Date: 20120808

File: 561-34-567

Citation: 2012 PSLRB 81

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

PAUL STURKENBOOM

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, ANDRIA GAUVREAU AND JAMIE DUNN

Respondents

Indexed as
Sturkenboom v. Professional Institute of the Public Service of Canada et al.

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

REASONS FOR DECISION

Before: Renaud Paquet, a panel of the Public Service Labour Relations Board

For the Complainant: Himself

For the Respondent: Isabelle Roy and Martin Ranger, Professional Institute of the Public Service of Canada

Decided on the basis of written submissions filed June 5, 18, 29 and July 6, 2012.

I. Complaint before the Board

[1] On May 17, 2012, Paul Sturkenboom ("the complainant") filed a complaint with the Public Service Labour Relations Board ("the Board"), stating that the Professional Institute of the Public Service of Canada (PIPSC), Andria Gauvreau and Jamie Dunn ("the respondents") committed an unfair labour practice as per paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). Both Ms. Gauvreau and Mr. Dunn work for the PIPSC. Ms. Gauvreau is an administrative assistant and Mr. Dunn is a negotiator.

[2] The complainant is a member of the Audit, Financial and Scientific bargaining unit (AFS) at the Canada Revenue Agency ("the employer"). The PIPSC is the certified bargaining agent for that bargaining unit. However, the complainant chose not to join the PIPSC, and he never signed a membership card. Consequently, he is not a member of the PIPSC, even though he is a member of the AFS bargaining unit for which the PIPSC is the bargaining agent. Employees in such positions are usually referred to as "Rands."

[3] On March 16, 2012, the PIPSC announced that it had just reached a tentative agreement with the employer for the AFS bargaining unit. On May 4, 2012, the PIPSC announced that a ratification vote would take place, ending on June 1, 2012. On May 8, 2012, the complainant contacted Ms. Gauvreau to obtain a voting key for the ratification vote as he had not received one. The same day, Ms. Gauvreau informed him by email that he had not signed his membership card with the PIPSC, and that he should fill in his application on the PIPSC website to obtain his right to vote. The complainant wrote a second email to Ms. Gauvreau on May 8, 2012, arguing that he was an employee of that bargaining unit and that he should be entitled to vote. On May 8 and May 9, 2012, Mr. Dunn also informed the complainant that he would first have to become a PIPSC member to be entitled to vote on the tentative agreement.

[4] In other words, the respondents did not allow the complainant to vote on the tentative agreement because he was not a member of the PIPSC, even though he was a member of the bargaining unit. According to PIPSC's Bylaw 7, only its regular or retired members can attend general membership meetings, vote in union elections, hold union office at any level, participate in union training and ratify tentative agreements. For the complainant, the fact that non-members are not allowed to ratify collective agreements is an unfair labour practice.

II. Summary of the arguments

A. For the complainant

[5] The complainant argued that his right to associate or to not associate with any organization is his own choice and not one that can be imposed on him, as guaranteed by the *Canadian Charter of Rights and Freedoms* as well as the *Act*. The respondents have a duty of fair representation to all employees that they represent and that applies to members and non-members alike. By seeking input from only the PIPSC's members when ratifying the collective agreement, the respondents acted in a manner that was discriminatory, arbitrary and in bad faith by favouring certain employees of the bargaining unit, based solely on whether they are PIPSC members. Such actions are contrary to section 187 of the *Act* and favour the PIPSC's own members. Those actions also coerce employees to become PIPSC members to exercise their right to vote, in violation of section 189 of the *Act*.

[6] The complainant argued that, although the letter of the *Act* does not specify that all employees have the right to vote to ratify a collective agreement, the spirit of the *Act* is such that, when a vote is held, all employees have the right to vote, with no distinctions made between members and non-members of the union. On that point, the complainant referred me to sections 65, 95, 183 and 184 of the *Act*. He also pointed out that it would be illogical for a union not to give the right to vote to non-members but for the Board to give it to them if it orders a vote. Furthermore, if the PIPSC decides to give employees a right to vote to ratify a tentative agreement, it must give it equally to members and to non-members; otherwise it violates section 187 of the *Act* by discriminating against non-members.

[7] Negotiating a collective agreement is part of the representation process as it relates to dealings between all employees of the bargaining unit and their employer. Additionally, it forms the foundation for all future dealings between employees and the employer. As such, it is not an internal union matter, and the union owes a duty of fair representation to all employees in their dealings with the employer while negotiating a collective agreement. The relationship between the parties in this context is set out by section 114 of the *Act*. By seeking input from only its members, the PIPSC clearly acts in a manner that is arbitrary or discriminatory or in bad faith by favouring certain employees, based solely on whether they are PIPSC members.

[8] The PIPSC's role is to act as the exclusive bargaining agent for all employees described in the certificate covering employees of the AFS bargaining unit. All employees have a direct interest in a tentative agreement; however, not all employees have an interest in internal union matters, such as electing the union executive, attending union courses, voting at meetings, etc. The fact that all employees have an equitable interest in a collective agreement is spelled out in section 114 of the *Act*, which stipulates that ". . . a collective agreement is binding on the employer, the bargaining agent and every employee in the bargaining unit. . . ." The ratification of a tentative agreement is not an internal union matter; rather it is part of the union's job of representing all employees.

[9] The complainant also argued that the negotiation of a collective agreement is an obvious labour relations matter. Thus, members and non-members of the PIPSC should have equal rights to vote. The PIPSC's bylaws might prevent non-members from voting on a tentative agreement, but they must conform to and cannot override the *Act*.

[10] The complainant referred me to *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509. He reminded me of the principles that form a bargaining agent's duty of representation, including the obligation to fairly represent all employees in the bargaining unit.

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

[11] The respondent argued that the complainant never applied to become a PIPSC member and so is considered a Rand deductee. He is covered by the AFS collective agreement and is entitled to representation on labour relations matters. However, the complainant is not a member of the PIPSC, and he is not entitled to vote on PIPSC matters, including on the ratification of a collective agreement.

[12] The respondents argued that it is a well-established principle that the Board, as well as other labour boards, does not have jurisdiction over internal union matters, such as whether ratification votes are necessary and who is entitled to vote. In the absence of any legal provisions giving the Board specific jurisdiction to control and govern the internal affairs of a union, the Board must decline jurisdiction on this complaint, which exclusively concerns the relationship between the complainant and the PIPSC and has nothing to do with the respondents' representation on behalf of the complainant with his employer.

[13] The respondents argued that the complainant did not establish a *prima facie* violation of the respondents' duty of fair representation. At no time did the respondents act in a negligent or discriminatory manner, including when the PIPSC asked the complainant to fill out an application to become a member and obtain the right to vote on the ratification of the collective agreement. By their request, the respondents simply applied the legally accepted formula applicable to "Rands."

[14] The respondents referred me to the following cases: *White v. Public Service Alliance of Canada*, 2000 PSSRB 62; *Bracciale et al. v. Public Service Alliance of Canada (Union of Taxation Employees, Local 00048)*, 2000 PSSRB 88; *Certain Employees (Re) v. CAW-Canada, Local 3014*, [1996] B.C.L.R.B.D. No. 378 (QL); and *Ford Motor Co. of Canada Ltd. v. U.A.W. – C.I.O.*, (1946) 46 C.L.L.C. para 18,001.

III. Reasons

[15] The question raised by this complaint is whether a bargaining agent commits an unfair labour practice when it does not allow a member of a bargaining unit who has not joined it to vote on a tentative agreement.

[16] Several provisions of the *Act* need to be examined to decide the complaint and to deal with the arguments raised by the parties. Section 187 and subsection 189(1) deal with the prohibited actions referred to by the complainant, sections 65 and 95, and subsections 183(1) and 184(1) with votes by employees in a bargaining unit, and section 114 with the effect of the collective agreement. Those provisions of the *Act* read as follows:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*
>
> . . .
>
> ***189.*** *(1) Subject to subsection (2), no person shall seek by intimidation or coercion to compel an employee*
>
> > *(*a*) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be, a member of an employee organization; or*

> *(b) to refrain from exercising any other right under this Part or Part 2.*
>
> . . .
>
> ***65.*** *(1) The Board may order that a representation vote be taken among the employees in the bargaining unit for the purpose of satisfying itself that a majority of them wish the applicant employee organization to represent them as their bargaining agent.*
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> . . .
>
> ***95****. After the application is made, the Board may order that a representation vote be taken in order to determine whether a majority of the employees in the bargaining unit no longer wish to be represented by the employee organization that is the bargaining agent for that bargaining unit. The provisions of subsection 65(2) apply in relation to the taking of the vote.*
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> . . .
>
> ***183.*** *(1) If the Minister is of the opinion that it is in the public interest that the employees in a bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the bargaining agent in respect of all matters remaining in dispute between the parties, the Minister may*
>
> > *(a) on any terms and conditions that the Minister considers appropriate, direct that a vote to accept or reject the offer be held by secret ballot as soon as possible among all of the employees in the bargaining unit; and*
> >
> > *(b) designate the Board, or any other person or body, to be in charge of conducting that vote.*
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> . . .
>
> ***184.*** *(1) In order to obtain approval to declare or authorize a strike, an employee organization must hold a vote by secret ballot among all of the employees in the bargaining unit conducted in a manner that ensures that the employees are given a reasonable opportunity to participate in the vote and be informed of the results.*
>
> . . .
>
> ***114.*** *Subject to, and for the purposes of, this Part, a collective agreement is binding on the employer, the bargaining agent and every employee in the bargaining unit*

> *on and after the day on which it has effect. To the extent that the collective agreement deals with matters referred to in section 12 of the* Financial Administration Act*, the collective agreement is also binding, on and after that day, on every deputy head responsible for any portion of the federal public administration that employs employees in the bargaining unit.*

[17] I will first address the complainant's argument with respect to the alleged violation of sub-section 189(1). With respect to this allegation, the complainant alleges two things: 1) that the statements made by Mr. Dunn and Ms. Gauvreau to the effect that he needed to join the union in order to be eligible to vote constitute violations of this provision in that they amount to intimidation and coercion to compel him to become a union member, and 2) that the provision in the PIPSC's constitution restricting ratification votes to members only is a violation of this same sub-section, for the same reasons. The complainant asserts that the above actions are not only contrary to sub-section 189(1) but also a violation of his *Charter* rights. The complainant did not make any submission that threats of any kind, either physical or economic, were directed at him by the respondents.

[18] The Canada Industrial Relations Board (CIRB) has recently considered the application of an almost identical provision of the *Canada Labour Code* (the "*Code*") in *Bell Mobility Inc.*, 2011 CIRB 579, holding that even possibly misleading statements used by a union to entice potential members into signing membership cards did not amount to a violation of the *Code.* The employer alleged that the union had, in the context of a certification drive, overstated the union's level of support and thereby misled employees, in violation of section 96 of the *Code*. The CIRB rejected that allegation and concluded that the facts did not constitute intimidation or coercion under section 96 of the *Code*. The CIRB also cited *TD Canada Trust v. United Steel*, 2007 FCA 285, in which the Federal Court of Appeal stated the following about the CIRB's investigation of the allegations and conclusion:

. . .

> *[3] The intimidation allegations made by the employees complained about unannounced evening visits by union representatives to their homes. These visitors were persistent and sometimes stayed beyond their welcome. The investigator found this conduct not to be serious enough to amount to intimidation or coercion. While perhaps not as thorough an investigation as the applicants would have liked,*

> *the investigator did interview three of the seven complainants before reporting to the Board, partially in confidence, as is customary to protect the employees. None of the complainants alleged that they signed membership cards as a result of any intimidation, although the only one who did sign indicated that afterwards she was sorry she did so. There was no allegation of violence or threats of violence. There was merely persistent, perhaps overly enthusiastic largely unsuccessful attempts at persuasion . . .*
>
> . . .

[19] The Ontario Labour Relations Board (OLRB) in *Atlas Specialty Steels*, [1991] OLRB Reports June 728, considered a similarly-worded section of the *Ontario Labour Relations Act* and stated that intimidation and coercion require more than campaign promises:

> *[12] The meaning of "intimidation or coercion" within the context of section 70 has been considered in a large number of prior Board decisions... In order for there to be even an arguable case for a breach of section 70, there must be intimidation or coercion of a sort which seeks to compel a person, amongst other things, to refrain from exercising any of the rights they might enjoy under the Act. There must be some force or threatened force, whether of a physical or non-physical nature. . . .*

[20] Statutory provisions should be interpreted in context. The purpose of sub-section 189(1) is to ensure that membership in the union is voluntary. I cannot find that the union's policy and the communication of that policy by the respondents could in any way be considered as intimidation or coercion. I also find that the actions complained of were in no way meant to "compel" the complainant to join the union. He was invited to do so and advised that if he wished to vote, joining would be necessary, but advising a person that they must join an organization if they wish to benefit from certain privileges is not conduct which rises to the level of "compelling" someone to join. The *Act* does not guarantee that employees who decide not to join the union will be granted the same rights and privileges that can come with union membership.

[21] The union's decision to restrict ratification votes to members is not at all unusual. The issue of ratification votes was recently considered by the CIRB in *Vézina v. IAMAW, Transportation District 140 v Air Canada et al.,* 2010 CIRB 540. In that case, the complainant alleged a violation of section 37 (the duty of fair representation) of

the *Code* when his bargaining agent decided to hold a second ratification vote. The Board turned its mind to the issue of ratification votes and wrote at paragraph 29:

> *(29) The Code does not contain any provision concerning ratification votes. The Code does not therefore set out or regulate the conditions under which a union may or must hold a ratification vote. The Board derives its powers, primarily and essentially, from the Code. Accordingly, the Board does not generally or routinely concern itself with questions related to ratification votes.*

The *PSLRA* is also silent on the issue of ratification votes, which, given the explicit provisions surrounding certification, de-certification and strike votes, leads inexorably to the conclusion that such votes are not within the powers of the Board.

[22] The complainant alleges that his right to freedom of association has been infringed in that he is being forced to join the union against his will, and he asserts that this coercion is a violation of both the *Charter* and s. 189(1)(a) of the *Act.* I have already found that there was no coercion and that the interactions and the union's policy as described were nothing more than assertions of fact on the part of the respondents and could not be characterized as coercive. The complainant remained free at all times to exercise his right to either join or not join the union. The material submitted to me shows that explanations were given to the complainant as to the benefits of joining the union. He was, however, free to remain a Rand deductee, and did so. I must therefore reject his argument based on the *Charter*.

[23] I agree with the complainant that the collective agreement is important in the relationship between employees and the employer, and that, as per section 114 of the *Act*, it is binding on the employer, the union and all employees, whether or not they are union members. That does not mean or imply that the union that bargained that collective agreement must give the right to vote on a tentative agreement to all employees. As stated earlier, the union does not have to hold a vote on a tentative agreement. Section 114 does not deal with the bargaining process and the obligations of the parties during that process. Rather, it deals with the impact of the collective agreement after it has been concluded.

[24] In support of his allegation of a violation of the duty of fair representation found in section 187 of the *Act*, the complainant cited four provisions of the *PSLRA* which deal with votes: sections 65, 95 and sub-sections 183(1) and 184(1). He argues

that although they have no direct application to the present factual situation, they nonetheless demonstrate, because they provide for all bargaining unit members having the right to vote, that "the spirit" of the *Act* requires that ratification votes also be open to Rand deductees and that the union's failure to do so constitutes a violation of the duty of fair representation.

[25] Sections 65 and 95 speak to certification and de-certification votes and, as the complainant points out, all employees in the bargaining unit are entitled to cast a vote on such occasions. Obviously, the right to vote on a certification vote must be open to all employees in the prospective bargaining unit. Indeed, since the union has not yet been certified, no bargaining unit is yet in existence and therefore a vote restricted to only union members is not possible. The fact that de-certification votes are open to all employees is simply the flip-side of the certification vote process. Since all employees who would be part of the bargaining unit are entitled to vote on certification, it is only logical that all employees in the bargaining unit, once it is formed, have the right to express their desires on any de-certification vote. Parliament has, in wording these sections as it has, clearly expressed its intention to have certification and de-certification votes open to all employees in the bargaining unit.

[26] The complainant, in referring to sub-sections 183(1) and 184(1) of the *Act*, points out that there is no distinction made between union members and non-members in the context of strike votes. However, sub-section 183(1) does not apply to the situation under scrutiny in this complaint. Rather, this section is a provision which applies to situations where the Minister determines that it would be in the public interest for all employees in the bargaining unit to vote on the employer's last offer. Indeed, this provision can be termed an exception provision in that it sets out an exception to the general rule in labour law, which is that it is up to the bargaining agent to decide whether or not to call a ratification vote and, in the event that it does decide to hold one, to restrict the vote to only members of the union. As for sub-section 184(1) which gives the right to all employees in the bargaining unit to vote on a strike vote, while the complainant is correct in pointing out that in such votes members and non-members alike have a right to vote, it is also the case that this sub-section does not apply to the factual context in issue.

[27] It is a well-known principle of statutory interpretation that to express or include one thing implies the exclusion of the other. Therefore, the fact that the legislator has

clearly and expressly provided that all employees in a bargaining unit can vote on certification, de-certification, strike and final offer votes but has not made any provision regarding ratification votes means that the union is free to do as it pleases on such matters. The legislator, in regulating certain votes but remaining silent on others, has, in effect, spoken. Ratification votes are a creation of the union and are regulated by the union, not by the *Act* or Board or Minister. The union does not have to consult its members or the employees who make up the bargaining unit; it can simply reach an agreement with the employer and accept it. The provisions cited by the complainant therefore support the respondent's case and not the complainant's.

[28] When the *Ford Motor Co. of Canada* decision was written by Justice Rand, the issue of "closed shop" and "union shop" was at the centre of most labour disputes. Unions needed support from workers to play their roles effectively. That support included paying dues, and the only way to get them from every worker was to negotiate a closed- or union-shop clause with the employer. Justice Rand imposed an alternative to the closed or union shop, namely, the mandatory payment of union dues by employees with no obligation to belong to the union. The following abstracts of the decision are of particular interest to this case:

. . .

> *I consider it entirely equitable then that all employees should be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract; that they must take the burden along with the benefit. The obligation to pay dues should tend to induce membership, and this in turn to promote that wider interest and control within the union which is the condition of progressive responsibility.*

. . .

> *Any employee shall have the right to become a member of the union by paying the entrance fee and complying with the constitution and by-laws of the union.*

. . .

[29] That is how Justice Rand struck the balance between the opposing interests in place at the Ford Motor Co. of Canada in the 40's. His solution survived. The federal public service is an "open shop" in which union membership is not a condition of

employment or a condition to maintain employment, as it is in many private-sector unionized workplaces. As Justice Rand stated, employees in an open shop are free to sign their union cards and become union members, but all must pay union dues, since all enjoy the benefits of the collective agreement and of union representation. However, to enjoy the privilege of union democracy, they must join the union. Nowhere in Justice Rand's decision or in the *Act* does it state that the union has an obligation to give voting rights to non-members on matters for which it has no legal obligation to call a vote.

[30] When a union is certified as a bargaining agent, it obtains the exclusive right and the responsibility to negotiate the working conditions for the employees included in the bargaining unit. As part of the bargaining process, the union can consult the employees, informally or formally through votes, on the bargaining proposals, the bargaining priorities or the acceptance of a tentative agreement with the employer. However, it does not have to. If the union decides to formally consult the employees with a vote, it runs that process and might decide, as it did in this case, to limit the right to vote to its members and to deny it to employees who chose to not become members. That does not constitute an unfair labour practice.

[31] The procedure for conducting ratification votes, including granting or not granting a right to vote to non-members of the union, is governed by the PIPSC, not by the *Act*. Consequently, it is an internal union matter in which the Board does not intervene. It has been stated consistently in the case law, as in *White* or in *Bracciale et al.*, that the Board has no jurisdiction in internal union matters, except if specifically mentioned in the *Act*.

[32] The complainant alleged the respondents violated the duty of fair representation found in section 187 of the *Act*. In such a complaint, the complainant must prove that the respondents acted in a manner that was arbitrary, discriminatory or in bad faith. The complainant argued that the union's policy was arbitrary, discriminatory and in bad faith in that it "favour(s) the PIPSC's own members". There is, however, no evidence that the respondents acted in a discriminatory manner towards him as there is no evidence to prove that the policy was not uniformly applied or that it took into account considerations that it ought not to have. Furthermore, that policy is based on long-standing and legislatively accepted principles, and its content cannot be construed as violating section 187 of the Act.

[33] I conclude that the respondents did not act in an arbitrary or discriminatory manner or in bad faith in the representation of the complainant. They did not seek by either intimidation or coercion to compel the complainant to become a member of the union. Consequently, they did not violate sections 187 or 189 of the *Act*.

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

(The Order appears on the next page)

IV. Order

[35] The complaint is dismissed.

August 8, 2012.

Renaud Paquet,
a panel of the Public Service
Labour Relations Board