Date: 20131113

File: 561-02-604

Citation: 2013 PSLRB 139

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

FEDERAL GOVERNMENT DOCKYARD CHARGEHANDS ASSOCIATION

Complainant

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)

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

REASONS FOR DECISION

Before: Kate Rogers, a panel of the Public Service Labour Relations Board

For the Complainant: Ronald A. Pink, counsel

For the Respondent: Zorica Guzina, counsel

Decided on the basis of written submissions,
filed June 6 and 25 and July 2, 2013.

I. Complaint before the Board

[1] The Federal Government Dockyard Chargehands Association ("the union") is the certified bargaining agent for employees of the Department of National Defence in the Ship Repair Chargehands and Production Supervisors - East bargaining unit. Those employees are covered by the collective agreement between the Treasury Board ("the employer") and the union; expiry date, March 31, 2011 ("the collective agreement").

[2] On March 4, 2013, the union filed a complaint under section 190 of the *Public Service Labour Relations Act* (*PSLRA*), alleging that the employer failed to implement the terms of an arbitral award issued on October 15, 2012 and a supplemental award issued on November 26, 2012 within the 90-day time limit set out in section 157 of the *PSLRA*. As corrective action, the union sought a declaration that the employer failed to implement the terms of the arbitral award within 90 days, contrary to the provisions of the *PSLRA*, interest payable to each member of the bargaining unit on the amounts owing for the wage portion of the arbitral award, and any other remedy fair and necessary in the circumstances. In later submissions, the complainant clarified that, in terms of other remedies, it was seeking general damages of $100.00 payable to each member of the bargaining unit for the breach of section 157.

[3] As there was no real factual dispute between the parties, it was agreed that the complaint would be dealt with by way of written submissions according to a timetable established by the Public Service Labour Relations Board (PSLRB or "the Board"), in consultation with the parties.

II. Background

[4] The parties agree that there are about 74 employees in the bargaining unit. They are first-level supervisors of the tradespeople employed in repairing, maintaining and modifying naval vessels at the Fleet Maintenance Facility - Cape Scott in Halifax, Nova Scotia.

[5] Bargaining for a new collective agreement began in December 2010. On December 2, 2011, the union submitted the issues that remained in dispute to arbitration. The arbitration board issued an award on October 15, 2012 that resolved issues of severance pay, salary increases and a self-directed team premium. However, the parties sought clarification from the arbitration board on the self-directed team premium. A supplementary ruling was issued on November 26, 2012.

[6] The parties agree that the 90-day time limit to implement arbitral awards established by section 157 of the *PSLRA* was reached on or about February 25, 2013. The employer acknowledged that the award was not implemented within the time limit. In particular, the salary increases and self-directed team premiums were not implemented; nor were the retroactive payments arising from those payments made within the 90-day time limit.

[7] In its submissions, the employer stated that it kept the union

> *. . . fully apprised of the situation and of the need to undergo internal processes to fully implement the award. This case may have been one of the unfortunate by-products of being involved in a government approval process, especially during the Christmas holidays.*

[8] The salary rates awarded by the arbitration board were implemented on May 22, 2013, and all other terms of the arbitral award were implemented by the end of June 2013.

[9] As the employer conceded that it breached section 157 of the *PSLRA,* the only issue remaining between the parties concerns the appropriate remedy. For that reason, only those submissions dealing with remedy will be summarized.

III. Summary of the submissions

A. For the union

[10] The union submitted that a panel of the PSLRB has the power to remedy a breach of section 157 of the *PSLRA* through the general power granted in subsection 192(1) to issue any order that the panel considers necessary. Such a broad grant of remedial power is consistent with section 36, which gives the PSLRB the authority to administer the legislation and to exercise the powers necessary to achieve its objects. The union argued that the PSLRB's power under sections 36 and 192 includes the authority to award interest on the retroactive wages and allowances owed to its members as specified in this complaint.

[11] Citing *Canada (Attorney General) v. Rosin,* [1991] 1 F.C. 391 (C.A.), and *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.), the union argued that interest may be awarded against the Crown if the authority to award interest may be inferred from the legislation or from the collective agreement. In the particular cases cited, the

power to award interest was inferred from a general power to award compensation under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*CHRA*).

[12] The union stated that the approach taken by the Federal Court of Appeal in *Rosin* and *Morgan* is consistent with the approach taken in other jurisdictions. For example, in *Nova Scotia Public Service Commission v. Nova Scotia Government and General Employees Union,* 2004 NSCA 55, the Nova Scotia Court of Appeal held that an implicit authority arising from the legislation or a collective agreement is sufficient to establish the power to award interest against the Crown.

[13] The union acknowledged the PSLRB jurisprudence that holds that adjudicators do not have jurisdiction to award interest. In particular, the union cited *Dahl v. Treasury Board (Agriculture Canada),* PSSRB File No. 166-2-25535 (19950621); *Puxley v. Treasury Board (Transport Canada),* PSSRB File No. 166-2-22284 (19940705); and *Nantel v. Treasury Board (Correctional Service of Canada),* 2007 PSLRB 66 (upheld in 2008 FC 84 and 2008 FCA 351).

[14] The union argued that because those cases concerned grievance adjudications, they are distinguishable from the circumstances in this case. The remedial powers of an adjudicator with respect to a grievance under the *PSLRA* differ from the remedial powers of a panel of the Board dealing with a complaint filed under section 190. Under subsection 192(1), which provides the authority to remedy breaches of the *PSLRA* that form the subject matter of complaints filed under section 190, a panel of the Board has the power to make any order it deems necessary to remedy the breaches.

[15] The union noted that *Eaton v. Canada,* [1972] F.C. 185 (T.D.), upheld in [1972] F.C. 1257 (C.A.), and one of the seminal cases concerning the former Public Service Staff Relations Board's jurisdiction to award interest, was founded on section 35 of the *Federal Court Act,* R.S.C., 1970, c. 10 (2nd Supp.), which provided that interest against the Crown could not be awarded unless an explicit statutory provision permitted it. Since section 36 of the *Federal Courts Act,* R.S.C., 1985, c. F-7, permits the awarding of pre- and post-judgement interest on Federal Court and Federal Court of Appeal decisions, the union contended that *Eaton* would be decided differently were it heard now.

[16] In addition to asking that interest at the Canada Savings Bonds rate be awarded on all money owed to the members of the bargaining unit from February 25, 2013 until

the date on which the arbitral award was fully implemented, the union also asked for general damages of $100 for each member of the bargaining unit. The union argued that an award of general damages was necessary as a declaration alone would not be sufficient to establish that there are consequences for breaching the *PSLRA* and would not provide a remedy to the union or its members.

[17] The union argued that the employer demonstrated complete disregard for the *PSLRA*. It failed to abide by the time limit for the implementation of an arbitral award set out in section 157, and it failed to ask for an extension of that time limit. Compliance with the *PSLRA* and respect for the processes that it establishes are necessary for labour relations harmony. The legislation must be applied consistently to both parties, and the parties must have confidence that its provisions will be enforced consistently. Neither party can be allowed to depart unilaterally from the terms of the *PSLRA*. The time limit set out in section 157 ensures that employees receive the wages and benefits owing to them as a result of an arbitral award in a timely fashion. The employer cannot delay those payments to its advantage. The union stated that, for those reasons, it believed that the remedy it requested was reasonable and consistent with the objects of the legislation.

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

[18] The employer argued that the wording of subsection 192(1) of the *PSLRA* does not give an adjudicator *carte blanche* to award interest. In fact, the authority to award interest is explicitly granted in paragraph 226(1)(*i*) only for cases involving termination of employment, demotion, suspension or financial penalty. Had Parliament intended to grant adjudicators the authority to award interest in other cases, it would have so provided, but it did not. The employer cited *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, and *Nantel.* In particular, the employer quoted the Federal Court of Appeal in *Nantel*, at paragraph 7, when it observed that Parliament waived the common law rule of Crown immunity against an award of interest on money due in specific circumstances under the *PSLRA*, leading to the conclusion that Parliament intended the rule to apply in all other cases.

[19] The employer noted that well-established jurisprudence supports the common law principle that PSLRB adjudicators do not have the jurisdiction to award interest in the absence of an explicit statutory or collective agreement provision. It cited *Eaton; Ogilvie v. Treasury Board (Indian and Northern Affairs),* PSSRB File No. 166-2-14268

(19840703); *Dahl;* and *Guest v. Canada Customs and Revenue Agency,* 2003 PSSRB 89, and noted that the Federal Court and Federal Court of Appeal reaffirmed the principle in 2008 in *Nantel* .

[20] The employer noted that neither the collective agreement nor section 192 of the *PSLRA* explicitly provides for the payment of interest in the circumstances of this matter. Furthermore, citing the Federal Court decision in *Nantel* at paragraph 17, the employer argued that there is also no implied authority to award interest.

[21] The employer observed that *Rosin* and *Morgan,* cited by the union, concern awards of interest on damages awarded for violations of the *CHRA*. As held by the Federal Court in *Nantel*, those cases are distinguishable, since the *CHRA* has a provision for compensation under which interest can be awarded, unlike the *PSLRA*, which has no such provision.

[22] The employer argued that the union provided no evidentiary or jurisprudential support to legitimize its claim for damages. Furthermore, while the employer conceded that it missed the prescribed deadline, it argued that it kept the union fully informed and that it ultimately implemented the award, demonstrating that it was acting in good faith. Based on its submissions, the employer requested that the remedy sought by the union be denied.

C. Union's rebuttal

[23] The union noted that while the terms of the arbitral award were ultimately implemented, that implementation took place almost 7 months after the award was issued and almost 4 months after the 90-day deadline imposed by section 157 of the *PSLRA*. The employer offered no real explanation for the delay, other than the suggestion that the Christmas holiday period impeded the implementation. The union also noted that the employer provided no explanation as to why it did not seek an extension of the deadline to implement the award. The union stated that simply keeping it "apprised" of the situation was not sufficient to meet the requirements of section 157.

[24] The union argued that *Nantel* and *Eaton* are distinguishable from the circumstances of this case, based either on the facts or on changes to the legislation. Therefore, they are not determinative.

[25] The union stated that there must be consequences for the breach of section 157 of the *PSLRA.* An order for interest and nominal damages is necessary to give effect to the requirements of the *PSLRA* and is within the jurisdiction of an adjudicator.

[26] The union reiterated its demands for a declaration that the employer breached section 157 of the *PSLRA*; for interest payable to each member of the bargaining unit on the amounts owing to them for the period between the expiration of the 90-day time limit established by section 157 and the date on which the arbitral award was finally implemented, based on the Canada Savings Bonds interest rate; and for general damages of $100 for each member of the bargaining unit for the breach of the *PSLRA.*

IV. Reasons

[27] This is a complaint filed under paragraph 190(1)(*e)* of the *PSLRA* alleging that the employer failed to implement the provisions within the time limit set out in section 157, which provides as follows:

> ***157.*** *Subject to the appropriation by or under the authority of Parliament of any money that may be required by the employer, the parties must implement the provisions of the arbitral award within 90 days after the day on which the award becomes binding on them or within any longer period that the parties may agree to or that the Board, on application by either party, may set.*

[28] There is no dispute that the arbitral award was issued on October 15, 2012, with a supplementary award issued on November 26, 2012. The parties agree that it became binding on or about February 25, 2013. There is also no dispute that the award was not fully implemented until the end of June 2013, some seven months after the award was issued and four months after it should have been implemented, according to the provisions of section 157 of the *PSLRA.* There is also no evidence or suggestion that the employer made any attempt to extend the time limit to implement the arbitral award. There was no suggestion that an issue arose with appropriating the money required for the award by Parliament, and in that absence, I read the time limit for implementation in section 157 as mandatory. Therefore, a clear and admitted breach of the *PSLRA* by the employer occurred, and the only issue to be determined is the appropriate remedy for the breach.

[29] The union asked for a declaration that the employer failed to implement the terms of the arbitral award within the time limit set out in section 157 of the *PSLRA*,

interest at the Canada Savings Bonds rate on the amounts owed under the arbitral award for the period of the breach, payable to each member of the bargaining unit, and general damages of $100 to each member of the bargaining unit.

[30] While the employer did not object to the issuance of a declaration, it did object to an order of interest and to an order of general damages. It took the position that there is well-established jurisprudence in support of the principle that adjudicators and panels of the Board do not have jurisdiction to award interest, other than in the specific circumstances set out in paragraph 226(1)(*i*) of the *PSLRA*. The employer also took the position that the union has not made out a case for general damages based on the evidence or jurisprudence.

[31] The union argued that the jurisprudence cited by the employer is distinguishable from the circumstances of this matter, based on both the facts and on changes to the legislation. The union also argued that an award of general damages is necessary to encourage compliance and respect for the processes established by the *PSLRA*.

[32] The union suggested that the remedial authority given to the Board under subsection 192(1) and section 36 of the *PSLRA* implicitly includes the authority to award interest and that it overrides the case law, which arose under the former *Public Service Staff Relations Act (PSSRA)*. I do not agree. It seems to me that had Parliament intended to give the Board the power to award interest on its awards, it would have done so explicitly when it introduced the new legislation, as it did in paragraph 226(1)(*i*). As there is no explicit grant of the authority to grant interest in any provision of the *PSLRA* other than paragraph 226(1)(*i*), I am drawn to the inescapable conclusion that Parliament did not intend to grant the authority to award interest in any other circumstance. On this issue, it seems to me that the decision of the Federal Court of Appeal in *Nantel* is quite clear. The Court agreed with the decision of the lower court that the *PSSRA* did not provide an exception to the principle of crown immunity against the payment of interest and considered that the amendments in the *PSLRA* would not have changed the lower court's decision. It wrote as follows at paragraphs 6 and 7:

> *6 It is unnecessary to address this question since, in our opinion, the amendments brought about by the* Public Service Labour Relations Act, *S.C. 2003, c. 22, s. 2 (PSLRA), which came into force on April 1, 2005, render the*

> *conclusion reached by Justice Pinard unavoidable, regardless of the standard of review applicable to the adjudicator's decision. Indeed, the PSLRA provides at paragraph 226(1)*(i) *that the adjudicator may "award interest in the case of grievances involving termination, demotion, suspension, or financial penalty [emphasis added] at a rate and for a period that the adjudicator considers appropriate.*
>
> *7 When this amendment is considered in light of the consistent line of case law that Justice Pinard relies on in his reasons, which has interpreted the PSSRA, without exception, in the same way for over 30 years, it demonstrates unequivocally that Parliament was indeed aware of the state of the law under the PSSRA, and that as of April 1, 2005, it chose to waive the benefit of the common law rule in the specific cases provided at paragraph 226(1)*(i)*. It therefore follows that the common law rule remains in effect for all other cases. The amendment cannot be construed otherwise.*

[33] For the reasons set out earlier, I find that I do not have the jurisdiction to award interest on an award made under subsection 192(1) of the *PSLRA*. In my opinion, the common law rule that interest cannot be awarded against the Crown remains in effect in the circumstances of this case.

[34] However, the union also made a claim for what it described as "general" or "nominal" damages of $100 to each member of the bargaining unit for the breach of the *PSLRA*, on the grounds that such damages are necessary to ensure future compliance with the *PSLRA,* to promote respect for its processes and to provide a remedy for the breach to the union and its members. The union argued that a declaration alone would not be sufficient to achieve those objects.

[35] Damages in the labour relations context are most frequently based on the concept of making the grievor "whole" and are, therefore, usually compensatory in nature. However, there is jurisprudence in other jurisdictions that supports awards of general damages by labour arbitrators for non-monetary losses. In *Canada Safeway Ltd. v. United Food and Commercial Workers,* 2001 ABQB 120, at para. 49, the Court upheld the decision of an arbitrator to award general damages as compensation for the "intrinsic value of the right not to be discriminated against."

[36] Arbitral awards in other jurisdictions have also awarded damages as a deterrent for breaches of notice requirements or for failure to consult. See, for example, *B.C. Rail Ltd. v. United Association, Local 170, Metal Trades Division* (2004), 135 L.A.C. (4th) 399; *Western Canada Council of Teamsters v.Canadian Freightways* 2013 CanLII 19947 (Alta

G.A.A.); *Calgary (City) v. Calgary Firefighters Association,* 2010 ABQB 226; and *Canadian Airlines International Ltd. v. International Association of Machinists and Aerospace Workers* (1999), 82 L.A.C. (4th) 81. One of the principles accepted in each of those cases is the notion that damages should be sufficiently meaningful to provide an incentive for future behaviour, without being punitive.

[37] Damages for non-monetary losses have also been awarded for breaches of the *Canadian Charter of Rights and Freedoms.* As noted by Waddams in the *Law of Damages* at para.10-50, the purpose of damages in these cases is both vindication of the right and deterrence. Damages in this context have been described as "nominal", regardless of the amount of the award, or "symbolic".

[38] Whether described as "general", "nominal" or "symbolic", damages for non-monetary losses have been awarded where there is an important and intrinsic right to be protected or enforced and where deterrence is an important factor. I believe that the circumstances of this case satisfy those requirements. Harmonious labour-management relations, which are one of the objects of the *PSLRA*, are not possible when one of the parties has no hesitation in ignoring provisions of the *PSLRA* designed to achieve labour relations peace. I agree with the union's argument that such behaviour is to be discouraged. Neither party should feel comfortable openly flouting the legislation that governs their relationship. In my view, an award of damages in the circumstances of this case is necessary to emphasize to the parties that the provisions of the *PSLRA* are to be respected and that there are consequences for breaching them. A declaration simply will not achieve that effect.

[39] I believe that subsection 192(1) of the *PSLRA* gives me the jurisdiction to make an award of damages for a non-monetary loss, as it provides that if a complaint is well founded, I may make any order I consider necessary in the circumstances. Section 36 also provides that the Board "…may exercise the powers and perform the functions that conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act…." It is also important to note that the Preamble to the *PSLRA* recognizes the importance of public interest in effective and harmonious labour relations. Respect for the provisions of the *PSLRA* is not simply a matter of internal labour relations but is in the public interest.

[40] In the circumstances of this case, I agree with the union that damages are appropriate. The employer had options available to it that would have avoided a

breach of section 157 but chose not to exercise them. It could have asked the union for an extension of the time limit or it could have made an application to the PSLRB for such an extension. It did not.

[41] I am also influenced by the nature of the breach in this case. The failure to implement the arbitral award in a timely fashion meant that employees in the bargaining unit did not receive the pay and benefit increases when they should have. That goes to the heart of the relationship between the parties, and failing to rectify it in a meaningful way could give rise to cynicism about labour-management relations and could undermine the ability of the union to represent its members effectively.

[42] Given the size of the employer and its experience and sophistication in labour relations matters and the fact that its breach of section 157 of the *PSLRA* continued for a period of some four months, I believe that an award of damages must be sufficiently large to discourage such behaviour in the future. Accordingly, I order the employer to pay damages to the union in the amount of $7,500., which represents roughly the amount claimed by the union on behalf of its members. I believe that that amount is sufficient to raise awareness of the importance of respecting the *PSLRA,* without being punitive.

[43] Because the deterrent effect of this award is important, it is necessary to ensure that all those involved understand that consequences follow a breach of the *PSLRA*. Cynicism must not be allowed to develop. For that reason, I believe that it is necessary that a copy of my order be posted in the workplace.

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

(The Order appears on the next page)

V. Order

[45] This complaint is allowed, and I declare that the employer and the Secretary of the Treasury Board breached section 157 of the *PSLRA* when they failed to implement the arbitral award within 90 days.

[46] I order the employer and the Secretary of the Treasury Board to pay to the union damages in the amount of $7,500 within 60 days of this decision.

[47] I order the employer the Secretary of the Treasury Board to post, forthwith, a full copy of this decision throughout all workplaces of the employer to which the collective agreement applies, in conspicuous locations, where it is most likely to come to the attention of the employees in the bargaining unit, for a period of no less than 60 days.

[48] I will remain seized for a period of 60 days in the event that there are difficulties in the implementation of these orders.

November 13, 2013.

Kate Rogers,
a panel of the Public Service
Labour Relations Board