms. Diguer, between October 2009 and June 2010, the employer did all the work required to open the coordinator of live and on-demand services position, which was new. After reflecting on what the job would be, the employer needed to write the job description, and then get the position classified. In early May 2010, the employer submitted a staffing request for the position. Among other things,

the request specified that there were three indeterminate technician positions at that time and that, since the incumbent of one of them had retired, ". . . the position was staffed on a term basis in order to restructure." The request also stated that the indeterminate television technician position would no longer exist and that it was abolished to finance the coordinator position. The staffing request was approved and the position posted on June 4, 2010.

[16] Ms. Diguer testified that the term appointment in the television technician position will not be renewed at the end of November 2012 and that the work done by that employee will be covered by a partnership with another section of Multimedia Services. Ms. Diguer testified that this was a very achievable option.

[17] In cross-examination, Ms. Diguer testified that she was unaware, in October 2009, that the FTE attached to the third television technician position would be used to staff the coordinator's position. That is why she did not provide that information to the bargaining agent at that time. She testified that the creation of the coordinator position was not raised or shared with the bargaining agent before a meeting that took place in May 2010. Ms. Diguer also admitted that she never shared with the bargaining agent, before this hearing, that she might be able to reassign some of the third television technician's work to another section.

[18] In cross-examination, Ms. Diguer testified that she disagreed with the idea that the television technician position could have been abolished as retaliation against the television technicians, who had just won a long battle to have their positions reclassified. She also testified that she had not yet determined what to do when the third television technician's term expires. She admitted that the technician and coordinator duties are very distinct.

III. Summary of the arguments

A. For the bargaining agent

[19] In fall 2009, the employer had no plans to abolish a television technician position, and when one incumbent retired, it staffed the position with a term to have more flexibility and more time to assess that the new employee would be a good fit. Then, in November 2009, the employer said that it would restructure, but it did not yet know just how. In May 2010, the employer decided to abolish the third television

technician position and to hire a coordinator. Before May 2010, that indeterminate television technician position still existed, and, at all times, the work attached to it needed doing.

[20] The employer's explanation as to why the television technician position was not staffed on an indeterminate basis is inconsistent. First, Ms. Hannah said that she wanted more flexibility in assessing whether the new employee was a good fit. Then, the employer wanted to restructure but did not yet know exactly how. Then, on May 25, 2010, the employer wrote that the television technician position would be abolished and that its duties would be devolved to a new coordinator position. Finally, in her testimony, Ms. Diguer said that she did not agree with Ms. Hannah's flexibility comments. She also admitted that the coordinator did not perform the television technician work.

[21] The employer did not establish that its decision to not fill the television technician position vacancy on an indeterminate basis was for one of the reasons stated in clause 2.2 of the collective agreement. If the employer cannot justify its decision by one of those reasons, it has violated the collective agreement.

[22] The employer has the right to abolish positions, but it does not have the right, according to clause 2.2 of the collective agreement, to staff vacant indeterminate positions with term employees, unless it is for one of the five reasons stated in clause 2.2. More flexibility or more time to assess employees' suitability or restructuring possibilities are not included in clause 2.2.

[23] The employer's decision not to staff the television technician position on an indeterminate basis is tainted with anti-union animus. At the time that decision was made, the employer was unhappy with the technicians, who had just won a long classification battle against it. The employer wanted to get back at them by abolishing one of their positions, even though the volume of work continued unabated. Furthermore, bargaining agent membership decreased from 2010 to 2011.

[24] The bargaining agent referred me to the following decisions: *Kelso v. The Queen*, [1981] 1 S.C.R. 199; *Horton Steel Work Ltd v. United Steelworkers, Local 3598* (1973), 3 L.A.C. (2d) 54; *Carleton University v. Canadian Union of Public Employees, Local 2424*, [2001] O.L.A.A. No. 842 (QL); *Caressant Care Nursing Home of Canada Ltd. v. Service Employees Union, Local 183*, (1994), 44 L.A.C. (4th) 24; *Children's Aid Society v. Ontario*

Public Service Employees Union, Local 668, [1999] O.L.A.A. No. 722 (QL); *Fernie (City) v. Canadian Union of Public Employees, Local 2093* (1999), 80 L.A.C. (4th) 289; *Greater Sudbury (City) v. Canadian Union of Public Employees, Local 4705*, [2003] O.L.A.A. No. 613 (QL); *International Union of Operating Engineers, Local 942 v. Prince Edward Island (Department of Health)* (2009), 190 L.A.C. (4th) 271; *Maplewood Nursing Home Ltd. Tilsonburg (Maple Manor) v. London & District Service Workers Union, Local 220* (1989), 9 L.A.C. (4th) 115; *Monarch Fine Foods v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* (1993), 30 C.L.A.S. 200; *Windsor (City) v. Canadian Union of Public Employees, Local 543,* [2011] O.L.A.A. No. 86 (QL); and *United Food and Commercial Workers Union, Local 832 v. A.E. McKenzie Seeds Co.* (1994), 41 L.A.C. (4th) 99.

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

[25] The bargaining agent had the burden of proving that the employer violated the collective agreement by not staffing the television technician position on an indeterminate basis. The bargaining agent neither met that burden, nor did it meet its burden of proving that the employer showed anti-union animus. In fact, the allegation of anti-union animus was first raised at the adjudication hearing.

[26] The employer admitted that it did not challenge the evidence adduced by the bargaining agent. The television technician work continued to exist after the retirement of one of the three technicians. In fact, it still exists, and it may continue to exist in the future. However, that is not the issue. The issue is that an FTE for that indeterminate television technician position no longer exists, and the position cannot be staffed on an indeterminate basis. Consequently, clause 2.2 of the collective agreement does not apply. Furthermore, it is within the employer's management rights to decide how to organize work, how it will be done, who will do it, and the staffing needed to achieve it.

[27] The employer referred me to the legal framework governing labour relations and governance at the House of Commons. It drew my attention to the *PESRA*, the *Public Service Staff Relations Act*, R.S.C. 1985, c. 33, which inspired the *PESRA*, the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, and to *By-Law 201,* passed pursuant to the authority of the *Parliament of Canada Act,* to make provision for the administration of the House of Commons. That legal framework outlines the employer's authority and the limitations of collective bargaining on that authority and especially on the employer's powers to staff positions and organize work as it sees fit.

[28] The employer had many options for replacing the retired employee. The employer's thought process did not start in May 2010, but rather when the employee announced his departure in summer 2009. The employer decided to use that opportunity to reorganize how it delivered its services. The process evolved between fall 2009 and May 2010, into the creation of a new coordinator position, and into the abolition of the FTE attached to the television technician position.

[29] Throughout that process, the employer met with the bargaining agent and shared its information. There was no point in the employer posting an indeterminate television technician position in fall 2009 and abolishing it in May 2010. The employer knew at the beginning of that process that it would abolish the position. It would have been illogical to open it on an indeterminate basis, staff it, and later, to layoff the new incumbent.

[30] The employer referred me to the following decisions: *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489; *Estwick and Quintilio v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 14; *Estwick v. Canada (Attorney General)*, 2007 FC 894; *Leckie et al. v. Canada*, [1993] 2 F.C. 473; *Niagara Falls (City) v. Canadian Union of Public Employees, Local 133,* (2010), 194 L.A.C. (4th) 189; *Public Service Alliance of Canada v. Senate of Canada*, 2010 PSLRB 87; *Public Service Alliance of Canada v. Senate of Canada*, 2011 FCA 214; *Tuckett-Ready v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 125; and *University of Saskatchewan v. Canadian Union of Public Employees*, (1997) 60 L.A.C. (4th) 404.

IV. Reasons

[31] In its reference to the Board, the bargaining agent alleged that the employer violated clauses 2.2 and 4.3.1 of the collective agreement. At the hearing, the bargaining agent also alleged that the employer's decisions were tainted or driven by an anti-union animus. I will first deal with the last two issues.

[32] No evidence was adduced at the hearing to support the allegation that the employer violated clause 4.3.1 of the collective agreement. According to that clause, the employer has to provide the bargaining agent with a monthly document outlining a series of details about employees who were hired, left or were transferred in and out of the bargaining unit. I have seen no evidence that that was not done. Consequently, the employer did not violate clause 4.3.1.

[33] The bargaining agent based its argument that the employer's decisions were tainted by anti-union animus on the fact that, at the time the decisions were made, the television technicians had just won a long classification battle against it. No witness testified that they heard any anti-union comments from the employer or that the employer's past actions could lead them to believe in the anti-union animus theory. No documents were adduced at the hearing to directly or indirectly support the anti-union animus theory. The only evidence was that the reclassification decision happened shortly before the employer decided to not staff the television technician position on an indeterminate basis.

[34] The fact that the reclassification preceded the term staffing action is not evidence that the employer decided to staff the third television technician position with a term employee to punish or to go after the other television technicians or their bargaining agent. I definitely need more than that to conclude that the employer's decisions or actions were tainted or driven by anti-union animus. There must be a link between the facts as proven and the allegation, but no link was made.

[35] The alleged violation of clause 2.2 of the collective agreement requires a more detailed analysis.

[36] The employer argued that the existing legal framework gives it the authority to staff positions and to organize work. According to the jurisprudence that it submitted, the employer has the exclusive authority to provide funds for a position, to determine its qualifications, to post vacancies as they occur and to appoint employees to positions. I agree with that argument. That legal framework differs from the private-sector legal framework, the municipal sector framework, or that of some provincial public services. The jurisprudence submitted by the bargaining agent almost entirely originates from those frameworks and is of little use for determining this employer's obligations. The House of Commons and the federal public service legal frameworks are more restrictive as to what can be bargained for or included in collective agreements.

[37] Despite those restrictions, the fact remains that clause 2.2 is part of the collective agreement. Either the parties agreed to it or it was imposed by an arbitration board. That clause certainly limits the employer's flexibility and powers as to how to staff indeterminate vacancies. It is an integral part of the collective agreement, and the parties have no choice but to respect it.

[38] The employer argued that an FTE for the indeterminate television technician position no longer exists and that the position cannot be staffed on an indeterminate basis. Consequently, according to the employer, clause 2.2 of the collective agreement does not apply. I agree with the employer that, if there is no indeterminate position to staff, clause 2.2 does not apply. However, the evidence shows that, for the period referred to in this reference to the Board, there was an indeterminate position to be staffed. In fact, according to the employer's own staffing request for a coordinator, there were still three television technician positions on May 7, 2010.

[39] In October 2009, Ms. Hannah told Ms. Cyr that the third indeterminate television technician position was being staffed with a term employee to create flexibility in deciding whether the new employee would be a good fit. Ms. Cyr's evidence was not contradicted. Then, in November 2009, the employer said that it would restructure but that it did not yet know exactly how. When the employer posted a term television technician position in late October 2009, I find that it was still an indeterminate position and that it still existed and had not been abolished. In fact, it continued as such until sometime in May 2010.

[40] Clause 2.2 of the collective agreement starts with the premise that indeterminate positions should be staffed on an indeterminate basis but it allows the employer a certain amount of room to manoeuvre by setting out precise circumstances where the employer can staff such a vacancy on a term basis. It is clear in my mind that that term appointment was not used for one of the reasons listed in clause 2.2 of the collective agreement, namely, to meet operational and organizational requirements, to cover leaves specified in the collective agreement, for additional requirements during peak periods, for projects, contracts and service agreements, or while a vacant position was being staffed or a position backfilled to replace employees on assignments. Instead, the term appointment was used either to provide the employer with some flexibility to assess how the new employee would fit, or later to reorganize the work. Regardless, neither reason fits into the exceptions enumerated in clause 2.2. Furthermore, contrary to what the employer wrote on May 25, 2010, the duties assigned to that television technician were not devolved to the coordinator position, and to this day, almost two years later, they continue to be performed by the term television technician. Further, the term employee occupying the supposedly inexistent position was renewed twice following the appointment of the coordinator.

[41] The employer has the right to reorganize the workplace and to abolish indeterminate positions as it sees fit. However, when doing so, it must, at all times, respect the law and the collective agreement. In this case, it did not. According to clause 2.2 of the collective agreement, reorganization is not one of the reasons that the employer could use to staff an indeterminate position with a term employee. Consequently, the employer violated the collective agreement by posting the indeterminate television technician position as a term position.

[42] Considering that, at this time, the indeterminate television technician position no longer exists, the remedies that I can order are limited to a declaration that the employer violated the collective agreement. There is no point, as the bargaining agent suggested, to remain seized of the grievance to resolve any difficulties implementing the remedies.

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

(The Order appears on the next page)

V. Order

[44] The employer violated clause 2.2 of the collective agreement.

March 27, 2012.

Renaud Paquet,
adjudicator