Date: 20130705

File: 525-02-50
XR: 561-02-587

Citation: 2013 PSLRB 76

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

TREASURY BOARD
(Canada Border Services Agency)

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Treasury Board (Canada Border Services Agency) v. Public Service Alliance of Canada

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: David Olsen, a panel of the Public Service Labour Relations Board

For the Applicant: Richard E. Fader, counsel

For the Respondent: Andrew Raven, counsel

Decided on the basis of written submissions,
filed May 23 and June 6 and 11, 2013.

I. Request before the Board

[1] This decision deals with a request filed by the Treasury Board ("the applicant") to review the decision made on April 23, 2013, in *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46.

[2] In 2013 PSLRB 46, a panel of the Public Service Labour Relations Board (PSLRB) upheld an unfair labour practice complaint filed by the Public Service Alliance of Canada ("the respondent"). The complaint alleged that the applicant had violated section 107 of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, in relation to the Border Services Group bargaining unit when it decided to stop paying union leave to specific officers of the respondent. Section 107 provides as follows:

> ***107.*** *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> > *(*a*) if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*
> >
> > *(*b*) if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

[3] The "Order" portion of 2013 PSLRB 46 reads as follows:

> ***VII. Order***
>
> *[205] I declare that the respondent contravened section 107 of the* PSLRA *in terminating the union leave arrangements only for those employees who were fully detached, namely the four vice-presidents, the equal-opportunities officer and the Branch presidents in Montreal, Toronto, Vancouver and Headquarters ("the detached employees").*
>
> *[206] I order the respondent to continue to respect the union leave arrangements for the duration of the statutory freeze to the terminal date specified in section 107 of the* PSLRA *for the detached employees.*

> *[207] I order the respondent to pay damages to the bargaining agent equal to the monies that would otherwise have been payable from August 15, 2012 to the date of this award to the detached employees had the arrangements not been terminated.*
>
> *[208] I remain seized of this matter for a period of sixty (60) days from the date of this award in the event that the parties encounter any difficulties in its implementation.*

[4] On May 2, 2013, the applicant requested that the panel of the PSLRB that made the decision in 2013 PSLRB 46 amend its decision ". . . to clarify what appears to be a clerical error in the decision . . ." in relation to Francine Stuart, President of the Canada Border Services Agency Headquarters Local of the Customs and Immigration Union (the Customs and Immigration Union is one of the component elements forming the respondent). More specifically, the applicant alleged that the evidence presented to the panel at the hearing clearly established that Ms. Stuart was at all material times an employee who belonged to a bargaining unit other than the Border Services Group bargaining unit and whose terms and conditions of employment did not fall under the protection of section 107 of the *PSLRA*. The applicant was therefore seeking ". . . that the order be amended to exclude the position occupied by Francine Stuart."

[5] On May 8, 2013, the respondent opposed the applicant's request. The respondent argued that ". . . the Board's decision, including the Board's Orders at paragraphs 205 and 206 thereof, is clear, final and binding . . ." and that ". . . the Board is now *functus officio* and there is no basis in law for reopening this matter . . . ." The responded further claimed as follows:

> *. . . the term or condition of employment that is at the root of the Board's Order in paragraphs 205 and 206 of its decision are terms and conditions of employment of benefit to all of the employees in the FB bargaining unit – not just the individual specified union officers. . . .*
>
> [S*ic* throughout]

Basically, the respondent contended that, as access to its officers on union leave paid by the applicant could have been a term and condition of employment included in the collective agreement applicable to the employees in the Border Services Group bargaining unit, such access is protected by section 107 of the *PSLRA*.

[6] At my directions, the Registry of the PSLRB wrote to the parties on May 14, 2013, to inform them that I was considering whether to exercise the powers set out in section 43 of *PSLRA* and to ask them to file written submissions in that regard. Section 43 reads as follows:

> ***43.*** *(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*
>
> *(2) A right that is acquired by virtue of an order or a decision that is reviewed, rescinded or amended by the Board may not be altered or extinguished with effect from a day that is earlier than the day on which the review, rescission or amendment is made.*

II. Summary of the arguments

A. For the applicant

[7] The applicant filed its written submissions on May 23, 2013.

[8] This applicant argued that its request relates to the implementation of 2013 PSLRB 46. The applicant noted that the panel of the PSLRB that rendered that decision has not exhausted its jurisdiction over the matter, as it has expressly retained jurisdiction to deal with issues arising out of the implementation of its order: see 2013 PSLRB 46, at para 208. In the alternative, the applicant suggested that section 43 of the *PSLRA* enables the PSLRB to review the decision rendered by one of its panels.

[9] The applicant relied on the test for decision review enunciated at para 29 of *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39 (upheld in *Chaudhry v. Canada (Attorney General),* 2009 FCA 376), which reads as follows:

> *[29] A review of the jurisprudence shows the following guidelines or criteria for reconsidering a decision of the PSLRB (see* Quigley, Danyluk, Czmola *and* Public Service Alliance of Canada*). The reconsideration must:*
>
> - *not be a relitigation of the merits of the case;*
> - *be based on a material change in circumstances;*
> - *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
> - *ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;*

- *ensure that there is a compelling reason for reconsideration; and*
- *be used ". . . judiciously, infrequently and carefully . . ." (*Czmola*).*

[10] The applicant claimed that its request is not aimed at reopening the merits of decision 2013 PSLRB 46. To the contrary, the applicant believed that the status of Ms. Stuart was not considered by the panel of the PSLRB and that any references to her in the decision were an oversight on the part of the panel. The evidence produced at the hearing clearly established that Ms. Stuart is not an employee in the Border Services Group bargaining unit and that her terms and conditions of employment do not fall under the protection of section 107 of the *PSLRA*. That evidence has not been contradicted by the respondent.

[11] The applicant suggested that the respondent is ignoring the first part of section 107 of the *PSLRA*, which protects in this case only the terms and conditions of employment of employees in the Border Services Group bargaining unit. The applicant maintained that the collective agreement for the Border Services Group bargaining unit cannot provide for terms and conditions of employment of employees who do not belong to that bargaining unit. Therefore section 107 of the *PSLRA* cannot protect in this case the terms and conditions of employment of employees who do not belong to the Border Services Group bargaining unit; Ms. Stuart's union leave with pay cannot be protected by section 107.

[12] The applicant requested that the panel of the PSLRB clarify that decision 2013 PSLRB 46 does not apply to Ms. Stuart or in the alternative that the PSLRB review and amend decision 2013 PSLRB 46 ". . . so as to exclude the position occupied by Francine Stuart."

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

[13] The respondent filed its written submissions on June 6, 2013.

[14] The respondent claimed that decision 2013 PSLRB 46 is unambiguous and needs no clarification. The panel of the PSLRB clearly considered the status of the position of President of the Canada Border Services Agency Headquarters Local of the Customs and Immigration Union and found that the applicant's practice of granting paid union leave for that position was a term and condition of employment protected by

section 107 of the *PSLRA*. The panel's orders at paragraphs 205-207 are consistent with those findings.

[15] The respondent contended that the test for decision review enunciated in *Chaudhry*, 2009 PSLRB 39, at para 29, is not met in this case.

[16] The respondent alleged that, by framing the issue in light of Ms. Stuart's personal terms and conditions of employment, the applicant is really attempting to re-litigate the finding of the panel of the PSLRB that the practice of granting paid union leave for the position of President of the Canada Border Services Agency Headquarters Local of the Customs and Immigration Union is protected by section 107 of the *PSLRA*. The respondent noted that the panel rejected the applicant's argument that the practice of paying union leave was merely a series of arrangements with individual employees that were not protected by section 107 of the *PSLRA*.

[17] The respondent pointed out that there has been no material change in circumstances since the panel of the PSLRB made its decision in 2013 PSLRB 46, and the respondent disagreed with the applicant's proposition that the issue of which positions with the Customs and Immigration Union were covered by the applicant's practice of granting paid union leave relates to remedy. According to the respondent, whether section 107 of the *PSLRA* protects the position of President of the Canada Border Services Agency Headquarters Local of the Customs and Immigration Union was one of the issues at the heart of the complaint.

[18] The respondent submitted that the applicant relied on no new evidence or argument that could not reasonably have been presented at the hearing before the panel of the PSLRB that decided 2013 PSLRB 46. The respondent stressed that the scope of the complaint was clear to the applicant as the complaint clearly referred to an agreement by which the applicant agreed to pay union leave for specific officers of the Customs and Immigration Union and as the complaint referred expressly to the position of President of the Canada Border Services Agency Headquarters Local of the Customs and Immigration Union. The respondent believed that nothing prevented the applicant from addressing at the hearing whether the practice of granting paid union leave for that position was protected under section 107 of the *PSLRA*.

[19] The respondent contended that there were no compelling reasons to review and amend decision 2013 PSLRB 46, as the findings of the panel of the PSLRB are reasonable.

[20] Finally, the respondent relied on para 8 of *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376, to argue that the applicant's request runs contrary to the judicially recognized principle of finality of PSLRB decisions.

C. Applicant's rebuttal

[21] The applicant filed its written submissions in rebuttal on June 11, 2013.

[22] The applicant pointed out that the need to clarify decision 2013 PSLRB 46 arose from the fact that the panel of the PSLRB did not squarely address the issue of whether the protection that section 107 of the *PSLRA* affords to the terms and conditions of employment of employees in the Border Services Group bargaining unit extend to Ms. Stuart's own terms and conditions of employment. The applicant reiterated that Ms. Stuart is not an employee in the Border Services Group bargaining unit; she belongs to another bargaining unit, which is covered by a different collective agreement and for which the protection of section 107 does not apply. The applicant alleged that denying its request would produce the absurd result of having Ms. Stuart's own terms and conditions of employment determined by those applying to employees in another bargaining unit.

[23] The applicant disagreed with the respondent on the characterization of Ms. Stuart's status. The respondent believes that paid union leave relates to Ms. Stuart's position with the Customs and Immigration Union, while the applicant believes that it relates to her own terms and conditions of employment. The applicant maintained that an employee's entitlement to any type of leave depends on the terms and conditions of employment that apply to the employee's position with the applicant, not to the employee's involvement in the affairs of the employee's bargaining agent. The applicant noted that Ms. Stuart was paid at the rate of pay of her substantive position with the applicant while she was on union leave; she was not paid as if she were an employee in the Border Services Group bargaining unit.

III. Reasons

[24] In *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 172-02-76 (19730605), a panel of the Public Service Staff Relations Board (PSSRB) was considering whether to exercise the powers given to it by section 25 of the *Public Service Staff Relations Act*, R.S.C., 1970, c. P-35. Section 25, which was a predecessor to section 43 of the *PSLRA*, read as follows:

> ***25.*** *The Board may review, rescind, amend, alter or vary any decision or order made by it, or may rehear any application before making an order in respect thereof, except that any rights acquired by virtue of any decision or order that is so reviewed, rescinded, amended, altered or varied shall not be altered or extinguished with effect from a day earlier than the day on which such review, rescission, amendment, alteration or variation is made.*

At pages 5 to 7 of its decision, the panel expressed as follows the circumstances in which it should exercise its discretion to review a decision of the PSSRB:

> . . .
>
> *8. It is obvious from the wording of Section 25 of the Public Service Staff Relations Act that the power of the Board to review, rescind, amend, alter or vary any of its decisions or orders is a discretionary power and it is to this discretion, no doubt, that the Chief Justice was referring when he indicated that he was not accepting any suggestion that there rests upon the Board an obligation to exercise its power to rehear or review a decision or order of the Board except where a valid reason to do so is present. At two points in the portion of the decision of the Chief Justice quoted above there appears the qualification upon a request for a review that there should be some valid reason for the Board to undertake a review of its decision.*
>
> *9. Generally speaking, it is not necessary to make an all inclusive ruling when the Board is asked to review or alter in some fashion a decision or order made by it. However, there must be some potent error on the face of the decision respecting its application to the situation with which it deals or some new matter which came to the attention of the parties or party after the original hearing.*
>
> *10. The first of such possibilities envisaged might apply to clerical or technical errors in the decision or order. It would include such things as clerical or typing errors. For*

> *example, the indication of the wrong name of a Party, or amending errors or mistakes resulting from an oversight, a miscalculation of the numerical or monetary amounts or the omission by the Board to deal with a collateral issue. In these situations the authority can be said to be clarifying its language or intent.*
>
> *11. The second reason for the Board undertaking a review of its decisions or orders relates more to the merits of the case than to the manner in which the decision is expressed. In such cases it must be made to appear to the Board that there is some compelling reason for the Board undertaking a review of its decision. This must of necessity mean more than that one party simply is unhappy with the result obtained from the Board, since, in any instance where a decision is given, at least one party will likely be unhappy with the result. Thus, generally speaking, before the Board will undertake a review of its decisions or orders where the requested review is on the merits of the case, the party requesting the review has upon him an onus to present substantial reasons why the case should be reviewed. It may be that there has been new evidence brought to the attention of the party seeking the application but even in such instances, the party must demonstrate to the Board that the new evidence was either not available for consideration at the time of the first decision or, if the evidence was available, that it could not have been discovered by the exercise of diligence in the preparation and presentation of its case. In any event, it must be shown that the evidence which the party now seeks to bring before the Board is of such a nature that it would be practically conclusive and not merely corroborative of the issue, that is, the fact or document sought to be introduced is essential to the case and its existence or authenticity is not in serious dispute.*
>
> *12. There may of course be other reasons why the Board should undertake the review of one of its decisions or orders but again in such instances there is cast upon the applicant a heavy onus to show some special consideration which warrants the review. Were this not the case, the Board would be in the untenable position of having to constantly review its decision at any time a party requested it to do so.*
>
> . . .

[25] Nowhere did 2013 PSLRB 46 refer to Ms. Stuart's own terms and conditions of employment; to the contrary, 2013 PSLRB 46 referred to Ms. Stuart's office with the Customs and Immigration Union in conjunction with similar but distinct offices, and

the persons holding those similar but distinct offices are all employees in the Border Services Group bargaining unit, to which the complaint related. In the process of writing 2013 PSLRB 46, I lost track of Ms. Stuart's substantive position with the applicant. A review of my notes of the hearing indicates that Camille Theriault-Power did testify that Ms. Stuart was an employee in a bargaining unit, other that the Border Services Group bargaining unit, for which the applicant and the respondent had already concluded a new collective agreement. Clearly, although Ms. Stuart held the office of President of the Canada Border Services Agency Headquarters Local of the Customs and Immigration Union, she was not an employee of the Border Services Group bargaining unit, and the protection of section 107 of the *PSLRA* did not apply to her. My reference to Ms. Stuart's office with the Customs and Immigration Union in 2013 PSLRB 46 was the result of an unfortunate oversight on my part.

[26] Is the clerical oversight of the panel of the PSLRB a potent enough error to justify clarifying 2013 PSLRB 46? I must admit that it is. The reasons in 2013 PSLRB 46 were clearly based on a finding that the terms and conditions of employment of the employees in the Border Services Group bargaining unit are subject to the protection of section 107 of the *PSLRA*. However, the applicant is right in submitting that Ms. Stuart does not belong to that bargaining unit; the evidence, which has not been contradicted, clearly shows that Ms. Stuart belongs to a different bargaining unit. Further, the protection of section 107 of the *PSLRA* did not apply at the relevant time to the bargaining unit to which Ms. Stuart belongs. My oversight is significant. I can come to no conclusion other than to find that this oversight is a potent error on my part. Therefore, I find that, in this case, my oversight is a valid reason justifying to clarify 2013 PSLRB 46.

[27] For all of the above reasons, the PSLRB makes the following order:

(The Order appears on the next page)

IV. Order

[28] Decision 2013 PSLRB 46 is hereby amended to delete any reference to the position of President of the Canada Border Services Agency Headquarters Local of the Customs and Immigration Union.

July 5, 2013.

David Olsen,
a panel of the Public Service
Labour Relations Board