Date: 20200107

File: 461-PP-40504

Citation: 2020 FPSLREB 1

Parliamentary Employment and Staff Relations Act

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

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

PARLIAMENTARY PROTECTIVE SERVICE

Employer

Indexed as
Public Service Alliance of Canada v. Parliamentary Protective Service

In the matter of a reference under section 70 of the *Parliamentary Employment and Staff Relations Act* seeking to enforce obligations that are alleged to arise out of the collective agreement, and

in the matter of an application by the employer to extend the time limits under section 43(1)(b) of the *Parliamentary Employment and Staff Relations Act* to implement the provisions of the collective agreement.

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Amy Kishek, legal officer

For the Employer: Sebastien Huard, counsel

Heard by way of written submission filed,
May 29, July 5 and 24, August 22, September 9 and 16, December 10 and 18, 2019.

REASONS FOR DECISION

I. Matter before the Board

[1] The Public Service Alliance of Canada ("the bargaining agent") filed a reference under s. 70 of the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.); "*PESRA*") on May 29, 2019, in which it maintained that the Parliamentary Protective Service ("the employer") had failed to implement the provisions of a memorandum of agreement relating to an economic increase for its members for the period of April 1, 2014, to March 31, 2017, incorporated into the relevant collective agreement, in contravention of s. 43(1) of the *PESRA*, which required that it be implemented within 90 days from the date of its execution.

[2] The employer replied on July 5, 2019. It stated in part that it had been unable to implement the economic increases as a result of difficulties preparing the new salary grades and issues with the new Phoenix-based system. It requested an extension of time to implement the increases until August 31, 2019, in accordance with the discretion of the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 43(1)(b) of the *PESRA*.

II. Background

[3] The bargaining agent is an employee organization that has been certified as the bargaining agent for approximately 120 detection employees working for the employer who are referred to in the bargaining certificate as scanners and scanner supervisors.

[4] The employer is the central security management agency of the Parliament of Canada. It was designed to improve security and crisis response by amalgamating all security-related groups in the Parliamentary precinct under single direction.

[5] On December 17, 2018, the parties reached a tentative agreement to address the then-current collective agreement and economic increases for the period of April 1, 2014, to March 31, 2017, for the members of the bargaining unit. The agreement was ratified on December 20, 2018.

[6] In accordance with s. 43(1) of the *PESRA*, as there was no provision in the collective agreement with respect to a date for implementing it, it was to be implemented within 90 days of its execution.

[7] As of the date of this reference to the Board, the terms of the memorandum of agreement had not been implemented, and the bargaining unit members continued to earn the same pay as they did in 2014.

[8] The bargaining agent stated that it contacted the employer on April 16, 2019, to advise of the missed implementation deadline.

[9] The bargaining agent stated that on April 23, 2019, the employer advised it that it had failed to meet the implementation deadline.

[10] The employer stated that it had encountered delays processing the economic increases and that it had not been able to issue payment within the expected 90 days. It stated that the delays were caused in part by the House of Commons preparing the salary grid as well as by issues with the Phoenix pay system.

[11] The employer stated that it received confirmation that the economic increases would be implemented no later than August 31, 2019. Given all the circumstances, it stated that it would be reasonable for the Board to allow for a longer period in which to implement the memorandum of agreement, pursuant to s. 43(1)(b) of the *PESRA*. That section confers on the Board the power to extend the time to implement a provision of a collective agreement, as may appear reasonable to the Board.

[12] The bargaining agent responded. It alleged that the employer did not apply to the Board for an extension of time, as required by s. 43(1)(b) of the *PESRA*, before the expiry of the period to implement the provisions of the collective agreement.

[13] On August 22, 2019, the employer advised the Board of additional delays in processing the economic increases and stated that the adjustments would be uploaded only on the weekend of September 14 and 15, 2019. As a result, the employees would receive the increases on October 2, 2019. The delay resulted from the Public Service Pay Centre having to process a significant number of updated or other pay increments.

[14] The employer requested an extension of time to implement the economic increases until October 2, 2019, in accordance with the Board's discretion under s. 43(1)(b) of the *PESRA*. On August 30, 2019, the employer wrote to the bargaining agent that most of the employees would see their pay changes by October 2, and the remaining few with outstanding issues would likely receive the remainder of their retroactive payments by October 16, 2019.

[15] A pre-hearing conference took place on August 30, 2019, during which the Board determined that it would render a decision, by way of written submissions, on the employer's request for an extension of time to implement the economic increases.

[16] On December 10, 2019, the bargaining agent advised the Board that the employer failed to compensate its members with the accurate retroactive pay set out in the December 20, 2018, agreement between the parties and that its members had advised it of substantial discrepancies in retroactive compensation for overtime pay. It pointed out that the employer had requested an extension of time, claiming that it would complete the retroactive payments by October 16, 2019. However, that date had long passed, and the bargaining agent consequently requested that a preliminary order be issued.

[17] On December 18, 2019, the employer responded by confirming that the employees had in fact received their retroactive increases on October 23, 2019, and that the negotiated increases had been fully implemented. The employer added that given concerns about potential discrepancies, its pay and benefits personnel were conducting a review of each personnel file to ensure that the retroactive payments were accurate and to make any needed adjustments. The employer noted that given the complexity of these issues, the review would require additional time to complete. The employer maintained that it had complied with its obligation to implement the economic increases and that any potential payroll errors did not represent a violation of s. 43(1)(b) of the *PESRA*. It submitted that no other remedies would be necessary or appropriate.

III. Summary of the arguments with respect to the application for an extension of time

A. The employer's submissions

[18] The Board has the necessary jurisdiction to grant the requested extension of time pursuant to s. 43(1)(b) of the *PESRA*. The employer followed the necessary process and time limits to request an extension. In particular, the *PESRA* and its regulations do not include any specific application process, and there is no requirement to file a stand-alone separate application; nor is there a prescribed time in which to make an application. The fact that the request for an extension of time was filed after the 90-day time period expired for implementing the economic increases

does not prevent the Board from granting it for any longer period that may appear reasonable to it.

[19] Given all the circumstances, it would be reasonable for the Board to allow for a longer period to implement the negotiated economic increases. In particular, the employer has always acted in good faith and was transparent with the bargaining agent. The employer consistently followed up with the House of Commons and the Public Service Pay Centre to ensure that the implementation was carried out as soon as possible.

[20] Despite its best efforts, issues with the Phoenix pay system and delays caused by the Public Service Pay Centre have continued to delay the implementation.

[21] The implementation delay is entirely outside the employer's control. It is appropriate for the Board to grant the extension of time. The employer has taken all necessary steps to ensure that payment will be processed as soon as possible.

B. The bargaining agent's submissions

[22] The employer breached s. 43(1) of the *PESRA*, which is a "strict liability offence." The request for an extension of time to implement the agreement ratified on December 20, 2018, is untimely and patently unreasonable in the circumstances.

[23] The employer did not make its request in a timely manner. A request for a longer implementation period is not an extension of time to be made once the initial 90 days have already passed. It is a request for a period exceeding the statutory minimum of 90 days when it may appear reasonable to the Board.

[24] The employer did not make an independent application for an extension of time. It waited until it had violated the *PESRA* and until the bargaining agent filed its reference to the Board under s. 70.

[25] The request for an extension of time is unreasonable as the employer admitted that it failed to implement the negotiated economic increases within the statutory time frame. Once a violation occurs, it cannot be remedied by way of a post-breach amendment to the implementation period. Doing so would be unjust and unreasonable.

[26] The challenges that the employer allegedly encountered were not unforeseeable. It was fully aware that it would have to engage the House of Commons in determining the pay grid and that it would have to process the changes to the Phoenix pay system. The appropriate place to raise questions and challenges with respect to implementation is at the bargaining table before the execution of the agreement.

[27] The employer failed to address these realities at the bargaining table or through a proper and timely application to the Board for an extension of time.

[28] The bargaining unit members are entitled to damages for the employer's violation of the *PESRA* and the implied terms of the December 20, 2018, agreement. The situation at hand is no different from the numerous implementation complaints that came before the Board involving the federal public service in which it granted declarations that the Treasury Board (the employer in those cases) contravened the provisions of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), reserved on the remedy, and established a timetable for the parties to implement the provisions of the respective collective agreements.

IV. Reasons

A. The application for an extension of time

[29] Section 43(1) of the *PESRA* reads as follows:

> *43(1) The provisions of a collective agreement shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required, be implemented by the parties*
>
> *(a) where a period within which the collective agreement is to be implemented is specified in the collective agreement, within that period; and*
>
> *(b) where no period for implementation is specified in the collective agreement, within a period of 90 days from the date of its execution or, on application by either party to the agreement, within such longer period as may appear reasonable to the board.*

[30] As noted by Adjudicator Jaworski in *Treasury Board v. Federal Government Dockyard Trades and Labour Council East*, 2014 PSLRB 13 at para. 64, the jurisprudence in this area is scant and dated. Nevertheless, a review of the decisions of the Board's predecessors has proved instructive.

[31] In *Treasury Board v. The Professional Institute of the Public Service of Canada*, PSSRB File No. 151-02-4 (19691118), [1969] C.P.S.S.R.B. No. 11 (QL), the Public Service Staff Relations Board (PSSRB) dealt with an application by the employer in that case under s. 56(1) of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; *PSSRA*) requesting that the PSSRB extend the time limits for implementing certain provisions of a collective agreement.

[32] Section 56(1) of the *PSSRA* read as follows:

> *56. (1) The provisions of a collective agreement shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required by the employer therefor, be implemented by the parties,*
>
> *(a) where a period within which the collective agreement is to be implemented is specified in the collective agreement, within that period; and*
>
> *(b) where no period for implementation is so specified*
>
> *(i) within a period of ninety days from the date of its execution, or*
>
> *(ii) within such longer period as may, on application by either party to the agreement, appear reasonable to the Board.*

[33] At paragraph 5 of the decision, the PSSRB set out its opinion with respect to the obligation upon the employer in that case to implement the provisions of a collective agreement as follows:

> *5. It will be noted that the ninety-day period referred to in section 56(1)(b)(i) is applicable only where no period for implementation is specified in a collective agreement. One would therefore expect that the Employer, at the time it is negotiating a collective agreement, would examine its resources to implement the agreement and would bargain for an implementation date that takes those resources into account. Where the agreement does not specify a period for implementation, one would normally assume that the Employer has made the necessary assessment of its resources and has come to the conclusion that they are adequate to enable it to implement the agreement within the ninety-day period fixed by section 56(1)(b)(i). The "safety valve" provided by section 56(1)(b)(ii) was designed to deal with situations that could not reasonably have been foreseen at the time the agreement was entered into or situations that develop subsequently and which are beyond the control of the Employer. There may also be instances in which the parties conclude during the course of negotiations that it may not be possible to implement certain provisions of the*

> *agreement within the ninety-day period specified but are unable to determine at that time what period would be reasonably necessary for these provisions to be implemented. Section 56(1)(b)(ii) would enable the Board in a proper case to grant an appropriate extension in light of the circumstances as they become apparent after the agreement has been executed. It was not intended that it was to be used in a routine fashion to enable the Employer or, in an appropriate case, the Bargaining Agent, to escape the consequences that might flow from a lack of reasonable foresight.*

[34] The PSSRB went on to say in part as follows at paragraph 8:

> *8. … if the Employer is unable to discharge its obligations to implement a collective agreement within the time fixed by section 56(1)(b)(i), it ought to seek the consent of the Board to enlarge the time for implementation. Before seeking such consent, the Employer should make known to the representatives of the Bargaining Agent concerned all the facts and circumstances which make it impossible for the Employer to implement the agreement within the ninety-day period. The parties should then discuss the problems that have arisen in good faith with a view to reaching agreement if possible on any extension that may be necessary. If the parties reach an understanding that the time for implementing an agreement should be extended, it is unlikely, save in the most exceptional circumstances, that the Board would not concur. If the parties failed to reach an understanding, the application for an extension should be made expeditiously and preferably in sufficient time to enable the Board to conduct the requisite hearing to ascertain whether the circumstances are such that an extension should be granted.*

[35] In *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 151-02-7 (19760716), involving another application by the employer in that case under s. 56(1)(b)(ii) of the *PSSRA* for an extension of time to implement a collective agreement due to a recognition that the compensation package provided in it might exceed the guidelines of the Anti-Inflation Board in place at that time, the PSSRB recited the extracts that have been quoted and stated that it was in accord with all the views expressed in the earlier decision.

[36] In the circumstances of the case before it, the PSSRB stated as follows at paragraph 8 of that decision:

> *8. With respect to the instant application, as was stated above, the Employer and the Bargaining Agent were aware that the compensation increments provided for in the Education Group collective agreement exceeded the Anti-Inflation Board guidelines. Moreover, it is clear from the evidence that the Employer intended*

> *at the time it entered into the collective agreement to refer the agreement to the Anti-Inflation Board for approval prior to implementing the compensation provisions. In these circumstances, the Employer, at that time, surely should have sought to secure an agreement with the Bargaining Agent for an extension of time for implementation either as part of the collective agreement itself, or separately, immediately thereafter. In any event, we are disturbed by the fact that the Employer waited until one day prior to the expiration of the ninety-day period for implementation of the agreement, before applying to this Board for an extension of time. By delaying its application until this late date, the Employer automatically accorded to itself an extension of time for the implementation of the compensation provisions of the collective agreement.*

[37] It stated in part as follows at paragraph 11:

> *11. … if the Employer is convinced, as it appears to have been in the instant case that the adoption of such a procedure is not feasible* [to implement the collective agreement to the extent permitted by the Anti-Inflation Board]*, it should then either negotiate, as a provision of the collective agreement itself, or subsequently, a time period for the implementation of the agreement's compensation features. Failing any agreement being reached with the Bargaining Agent, in our view, there is an obligation upon the Employer at the earliest possible opportunity, and certainly well in advance of the expiration of the ninety-day time limit, to make an application to this Board for an extension of time. In any case, the application should be made early enough to allow the Board sufficient time to fully appraise the respective positions of the parties. The Employer hardly can be accused of fulfilling that obligation in the instant case.*

[38] The statutory language in s. 43(1) of the *PESRA* and that in s. 56(1) of the *PSSRA* is very similar and in terms of substance, virtually identical. Both provisions state that when the parties specify a period in a collective agreement during which the agreement is to be implemented, it is to be implemented within that period. If no implementation period is provided in the agreement, it is to be implemented within 90 days of its execution. Both statutes contemplate that a longer implementation period may occur, with the Board's approval.

[39] Section 43(1)(b) of the *PESRA* states as follows: "… on application by either party to the agreement, within such longer period as may appear reasonable to the Board."

[40] Section 56(1)(b)(ii) of the *PSSRA* stated as follows: "… within such longer period as may, on application by either party to the agreement, appear reasonable to the Board."

[41] Although the provisions are structured differently, the language used is identical, and in my view, the meaning is the same.

[42] I find the PSSRB's reasoning in these decisions persuasive and applicable to the issues presented in this case.

[43] Based on the language in the *PESRA*, I have determined that the employer was obligated to make an application to the Board for an extension of time at the earliest possible opportunity in advance of the expiration of the 90-day time limit and early enough to allow the Board sufficient time to fully appraise the parties' positions.

[44] Applying these principles to the facts of this case, the employer did not apply to the Board to extend the time limit for implementing the collective agreement until after the 90-day time limit to implement it had expired. Nor did it apply to extend the time limit before the bargaining agent made this s. 70 reference to the Board, on May 29, 2019. The employer raised the prospect of an extension for the first time by way of its response to the reference, on July 5, 2019.

[45] Clearly, the employer's application for an extension of time to implement the provisions of the collective agreement was not made in accordance with s. 43(1)(b) and it is therefore not granted.

B. Application for a preliminary order declaring that by failing to implement the agreement within the 90-day deadline, the employer contravened s. 43(1)

[46] Is not disputed that as of the date of the application, May 29, 2019, until at least October 23, 2019, the terms of the memorandum of agreement had not been implemented, and the bargaining unit members continued to earn the same pay as they did in 2014.

[47] The employer stated that it encountered delays processing the economic increases, that it had not been able to issue payment within 90 days as expected, and that the delays were caused in part by the House of Commons preparing the salary grid and by issues with the Phoenix pay system.

[48] The Board has issued a number of preliminary orders in other cases involving delays caused by the implementation of the Phoenix pay system. Those cases involved this and other bargaining agents making complaints to the Board under the analogous provisions (see s. 117) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) alleging that the Treasury Board as the public service employer had failed to implement the provisions of collective agreements. See, for example, *Professional Association of Foreign Service Officers v. Treasury Board*, 2019 FPSLREB 69. The bargaining agent has requested that a similar preliminary order be made in this case.

[49] Although the Board granted those preliminary orders with the Treasury Board's consent, the factual circumstances are virtually similar, and I see no reason to depart from the approach taken in those cases.

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

(The Order appears on the next page)

V. Order

[51] The bargaining agent filed a reference to the Board under s. 70 of the *PESRA* alleging that the employer failed to implement the provisions of the collective agreement between them within the period specified in the collective agreement, contrary to s. 43(1) of the *PESRA*.

[52] The employer acknowledged in its response that it did not fully implement the agreement by the March 20, 2019, deadline.

[53] Therefore, it is declared that by failing to implement the agreement ratified on December 20, 2018, within the 90-day deadline as prescribed in s. 43(1) of the *PESRA*, the employer is in violation of that Act.

[54] To effectively manage the determination of the outstanding issues in this matter, including whether the violation of s. 43(1) of the *PESRA* constitutes a breach of an employer obligation in accordance with s. 70, the Board will remain seized of the matter to determine whether in the circumstances the violation constituted a breach of an employer's obligations pursuant to s. 70 and to determine the appropriate remedy based on the facts.

[55] To that end, a pre-hearing conference will be held on a date to be scheduled, at which time the employer shall confirm to the bargaining agent whether the collective agreement signed on December 20, 2018, has been fully implemented for all employees, and if so, as of what date.

[56] If the implementation is not complete, the employer shall advise the bargaining agent of the number of employees for whom it has not been implemented.

[57] The parties are encouraged to meet in the meantime to resolve all outstanding matters and to reach a mutually agreeable resolution.

[58] During the pre-hearing conference, the parties will provide the Board with a status report on the progress, if any, that has been made to resolve all outstanding matters, including determining the appropriate remedy.

[59]

[60] Hearing dates to deal with the outstanding parts of the reference will be set at the conclusion of the above-noted exchange of information, if required.

January 7, 2020

David Olsen,
A panel of the Federal Public Sector
Labour Relations and Employment Board