Date: 20180227

File: 585-02-67

Citation: 2018 FPSLREB 16

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

Before the Chairperson of the Federal Public Sector Labour Relations and Employment Board

IN THE MATTER OF
THE *FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT*
and a dispute affecting
the Professional Association of Foreign Service Officers, as bargaining agent,
and the Treasury Board, as employer,
in respect of the Foreign Service bargaining unit

Indexed as
The Professional Association of Foreign Service Officers v. Treasury Board

AMENDED TERMS OF REFERENCE

To: Ian Mackenzie, chairperson of the arbitration board;
Ronald A. Pink and Jock Climie, arbitration board members

Before: Catherine Ebbs, Chairperson of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Ron Cochrane, Professional Association of Foreign Service Officers

For the Employer: Daniel Cyr, Treasury Board

Issued on the basis of written submissions,
dated December 20, 2017, January 11, 16, 22 and February 16, 2018.

TERMS OF REFERENCE

1 In decision 2017 FPSLREB 26, issued on September 22, 2017, the Chairperson of the Federal Public Sector Labour Relations and Employment Board ("the FPSLREB") issued Terms of Reference in Board File No. 585-02-67 ("the Terms of Reference") further to a request for arbitration made by the Professional Association of Foreign Service Officers ("the bargaining agent"). The request was made in respect of the employees of the Treasury Board of Canada ("the employer") in the Foreign Service ("FS") bargaining unit ("the FS bargaining unit").

2 The parties were advised in the decision that should any jurisdictional question arise during the course of the hearing as to the inclusion of a matter in the Terms of Reference, then that question was to be submitted without delay to the Chairperson of the FPSLREB, who is, according to s. 144(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), the only person authorized to make such a determination.

3 By letter dated December 20, 2017, the employer filed submissions in support of a preliminary jurisdictional objection it was making to the inclusion in the Terms of Reference, of five new collective agreement clauses as the bargaining agent had proposed (clauses 24.02, 24.05, 24.07, 44.02, and 44.03).

4 By letter dated January 11, 2018, the employer filed submissions in support of a supplementary preliminary jurisdictional objection it was making to the inclusion in the Terms of Reference, of another collective agreement clause as the bargaining agent had proposed (clause 24.06).

5 By letter dated January 16, 2018, the bargaining agent filed submissions in response to the employer's first jurisdictional objection.

6 By letter dated January 22, 2018, the bargaining agent filed submissions in response to the employer's supplementary preliminary jurisdictional objection.

7 By letter dated February 16, 2018, the employer filed submissions in reply to the bargaining agent's responses, in which it also stated that it was withdrawing its objection to the inclusion of clause 24.02.

8 The FPSLREB advised the parties that the Chairperson would determine the jurisdictional objections on the basis of their written submissions.

Reasons

Applicable legislative provisions

9 According to s. 144(1) of the *Act*, the Chairperson refers matters in dispute between the parties to the arbitration board ("the board"), subject to ss. 150 and 238.22 of the *Act*, of which only s. 150 is relevant to the matters at issue. The relevant provisions are as follows:

> ***144 (1)*** *Subject to sections 150 and 238.22, after establishing the arbitration board, the Chairperson must without delay refer the matters in dispute to the board.*
>
> *…*
>
> ***150 (1)*** *An arbitral award that applies to a bargaining unit — other than a bargaining unit determined under section 238.14 — must not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> > ***(a)*** *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;*
> >
> > ***(b)*** *the term or condition is one that has been or may be established under the* Public Service Employment Act, *the* Public Service Superannuation Act *or the* Government Employees Compensation Act*;*
> >
> > ***(c)*** *the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*
> >
> > ***(d)*** *in the case of a separate agency, the term or condition relates to termination of employment, other than termination of employment for a breach of discipline or misconduct; or*
> >
> > ***(e)*** *doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.*
>
> ***(2)*** *The arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested.*

10 Thus, since the board is prohibited from making arbitral awards in areas listed in s. 150, any matter in dispute relating to these areas cannot form part of the Terms of Reference.

11 The issue before me is whether the proposed new clauses to which the employer has objected are matters that can be referred to the board in accordance with ss. 144(1) and 150.

Clause 24.05

12 The proposed new clause reads as follows:

> *24.05 A Foreign Service officer may refuse to work in an environment that would endanger their health or life.*

13 The employer submits that this clause is contrary to s. 150(1)(a) of the *Act* and its related provision, s. 113(a), which states as follows:

> **113** A collective agreement that applies to a bargaining unit — other than a bargaining unit determined under section 238.14 — must not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if
>
> > **(a)** doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition ….

14 In particular, the employer argues that this proposal would require amendments to Part II of the *Canada Labour Code*, (R.S.C., 1985, c. L-2: "the *Code*") concerning the circumstances for refusing dangerous work as well as to the legislated process provided under the *Code* and the applicable regulations. The employer did not specify which provisions of the *Code* would be impacted but noted that under the *Code*, the right to refuse work is activated only when there is a hazard, condition, or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered. However, the right to refuse work is not available to an employee if the refusal puts the life, health, or safety of another person directly in danger or the danger is a normal condition of employment.

15 The employer points out that the bargaining agent stated in its submissions that the proposed new clause 24.05 is intended to go over and above the provisions of the *Code* and allow employees in the FS group the ability to refuse assignments to certain areas where the Government of Canada has diplomatic and consular missions. The employer claims that the bargaining agent's position would in effect mean that a lack of insurance coverage in dangerous posting areas would become a ground for refusing certain work assignments.

16 The employer is essentially arguing that clause 24.05 would go beyond what is contemplated in the *Code* and would afford additional protection or options to FS employees.

17 I do not see how that would require an amendment to the *Code*. The parties could freely negotiate this term and condition, which would add to employees' rights under the *Code*. The employer has not demonstrated why adopting such a term and condition would necessarily require an amendment to the *Code* and thus trigger the application of ss. 113(a) and 150(1)(a). Therefore, I am not persuaded by this submission.

18 In addition, the employer submits that the issue of an employee's right of refusal to work is already captured in the collective agreement through Part XIX of the National Joint Council ("the NJC") Occupational Health and Safety Directive ("the directive"), in accordance with clause 40.05 of the of the collective agreement, which states that the directive forms part of the collective agreement.

19 Part XIX states that it enhances and supplements Part II of the *Code* and that it should be read in that context. At clause 19.1, the provision also states that the selection of redress mechanism in the *Code* is revocable if the employer and employee agree, and if no solution is found under the directive, either party can use the legislated process under the *Code*. Therefore, the employer submits, the proposed new clause 24.05 "rests squarely with the NJC" and should be negotiated through the cyclical review process agreed to by the employer and the bargaining agent and outlined at Part 7 of the NJC By-Laws. The employer also notes that those By-Laws require that the bargaining agent "refrain" from making a collective bargaining proposal concerning items contained in an NJC directive unless the bargaining agent

has opted out of the cyclical review process of the directive, which is not so in this case.

20 In response, the bargaining agent points out that this proposal was included in the initial exchange of proposals when bargaining commenced several years ago, but the employer never raised a concern that it should not be the subject of negotiations at the time. This is the first time an objection has been raised. Since bargaining began, exchanges of proposals for the cyclical review of the NJC Foreign Service Directives have taken place. Yet, since receiving the proposal for this clause several years ago, the employer has not followed the proper procedure for opting into the NJC Foreign Service Directives review process.

21 I am not persuaded that the employer's argument establishes a valid jurisdictional objection to the inclusion of the proposed clause 24.05 in the Terms of Reference. The employer has not demonstrated how the fact that the clause addresses an issue that is also mentioned in the directive means that its inclusion in the Terms or Reference would contravene any of the provisions in s. 150 of the *Act.* If anything, this fact shows that the employer and the bargaining agent have already agreed to "enhance and supplement" the provisions of the *Code* without requiring amending it, which is consistent with my earlier finding in relation to the employer's first argument.

22 Finally, the employer also argues that the proposed clause would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service, contrary to s. 150(1)(e). Basically, it contends that the ability of employees to refuse assignments for reasons that go beyond what is already provided for in the *Code* will prevent it from assigning employees to certain duties. I am also not persuaded by this argument. The proposed clause would not prevent the employer from assigning its employees to perform those duties. The clause would only create the possibility for an employee to refuse to work if the circumstances described in the clause were present.

23 Therefore, the employer has not established that the proposed clause 24.05 is outside the board's jurisdiction.

Clause 24.06

24 The proposed new clause reads as follows:

> 24.06 Notwithstanding any other benefits concerning employees, who because of their assignment would render their AD and D coverage null and void will be provided with AD and D COVERAGE PAID BY THE EMPLOYER FOR $1,000,000 The Employer paid premium shall be a non-taxable benefit.
>
> (*Sic* throughout)

The "AD and D coverage" mentioned in the clause refers to accidental death and dismemberment insurance.

25 The employer submits that this clause is also contrary to ss. 113(a) and 150(1)(a) of the *Act* because it proposes to make a taxable benefit non-taxable, which would require the enactment or amendment of legislation, namely, the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.); "the *ITA*"). The employer maintains that whether a particular benefit is taxable is determined by legislation and therefore cannot be included in the Terms of Reference for the board. The specific provision at issue is s. 6(1)(e.1) of the *ITA*, which deals with the tax treatment of group sickness or accident insurance plans. The employer states that in a letter dated June 12, 2017, the Canada Revenue Agency ("the CRA") confirmed that according to this *ITA* provision, the employer-paid premiums for group accidental death and dismemberment coverage must be included by employees in the calculation of their employment income.

26 Thus, the employer submits that to achieve what clause 24.06 proposes in its last sentence, the *ITA* would need to be amended, which would be in contravention of ss. 113(a) and 150(1)(a) of the *Act* and cannot form part of the Terms of Reference.

27 In its response to the employer's objection, the bargaining agent indicates that before 2014, employees were not asked to pay tax on the premiums. The employer sought to change this practice in 2014 but changed course after the bargaining agent objected. The bargaining agent maintains that the CRA has not insisted that employees pay tax on the premiums. It points to an email the employer sent it on February 1, 2016, stating that the CRA confirmed to the employer that the premiums are non-taxable because they are individual, not group, policies. It should be noted that the CRA's letter of June 12, 2017, which the employer filed with its submissions, addressed the treatment of group policies.

28 In any event, whichever interpretation may be appropriate to the particular circumstances of the employees in question, the fact is that the determination is based on the provisions of the *ITA*, and any change would require an amendment to that legislation or the enactment of new legislative provisions. Accordingly, the board would not have jurisdiction to make the requested award as it would be contrary to ss. 150(1)(a) and 133(a) of the *Act*. The matter of the tax treatment of employer-paid premiums can therefore not form part of the Terms of Reference.

29 I note that although the last sentence of the proposed clause 24.06 cannot be included in the Terms of Reference, the employer has not presented any basis to exclude the rest of the clause. Therefore, I will sever the part that is not within the board's jurisdiction from the rest of the proposal, which remains within its jurisdiction (see *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20 at para. 31; and *Public Service Alliance of Canada v. Attorney General of Canada*, 2015 FC 55 at para. 46 ("*Statistics Canada*")).

Clause 24.07

30 The proposed new clause reads as follows:

> *24.07 The parties acknowledge that Part 2 of the Canada Labour Code applies both in Canada and Missions abroad and have the responsibility to ensure the provisions are respected.*

31 The employer objects to the inclusion of this clause in the Terms of Reference because it proposes rights that FS officers already have under the *Code*. It submits that the rights and obligations set out in the *Code* form part of the collective agreement even in the absence of any specific language to that effect in that agreement. It points out that at clause 1.04, the collective agreement provides that nothing in it shall be construed as an abridgement or restriction of a right conferred on an employee in an Act of the Parliament of Canada.

32 As such, the employer argues that it would be redundant to include the proposed clause in the collective agreement. In addition, the employer submits that including it could potentially confuse matters by creating some overlap with the *Code*, which already provides for a comprehensive scheme to prevent accidents and injury to

health arising out of, linked with, or occurring in the course of employment, including an internal complaint resolution process under s. 127.1.

33 Based on the above, the employer submits that there is no need to include the proposed new language.

34 However, the employer fails to establish on what jurisdictional basis the clause should be excluded other than to make a general statement that it is not a matter in dispute within the meaning of s. 144(1) of the *Act* and that it is "overly broad" and could require the enactment or amendment of legislation, contrary to s. 150(1)(a). The employer does not explain how the clause is overly broad, and if so, why the *Code* would need to be amended merely to interpret any additional contractual language differently from any other term or condition of the collective agreement.

35 As the for the redundancy argument, the bargaining agent correctly points out that it is not a jurisdictional issue. If the *Code* protects employees in their work assignments, acknowledging this does not take away their rights under it and does nothing more than make those rights more visible to them. As the bargaining agent also notes in its submissions, federal public sector collective agreements typically contain "no discrimination" clauses even though they mirror the protections afforded by the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "the *CHRA*"). There is no reason to believe that discrimination could not form part of the Terms of Reference if a party were to propose that, for instance, the scope of the "no discrimination" clause should be extended to grounds that are not enumerated in the *CHRA*.

36 Accordingly, I find that the employer has not established that the proposal in clause 24.07 is outside the board's jurisdiction.

Clause 44.02

37 The proposed new clause reads as follows:

> *44.02 The employer will not contract out work that is normally and customarily performed by FS employees as described in the Foreign Service officer occupational group definition.*

38 The employer submits that this clause, which would prevent it from contracting out FS work, would be contrary to s. 150(1)(e) of the *Act* and would encroach on its managerial prerogatives, as defined in the *Financial Administration Act*

(R.S.C., 1985, c. F-11; "the *FAA*") and the *Act*. It points out that s. 6 of the *Act* states that nothing in the *Act* is to be construed as affecting its right or authority under s. 7(1)(b) of the *FAA*. This latter provision allows the employer to act for the Queen's Privy Council with respect to the organization of the federal public administration or any portion of it and the determination and control of establishments in it.

39 The employer further notes that s. 7 of the *Act* states that nothing in the *Act* is to be construed as affecting the right or authority of the employer to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.

40 The employer maintains that the proposal in clause 44.02 preventing contracting out FS work clearly interferes with its authority to determine the organization of the federal public administration and to assign duties to positions in it, which is an authority reserved to the employer by s. 7 of the *Act*.

41 The employer also submits that the proposal violates ss. 113(b) and 150(1)(b) and (c) of the *Act* since it is a term and condition established under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*") relating to procedures and processes governing the appointment of employees and would require amendments to the *PSEA* with respect to appointments.

42 In support of its position, the employer referred to the decision in *Public Service Alliance of Canada v. National Capital Commission*, [1998] 2 FC 128 (FCTD). The Trial Division of the Federal Court upheld the decision of the Chairperson of the Public Service Staff Relations Board ("the PSSRB") to refuse to include in the terms of reference a proposal for a clause that would have prevented contracting out functions already being performed by employees during regular work hours. The Court held that the clause could directly operate to prevent layoffs and that hence it would be contrary to ss. 69(3)(a) and (b) of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) (the equivalents of ss. 150(1)(a) and (e) of the *Act*).

43 In 2005, a similar issue arose before the Public Service Labour Relations Board ("the PSLRB") in *Federal Government Dockyard Trades and Labour Council East v. Treasury Board,* 2005 PSLRB 42 ("*Dockyard*"). The bargaining agent in that case had

proposed that a clause be referred to arbitration that prevented the employer from contracting out work that was normally performed by employees in the bargaining unit when employees qualified to perform the work were available or when laid-off qualified employees were available. The employer objected to including the clause in the terms of reference for arbitration on grounds similar to the present case.

44 At paragraphs 19 and 20, the Chairperson of the PSLRB ruled that the employer's right to determine the organization of the public service and to assign duties to positions in it is protected by legislation and that a contracting-out proposal would clearly interfere with the employer's right to determine its organization and could not be considered within the scope of a request for arbitration.

45 In its response contesting the employer's objection to clause 44.02, the bargaining agent argues that the courts have upheld such restrictions on contracting out work, particularly if the employer contracts out identical work performed by active and laid-off employees in a bargaining unit. In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, the Supreme Court of Canada held that the PSSRB correctly concluded that a 1985 initiative to contract out the work performed by 270 data processors violated the work force adjustment policy then in force, which had been agreed upon by the NJC and had formed part of the collective agreement governing those employees. The policy stated that government departments should review their use of contracted services and terminate them when doing so would "facilitate" redeploying affected employees, surplus employees, or laid-off persons.

46 In *Public Service Alliance of Canada v. Canada (Attorney General)*, 2014 FC 1152, the Federal Court looked at a similar, if slightly differently worded, provision of the work force adjustment policy in place in 2012. The Court noted that in this instance, the employer did not set out to reduce the number of indeterminate employees and contract out their work, as had occurred with the data processors three decades earlier. Instead, a strategic decision was made to the operational system of the department in question that changed the very nature of the work performed by the employees and resulted in a reduction of the work to be done. The Court found that the contracting-out clause in the policy did not prevent the government from making this type of work force adjustment.

47 Therefore, relying on these two decisions, the bargaining agent submits that its proposal should really be read as meaning that contracting out would be prohibited if it would result in a layoff of employees performing identical work, an interpretation that would be consistent with the Supreme Court's findings.

48 However, I find that the bargaining agent's submissions do not address the real issue before me. Both judgments are about applying clauses to which the employer freely agreed in the work force adjustment policy and incorporated into collective agreements. They do not deal with the issue of whether the board has jurisdiction to deal with the proposals.

49 The findings of the Federal Court in the *National Capital Commission* case are clear, and I agree with the PSLRB Chairperson's conclusion in *Dockyard* that a proposal precluding any contracting out of work would clearly interfere with the employer's right to determine its organization and could not be considered within the scope of a request for arbitration, pursuant to s. 150(1)(e).

50 Therefore, the employer's objection to the inclusion of the proposed new clause 44.02 has been substantiated, and the proposal will no longer form part of the Terms of Reference.

Clause 44.03

51 The proposed new clause reads as follows:

> *44.03 Prior to considering or assigning FS work to other occupational groups the FS work/assignment will [sic] offered first to an FS employee in priority to all other persons.*

52 The employer submits that the object of this new proposed clause is to oblige it to assign duties to certain specific positions or persons. As it similarly argued with respect to clause 44.02, its right to determine the organization of the federal public administration and to assign duties to positions and persons in it is protected by ss. 6 and 7 of the *Act*.

53 The employer relies on the decision in the *Statistics Canada* case, in which the Federal Court upheld the decisions of the PSLRB's then acting chairperson to refuse to refer to arbitration several clauses proposing that work be assigned to employees by order of preference based on several factors, including indeterminate or

term status and seniority. The Acting Chairperson based his finding on ss. 150(1)(c) and (e), as the proposals would have interfered with the employer's ability to assign duties to employees by mandating how work hours were assigned and would have restricted the employer from hiring new employees until it had exhausted certain steps (*Public Service Alliance of Canada v. Statistics Survey Operations*, 2013 PSLRB 98 at paras. 67-68).

54 The employer also points to the finding in *Professional Institute of the Public Service of Canada v. Canadian Nuclear Safety Commission*, 2005 PSLRB 174 at para. 45, in which the PSLRB's chairperson found that a proposed clause dictating which managerial positions would be tasked with replying to grievances at each level was a question of who would carry out duties, which was precluded from referral to arbitration by virtue of ss. 7 and 150(1)(e) of the *Act*.

55 In its response to the objection, the bargaining agent submits that there is no interference with the employer's ability to determine the organization of the federal public administration. It points out that the positions referred to in the proposal are all within the FS occupational group, and as such, it is specifically drafted to work within the organizational structure as determined by the employer. The bargaining agent adds that the Federal Court decision on which the employer relies can therefore be distinguished as the proposals in that case were not confined to a single occupational group or bargaining unit.

56 The bargaining agent also makes a number of submissions as to the utility of its proposal in promoting good labour relations and improving morale. However, these points go to the merits of the proposed clause. They do not address the jurisdictional issue raised by the employer.

57 Returning to the bargaining agent's principal argument, I find that it attempts to create a distinction that is simply not found in the applicable provisions of the *Act*. As the employer points out in its submissions, s. 150(1)(e) provides that an arbitral award must not alter or eliminate any existing term or condition of employment or establish any new term or condition, if doing so would affect the organization of the public service or the "… assignment of duties to, and the classification of, positions and persons employed in the public service." There is no

distinction made between assigning work within a bargaining unit and assignments from one unit to another.

58 Therefore, I find that the employer's objection to including the proposed new clause 44.03 is substantiated, and the proposal will no longer form part of the Terms of Reference.

ORDER

59 Accordingly, pursuant to s. 144 of the *Act*, the Terms of Reference issued on September 22, 2017, in decision 2017 FPSLREB 26, are amended. The matters in dispute on which the board shall make an arbitral award are those set out in Schedules 1 to 3 inclusive contained in the Terms of Reference, with the following exceptions:

- The last sentence of clause 24.06 is deleted. The clause will now read as follows, although it should be noted that there still appears to be an error in the syntax of the proposal that I will leave to the parties and the board to resolve:

  > *24.06 Notwithstanding any other benefits concerning employees, who because of their assignment would render their AD and D coverage null and void will be provided with AD and D COVERAGE PAID BY THE EMPLOYER FOR $1,000,000.*

- Clause 44.02 will not form part of the Terms of Reference.
- Clause 44.03 will not form part of the Terms of Reference.

60 Should any further jurisdictional question arise during the course of the hearing as to the inclusion of a matter in these Terms of Reference, then that question must be submitted without delay to the Chairperson of the FPSLREB, who is, according to s. 144(1) of the *Act*, the only person authorized to make such a determination.

February 27, 2018.

Catherine Ebbs,
Chairperson of the
Federal Public Sector Labour
Relations and Employment Board