Date: 20191101

File: 569-02-228

Citation: 2019 FPSLREB 106

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

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board

In the matter of a policy grievance referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Amanda Montague-Reinholdt, counsel

For the Employer: Stefan Kimpton, counsel

Decided on the basis of written submissions,
Filed October 10 and 17, 2019.

REASONS FOR DECISION

I. Summary

[1] A hearing into this policy grievance was scheduled for November 15, 2019. However, the Treasury Board ("the employer" or TB) made a motion to the Federal Public Sector Labour Relations and Employment Board ("the Board"), requesting that the grievance be dismissed because it is moot. I grant the request and dismiss the grievance.

[2] On September 12, 2017, the Public Service Alliance of Canada ("the bargaining agent") filed a policy grievance alleging that the employer was in violation of clause 10.02 of the Program and Administrative Services collective agreement, expiry date June 20, 2018 ("the agreement"), which states, "The Employer agrees to supply each employee with a copy of this agreement and will endeavour to do so within one (1) month after receipt from the printer."

[3] As remedy, the bargaining agent seeks that the Board make a declaration that the agreement has been violated and that the employer be directed to comply with the agreement and to provide the employees with a printed copy of it.

[4] On January 25, 2018, the employer informed the bargaining agent in writing that the grievance had been allowed and that based upon the particular language of the agreement, departments would be advised in writing to print copies of the collective agreements for all employees in the bargaining agent's bargaining units who were subject to the noted language.

[5] In October 2019, the bargaining agent continued to assert that some of its members had not yet received their printed agreements, while the employer made a motion to dismiss the grievance as moot.

[6] In light of the grievance being allowed at the final level and the fact that government departments have been instructed by the employer to provide affected employees with copies of the agreement, I conclude that there is no longer a live dispute between the parties. Moreover, I am not persuaded that it is appropriate in the circumstances to exercise my discretion to hear this grievance. I decline to intervene.

[7] I find troubling on many levels the prospect of ordering at this time the printing of potentially thousands of copies of the agreement, as the bargaining agent requested.

[8] Firstly, departments have already been told to do it. If I make such an order, it would result in a further instruction from TB to departments to do it again. I do not find that result a wise use of scarce arbitral resources.

[9] Secondly, there are no ancillary interests that have been identified by the bargaining agent which might persuade me to exercise my discretion to hear the case.

[10] And perhaps most importantly, I find the prospect of ordering a large quantity of paper to be printed for speculative value at best, given the fact that the agreement will soon be outdated, to be contrary to public policy of good environmental stewardship. That includes minimizing the consumption of Canada's forests, which are a valuable carbon sink that help Canada's efforts to reduce its greenhouse gas emissions.

II. Summary of the arguments

A. For the bargaining agent

[11] The bargaining agent acknowledges that the respondent allowed the grievance at the final level but maintains that the corrective measures sought have not yet been fully implemented. It cites many written communications with its members across the country who have stated that copies of the agreement are not available, that they must ask for one, that a copy is not available to newly hired members, that they have been told that it is no longer in print, and that in some cases, they have been told to access a copy of it online.

[12] The bargaining agent states that it has been asked for a list of its members who have not yet received a copy of the agreement. It further states that it has provided the respondent with many examples of workplaces across Canada in which its members have reported being unable to obtain a printed copy. However, there are so many members spread across the country that it is not feasible to name each one. The bargaining agent points out that clause 10.02 of the agreement places the duty upon the respondent to provide the bargaining agent's members with a copy of the agreement.

[13] The bargaining agent cites well-established Board jurisprudence finding that agreements should be accepted at their word and given full force and effect. Its counsel relies upon a decision of the Board's Chair for the proposition that I must carefully scrutinize a motion of this kind, which could deny a party a full hearing on the merits of its claim, as it may not be clear whether reasons exist to take corrective action before I hear all the evidence (see *Henderson v. Deputy Minister of Citizenship and Immigration*, 2017 FPSRLEB 25).

[14] *Henderson* does not fit well with the facts before me. On reading it in conjunction with my decision in *Obioha v. Deputy Minister of Employment and Social Development*, 2016 PSLREB 13, which both parties cited, I conclude that *Henderson* must be distinguished.

[15] Both *Henderson* and *Obioha* deal with staffing complaints made under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13). Both deal with motions of the respondent to dismiss them, due to mootness. *Henderson* considers a staff member who filed a complaint but later was offered and refused the position she had initially been denied. The Board found that the matter was not moot as the dispute had not been resolved. The complainant had chosen not to accept the promotion despite it being offered to her. The Board found that if the hearing was conducted and the complaint was awarded, then a possible remedy would be to order the appointment at issue revoked.

[16] In *Obioha*, the complainant was offered and accepted a promotion within weeks of filing a complaint for initially having been unsuccessful in seeking the same appointment. When I accepted the respondent's motion of mootness, I noted that the dispute was no longer live as the complainant had accepted the appointment that she had sought and that based on the allegations in the complaint, there were no other serious matters or remedies sought that justified exercising my discretion to hear the case and rule on the merits of it.

[17] The bargaining agent's counsel also refers me to an authority that states that all aspects of the remedy being sought must be addressed. The case considered a position that the employer contested as to being within the scope of the bargaining unit. A settlement was offered, but it did not resolve the ultimate matters of the position being within the scope of the bargaining unit and the related issue of a wage rate for it.

If left unresolved, they would have continued the problem of staff with unresolved wage rates to be grieved. (See *Hilltop Manor Cambridge v. Service Employees International Union, Local 1 Canada*, 2018 CanLII 73142 ONLA at 52-53).

[18] Counsel for the bargaining agent also cites a Federal Court patent law decision, which carefully considered the jurisprudence following from the *Borowski* test (as noted later in this decision) for mootness. The Federal Court concluded that the fact the patent at issue before it had expired did not render the case moot. There remained a live issue of whether the patent had always been invalid. If the patent was found to have been valid prior to expiring, that would continue to carry rights that the patent holder could retrospectively enforce. (See *Stelpro Design Inc. v. Thermolec Ltee.*, 2019 FC 363 at 30-31).

[19] And finally, counsel for the bargaining agent notes the proposition that unless a grievance has been clearly resolved in favour of one party or that it has disappeared in all respects, it should not be found to be moot merely because only declaratory relief may be appropriate. While a particular situation on the surface may seem to be confined to its own facts, it can have wider implications for the parties in the ongoing relationship. (See *Elementary Teachers' Federation of Ontario-Trillium Lakelands Elementary Teachers' Local v. Trillium Lakelands District School Board*, 2017 CanLII 84616 ONLA at 29-33).

[20] I accept all the bargaining agent's submissions as helpful points of jurisprudence but distinguish each one on its facts as being materially different from the case before me. During a case-management teleconference with each party's representative, I specifically asked the bargaining agent's representative what was at stake in this matter for the bargaining agent. I asked if it is seen as setting a precedent with broader application. Is there more to the grievance than is readily apparent, perhaps as part of a broader strategy related to contract negotiations? Is there more to the remedy? The answer to all my questions was in the negative.

B. For the Employer

[21] The employer concedes that it was in breach of clause 10.02 of the agreement, as alleged in this grievance. It also confirms that upon allowing the grievance at the final level, it instructed all departments with staff in the groups with the noted language in the agreement to distribute printed copies of it to them.

[22] The employer notes correspondence asking the bargaining agent to list those workplaces or staff without a printed copy of the agreement and indicates its willingness to ensure that the resulting list is remedied.

[23] The employer relies upon well-established jurisprudence, which shall be examined later in this decision, to submit that there is no longer a live controversy between the parties. It submits further that the grievance would have no practical effect on the parties' rights. As such, the employer argues that the issue of judicial (arbitral) economy is of concern, as no special circumstance in this matter would justify using scarce resources to hear and decide it.

[24] Counsel also cites authority for me having the discretion to decline to hear a case that serves no sound labour relations purpose. Specifically, "… where the Board can make no effective order beyond what has already been voluntarily undertaken by the Employer, there is no valid legal reason to conduct a hearing into the merits of this case." (*St. Joseph's Hospital Full Time Laboratory v. Ontario Public Service Employees Union*, 2005 CanLII 40175 (ONLA) at p. 19).

[25] And finally, counsel builds on its argument of arbitral economy and cites authority for the proposition that grievance hearings should not be held merely to issue declaratory judgements that amount to nothing more than scoring a "debating point". (*Welland (County) Roman Catholic School Board v. O.E.C.T.A.*, 1992 Carswell Ont 1276 at para 17.

III. Analysis

[26] The parties jointly cite my decision in *Obioha*, which as follows, at paragraphs 8 to 10, references the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, as enunciating the test for mootness:

> *[8] … the doctrine of mootness is an aspect of a policy or practice such that a court may decline to decide a case when its decision will not have the effect of resolving some controversy that affects or may affect the parties' rights. If the court's decision will have no practical effect on such rights, it may decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. Accordingly, if subsequent to the initiation of the action or proceeding events occur that affect the parties' rights, the case is said to be moot. This general policy or practice is*

> *enforced in moot cases unless the court exercises its discretion to depart from it.*
>
> *[9] The approach in cases considering mootness involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is in the affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.*
>
> *[10] … the two-step test for mootness arising from Borowski [is] as follows:*
>
> > *(a) Is there still an issue, that is, a tangible and concrete dispute, between the parties?*
> >
> > *(b) If there is no longer a dispute between the parties, should the Tribunal still exercise its discretion to rule on the merits of the complaint?*

[27] In my review of the submissions, I do not find that the dispute persists. Similarly, I do not find that the Board's intervention by convening a hearing and potentially issuing a declarative order as the bargaining agent requested would serve any useful purpose or have any practical effect.

[28] Since I find no ongoing tangible dispute between the parties, I decline to exercise my discretion to rule on the merits of the grievance. The respondent conceded that it was in breach of its obligations under clause 10.02. Furthermore, it directed that copies of the agreement be given to all members of the bargaining unit, as required by the agreement.

[29] I find troubling on many levels the prospect of ordering the printing of perhaps thousands of copies of the agreement, as the bargaining agent requested.

[30] Firstly, the departments have already been told to do it. If I make such an order, it would simply result in the TB again telling departments to do it again. I do not find that a wise use of arbitral resources.

[31] Secondly, the agreement at issue expired on June 20, 2018, and will soon be replaced by a new agreement.

[32] And perhaps most importantly, I find the prospect of ordering a large quantity of paper consumed and a great deal of energy spent to distribute the agreement, for speculative value at best given that it has expired, contrary to public policy of good environmental stewardship. That includes minimizing the consumption of Canada's

forests, which are a valuable carbon sink that help Canada's efforts to reduce its greenhouse gas emissions.

IV. Conclusions

[33] I find the matter before me moot and I have determined that it is inappropriate for me to exercise my discretion to hear the grievance on its merits.

[34] The respondent's motion to dismiss the grievance is granted.

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

(The Order appears on the next page)

V. Order

[36] The grievance is dismissed

(November 1, 2019).

Bryan R. Gray,
A panel of the Federal Public Sector
Labour Relations and Employment Board