Date: 20170809

File: 561-02-834

Citation: 2017 FPSLREB 19

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Complainant

and

ECONOMIC DEVELOPMENT AGENCY OF CANADA FOR THE REGIONS OF QUEBEC

Respondent

Indexed as
Canadian Association of Professional Employees v. Economic Development Agency of Canada for the Regions of Quebec

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

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Mathieu Delorme and Jean-Michel Corbeil, counsel

For the Respondent: Kétia Calix, counsel

Decided on the basis of written submissions filed May 26 and June 9 and 23, 2017.
(FPSLREB Translation)

I. Complaint before the Board

[1] On March 6, 2017, the Canadian Association of Professional Employees ("the Association") filed an unfair labour practice complaint against the Economic Development Agency of Canada for the Regions of Quebec ("the Agency") on the grounds that the Agency refused to allow Alessandro Bono, an employee working at the Agency, to be represented by the Association in a grievance challenging the reclassification of his position.

[2] The Association's complaint was based on s. 186(1)(a) of the *Public Service Labour Relations Act*, which read as follows at the time:

> ***186 (1)*** *Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> > ***(a)*** *participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization ….*

II. Legislative amendment

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[4] To ease reading this decision, the term "Board" is used to refer to the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board. Similarly, the term "*Act*" is used to refer to the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act*.

III. Background

[5] The Agency is a part of the core public administration for which the Treasury Board is the employer.

[6] The Association is a bargaining agent that represents, in particular, the bargaining unit for the Economics and Social Science Services Group. Until November 1, 2016, Mr. Bono, an Agency employee, held position 21788, classified at the EC-06 group and level. His bargaining agent was the Association.

[7] On November 1, 2016, Mr. Bono learned that his position had been reclassified to the AS-06 group and level. On November 30, 2016, he filed a grievance to challenge that reclassification, with the Association's support.

[8] The Agency acknowledged receiving the grievance but advised Mr. Bono that he could not be represented by the Association. His position, reclassified to the AS-06 group and level, would henceforth be part of a different bargaining unit, represented by the Public Service Alliance of Canada ("the Alliance"). The *Directive on Classification Grievances*, issued by the Treasury Board Secretariat, states the following in section 1.4.1 of Appendix B:

> *Representation of a grievor who is included in a bargaining unit must be in accordance with the* [Act]*….*

[9] Throughout the relevant period, s. 213 of the *Act* read as follows:

> ***213*** *No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any other employee organization in the presentation or reference to adjudication of an individual grievance.*

[10] Therefore, the Agency considers that Mr. Bono has to be represented by the Alliance, to represent himself, or to choose a representative not linked to the Association. Representation by the Association would be contrary to s. 213 of the *Act*.

[11] The Association's complaint is based on s. 186(1)(a) of the *Act*, which prohibits the employer, or its delegate, from intervening in the representation of employees by an employee organization. Although s. 186(1)(a) has been amended since the complaint was filed, the prohibition it sets out for the employer did not change. In its complaint, the Association claims that because the position was part of the bargaining unit it represented before the Agency reclassified it, and because the purpose of the grievance is to maintain the position in that bargaining unit and to retain the EC group classification, it is only logical that the Association represent Mr. Bono's interests. In addition, it is not in the Alliance's interests to represent an employee who wants to be

part of another bargaining unit because if the grievance is allowed, the employee will not be part of the Alliance's bargaining unit.

[12] As a corrective measure, the Association asks that the Board render a decision declaring that s. 186(1)(a) of the *Act* was violated and that it order the Agency to allow the Association to represent Mr. Bono in his classification grievance.

IV. Decision to proceed on the basis of written submissions

[13] The facts in this case are not contested. The parties ask that the Board interpret s. 213 of the *Act* to determine whether the Association can represent Mr. Bono in his classification grievance. Following a conference call held on May 5, 2017, an agreement was reached to proceed by written submissions. The Alliance was advised of the complaint and the proceedings and was informed of its right to intervene. The Board did not receive anything from the Alliance.

V. Summary of the arguments

A. For the complainant

[14] According to the Association, the triggering event of the grievance, i.e., the reclassification, occurred when Mr. Bono was still part of the Economics and Social Science Services Group bargaining unit. Consequently, the Association's representation in the grievance is not contrary to s. 213 of the *Act*.

[15] According to the Association, the only issue is determining whether the Agency illegally interfered in the representation of an employee represented by the Association, within the meaning of s. 186(1)(a) of the *Act*.

[16] The Association submits two arguments to claim its right to represent Mr. Bono. The first is based on the fact that at the time of the events that gave rise to the grievance, Mr. Bono was still part of the bargaining unit that the Association represents. Alternatively, the Association claims that Mr. Bono is currently assigned to another position, with the Department of Agriculture and Agri-Food, classified in the EC group, and is still in the bargaining unit represented by the Association.

[17] The Association cites the decisions in *Tremblay v. Syndicat des employées et employés professionnels-les et de bureau, section locale 57*, 2002 SCC 44, and in *Salie v. Canada (Attorney General)*, 2013 FC 122, to emphasize that its duty of representation

can be extended even when an employee changes positions. It also cites the following Board decisions: *Laferrière v. Hogan and Baillargé*, 2008 PSLRB 26; and *Cawley v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 135.

[18] The Association agrees that employees cannot always choose the employee organization to represent them in a grievance process. It claims instead that when the incidents that gave rise to a grievance occurred when the employee was represented by a bargaining agent, it is normal for that bargaining agent to represent the employee for the grievance, particularly if it is related to the employee's rights with respect to the position in the bargaining unit represented by the bargaining agent.

[19] The Agency's proposed interpretation of s. 213 of the *Act* is untenable and would lead to absurd results. For example, according to that interpretation, employees who, after changing positions and bargaining units, wish to file grievances against management actions related to their previous positions must be represented by their new bargaining agents. However, those bargaining agents would be unable to represent employees whose grievances are based on collective agreements negotiated by their former bargaining agents.

[20] Representation by the Alliance in this case creates a conflict of interest. Indeed, it is not in the Alliance's interests to lose a position in the bargaining unit that includes those classified in the AS group, which would be the case were the grievance allowed. Consequently, refusing to allow Mr. Bono to be represented by the Association effectively deprives him of the services of a bargaining agent that has his interests at heart, as the interests of the Alliance and those of Mr. Bono do not coincide.

[21] The Association also explains that Mr. Bono is currently on assignment in a bargaining unit that it represents. Thus, for that reason, his union dues are currently remitted to the Association, and it is logical that he benefit from its representation services.

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

[22] The Agency included documents with its written submissions that contradict the facts the parties agreed to in the agreed statement of facts dated May 26, 2017. Mr. Bono would be effectively seconded to the Department of Agriculture and Agri-Food. However, his position there would be classified at the CO-2 group and level, and the

bargaining agent for that position would be the Professional Institute of the Public Service of Canada ("the Institute"). The Agency also indicates that Mr. Bono's dues would be remitted to the Alliance but that it could be an error, as they should be remitted to the Institute.

[23] The Agency claims that it did not interfere in the employee's representation by the Association. Mr. Bono's substantive position would be part of a bargaining unit represented now by the Alliance. His seconded position would be part of a bargaining unit represented by the Institute. Consequently, the Association could not represent him in his classification grievance.

[24] The Agency returns to its initial reasoning, which is that it objected to the Association's representation when the grievance was filed. The *Directive on Classification Grievances* issued by the Treasury Board Secretariat clearly states that representation by a bargaining agent must be in accordance with the *Act*, s. 213 of which states that an employee filing an individual grievance cannot be represented by a bargaining agent other than the one for his or her bargaining unit. In Mr. Bono's case, the bargaining agent for his substantive position would be the Alliance.

[25] The jurisprudence submitted by the Association refers to the right to be represented, which the Agency does not challenge. The issue, which the submitted jurisprudence does not resolve, is determining specifically which employee organization can represent Mr. Bono in his grievance. No decision was rendered on the interpretation of s. 213 of the *Act.*

C. The complainant's objection

[26] The Association objects to the Agency challenging the facts that the parties agreed to in the agreed statement of facts dated May 26, 2017, which indicates that Mr. Bono was assigned to a position classified at the EC-06 group and level.

VI. Reasons

[27] I will begin with the dispute between the parties on the classification of the seconded position Mr. Bono currently holds with the Department of Agriculture and Agri-Food. I do not believe that it is appropriate to exercise my discretion to allow the Agency to contradict the facts that the parties agreed to in the agreed statement of facts dated May 26, 2017, by adding new documents to its written submissions on

which the parties have not agreed. Therefore, I allow the Association's objection to those new documents.

[28] Regardless, in my opinion, this controversy over the facts is not important to the question at issue, which instead is to determine whether the Association can represent Mr. Bono in his classification grievance, which is related to his substantive position, and whether the Agency's refusal of that representation violated the *Act*. The issue concerns Mr. Bono's substantive position, not his seconded position. Thus, I must analyze the issue based on his substantive position. His current secondment is not relevant. If his secondment position were part of a bargaining unit represented by the Institute, as the Agency claims, it would not necessarily mean that the Institute's role would be to defend terms of employment associated with a position that was represented by the Association before it was reclassified. In other words, regardless of the bargaining unit for the seconded position, it has no impact on this decision.

[29] The Association's complaint is based on a violation of s. 186(1)(a) of the *Act*, which prohibits the employer or its delegate from intervening in the representation of an employee by an employee organization. In fact, the Agency refuses representation by a specific employee organization based on its interpretation of s. 213 of the *Act*. Therefore, my task is to determine whether the Agency respected the prohibition set out in s. 186(1)(a) of the *Act*.

[30] For the following reasons, I conclude that the Agency's position on s. 213 of the *Act* is incorrect and thus that s. 186(1)(a) of the *Act* was violated when the Agency prevented the Association from representing Mr. Bono.

[31] The parties did not cite any jurisprudence on interpreting s. 213 of the *Act*. I found one decision about interpreting that section as it read in the legislation that preceded the *Act*.

[32] In *Federal Government Dockyard Trades and Labour Council East v. Treasury Board*, PSSRB File No. 161-02-579 (19901120), the issue was whether s. 91(4) of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), which is essentially the same as the current s. 213, was violated by the employer when it apparently agreed to another employee organization representing employees who should have been represented by their bargaining agent. In that case, no representation had occurred, other than for filing the grievance, and thus, the Public Service Staff Relations Board found that s.

91(4) had not been violated. However, the meaning of the decision is clear; the employees' bargaining agent is the only employee organization authorized to represent them in the applicable grievance process. That case involved grievances against disciplinary measures.

[33] I think that it is important to note the nature of Mr. Bono's grievance. Unlike the decision in *Federal Government Dockyard Trades and Labour Council East*, it is not against a disciplinary measure but instead is about Mr. Bono's rights stemming from the position that was part of a bargaining unit represented by the Association as a bargaining agent, which raises some logical implications. The grievance is about Mr. Bono's terms of employment, which the Agency modified when it reclassified his position. In his grievance, Mr. Bono seeks to maintain his terms of employment. Thus, it is important to properly identify the employee organization that can represent him in the situation that he wishes to maintain.

[34] The Agency does not deny that Mr. Bono is entitled to representation by an employee organization but claims that it must be the Alliance, which is the bargaining agent for the bargaining unit that includes his substantive position, as it was reclassified to the AS-06 group and level.

[35] Although Mr. Bono is not in a situation in which he can freely choose the employee organization that will represent him, nevertheless, it should be noted that there is no relationship between the Alliance, which the employer claims should represent Mr. Bono, and the terms of employment that Mr. Bono seeks to maintain, as those terms of employment were negotiated on his behalf by the Association, in its position as his bargaining agent. Therefore, no relationship exists between the Alliance and the terms of employment referred to in Mr. Bono's grievance. However, the Association and the terms of employment that it negotiated on his behalf are undeniably linked.

[36] This is a matter of clearly understanding the interpretation context of s. 213 of the *Act.* Mr. Bono is not represented by a bargaining agent other than his own. In pursuing a grievance that seeks to maintain the terms of employment of his substantive position, he is represented by the bargaining agent that negotiated those terms of employment, and the Association is the only employee organization authorized to do that by the *Act.*

[37] In a borderline situation like this one, in which the employee can supposedly be represented by either employee organization, it seems to me that the interpretation to be assigned to s. 213 must be based on the essence of the grievance in question. In the circumstances before me, the essence of Mr. Bono's grievance is related to protecting the terms of employment of his substantive position, negotiated on his behalf by the Association, his bargaining agent. Thus, by refusing to allow the Association to represent Mr. Bono in his grievance, the Agency breached the prohibition set out in s. 186(1)(a) of the *Act.*

[38] In closing, I note that s. 192(2) of the *Act* requires that the order that I make in this case also be addressed to the secretary of the Treasury Board.

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

(The Order appears on the next page)

VII. Order

[40] I allow the Association's objection to the new documents included with the Agency's written submissions.

[41] I declare that the employer violated s. 186(1)(a) of the *Act.*

[42] The unfair labour practice complaint is allowed.

[43] I order the Agency and the secretary of the Treasury Board to deal with the Association and its representatives with respect to Mr. Bono's grievance about the terms of employment that were modified by the reclassification of his position, bearing number 21788.

August 9, 2017.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board