Date: 20200925

File: 521-02-41990

Citation: **2020 FPSLREB 89**

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

KEITH HERBERT

Applicant

and

DEPUTY HEAD
(Parole Board of Canada)

Respondent

Indexed as
Herbert v. Deputy Head (Parole Board of Canada)

In the matter of a request for the filing of a Board order in the Federal Court under subsection 234(1) of the *Federal Public Sector Labour Relations Act*

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Howard Markowitz, counsel

For the Respondent: Michel Girard, counsel

Decided on the basis of written submissions,
filed August 13 and September 2 and 11, 2020.

REASONS FOR DECISION

I. Request before the Board

[1] The applicant, Keith Herbert, seeks the filing of a letter dated August 6, 2020, from the Chairperson of the Federal Public Sector Labour Relations and Employment Board ("the Board"), in the Federal Court (FC) pursuant to s. 35 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "the *Act*").

II. Summary of the evidence

[2] The applicant filed a series of grievances, which were heard by Board Member John Jaworski. Mr. Jaworski issued his decision on the grievances on September 11, 2018. He allowed the termination grievance and dismissed the other grievances that were heard at the same time (see 2018 FPSLREB 76). At the hearing, the parties had requested that it be bifurcated, meaning that the issue of remedy would be addressed later. As part of his order in the written decision, Mr. Jaworski ordered the parties to agree to hearing dates for the remedy phase. Hearing dates were set for September 30 to October 2, 2019.

[3] On September 24, 2019, the applicant's new counsel, Mr. Markowitz, filed an application before the Board requesting that among other things, Mr. Jaworski recuse himself. As the arbiter of whether a Board member is in a position of conflict is the Board member, the matter was referred to Mr. Jaworski for decision. He dismissed the application (in 2020 FPSLREB 28) on March 17, 2020.

[4] I take notice that in normal circumstances, a party wishing to judicially review a Board decision has 30 days from the decision date to file the notice of judicial review with the Federal Court of Appeal (FCA). On March 14, 2020, due to the COVID-19 pandemic, the 30-day timelines for filing a judicial review of the Board's decisions were frozen. They restarted on September 14, 2020.

[5] On July 14, 2020, the Board received a second motion for recusal, this time addressed to its chairperson. The applicant wanted Mr. Jaworski removed from his file and the file reassigned to a different Board member. He also sought an order permitting the relitigation of Mr. Jaworski's findings in the matters that had been dismissed, as well as an order directed at the respondent and compelling it to enter into an agreed statement of facts.

[6] The respondent was provided the opportunity to respond to the second motion. It relied on the doctrine of issue estoppel, arguing that the recusal matters had been decided, as had the questions that the applicant sought to have relitigated.

[7] On August 6, 2020, the Chairperson responded to the applicant in the letter, denying his requests. She stated that unless the FCA directed him otherwise, Mr. Jaworski would remain seized of the files. That same day, counsel for the applicant responded to the Chairperson by email, insisting that the initial recusal request, dated September 24, 2019, had not been duplicated. This request was new and was based on Mr. Jaworski's March 17, 2020, decision, and her failure to consider the new grounds for recusal was a breach of natural justice. On August 10, 2020, the Chairperson confirmed her directions of August 6, 2020, by email, to the applicant's counsel.

[8] On August 13, 2020, the applicant sent a request to the Board, asking that the Chairperson's letter be filed with the FC, citing s. 35 of the *Act*. The stated rationale was that "… once the decision is filed with the Federal Court it appears that we are then free to file for a judicial review of Mr. Jaworski's decisions". The applicant also asks for answers to what he perceives as unanswered questions about the relitigation of evidence and the order to prepare an agreed statement of facts.

[9] Again, the respondent was given the opportunity to respond to the application. On September 2, 2020, in writing, it submitted its point of view that filing the Chairperson's letter under s. 35 is not a condition precedent to the judicial review of Mr. Jaworski's decisions and that doing so would serve no purpose.

III. Reasons

[10] The Chairperson's letter was very clear. In my opinion, it addressed all the issues that the applicant sought to have remedied. Mr. Jaworski would not be removed from the hearing of his file unless directed by the FCA, which required an application for judicial review. As a consequence, the conclusion of the matter and any process related to that conclusion, including recording hearings and an agreed statement of facts, were strictly within his bailiwick.

[11] Repeated recusal applications will not result in a different result, as the arbiter does not change. The arbiter of whether a Board member is biased or a conflict of interest in the hearing process exists is him or her, as Mr. Jaworski explained in his

decision, 2020 FPSLREB 28. The proper process for challenging a Board member's decision is through the judicial review process.

[12] The applicant mistakenly referred to s. 35 of the *Act*. In fact, he quoted the text from s. 35 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), as it was then named, which was repealed and replaced with s. 234(1) of that Act under its current name, the *Federal Public Sector Labour Relations Act* (*FPSLRA*), which states as follows:

> ***Filing of order in Federal Court***
>
> ***234 (1)*** *The Board must, on the request in writing of any person who was a party to the proceedings that resulted in an order of an adjudicator or the Board, as the case may be, file a certified copy of the order, exclusive of the reasons for it, in the Federal Court, unless, in the opinion of the Board,*
>
> ***(a)*** *there is no indication, or likelihood, of failure to comply with the order; or*
>
> ***(b)*** *there is another good reason why the filing of the order in the Federal Court would serve no useful purpose.*
>
> ***Non-application***
>
> ***(2)*** *Section 35 of the* Federal Public Sector Labour Relations and Employment Board Act *does not apply to an order of the Board referred to in subsection (1).*
>
> ***Effect of filing***
>
> ***(3)*** *An order of an adjudicator or the Board becomes an order of the Federal Court when a certified copy of it is filed in that court, and it may subsequently be enforced as such.*
>
> [Emphasis in the original]

[13] I will consider this application as if it had been filed under s. 234 and the employer's response as if it had also been filed under that section.

[14] The applicant insists that the Board has no discretion and that it must file the August 6, 2020, letter in the FC. For its part, the respondent argues that conditions precedent must be met before the Board must comply with the applicant's request. In essence, s. 35 of the *PSLRA*, now s. 234 of the *FPSLRA*, is a discretionary and not a mandatory provision, as the applicant argues.

[15] Section 234 is in fact discretionary within the limited circumstances identified in paragraphs (1)(a) and (b). Its purpose is to ensure compliance with Board orders, such as reinstatement orders, disclosure orders, or summonses to appear, when the

Board has an indication of or when it is likely that one of its orders will not be complied with. Other circumstances include when it is deemed in the public interest to file the order or when it serves some other purpose useful to the maintenance of good labour relations.

[16] In the case before me, the Chairperson relied on Mr. Jaworski's assessment that he is not in a conflict of interest position and that he has no reason to believe that there is an impediment to him completing the hearing process. Dates were set for the hearing, and there is no likelihood that Mr. Jaworski will not conclude his assigned duties. Consequently, there is no likelihood that her direction in August 6, 2020, letter will not be complied with; he will remain seized of the matter unless the FCA orders otherwise. Accordingly, I find that the exception to filing a Board order set out in s. 234(1)(a) has been met.

[17] Another stated reason that the applicant identified for filing the August 6, 2020, letter is to facilitate the judicial review of Mr. Jaworski's decisions. Nowhere does the *Act* stipulate that a condition precedent to filing a notice of the judicial review of a Board order or an adjudicator's decision requires a process such as the applicant has followed in this case. The judicial review process is initiated by the aggrieved party filing a "Notice of Judicial Review" in the FCA under the *Federal Court Rules* (SOR/98-106). It does not require that correspondence between the Board and the parties be filed with the FC in advance of filing the notice.

[18] For that reason, I conclude that s. 234(1)(b) applies and that filing the August 6, 2020, letter would serve no reasonable purpose.

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

(The Order appears on the next page)

IV. Order

[20] The application is dismissed.

September 25, 2020.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board