Date: 20210318

File: 525-02-42430
XR: 566-02-42257

Citation: 2021 FPSLREB 28

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

SUSAN KRUSE

Applicant

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Kruse v. Deputy Head (Canada Border Services Agency)

In the matter of a request for the Board to exercise any of its powers under section 43 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: John King

For the Respondent: Alexandre Toso, counsel

Decided on the basis of written submissions, filed January 26 and February 11 and 17, 2021.

REASONS FOR DECISION

I. Request before the Board

[1] The applicant, Susan Kruse, seeks a review, pursuant to s. 43 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") of the decision rendered by the Federal Public Sector Labour Relations Board ("the Board") on January 6, 2021. It dismissed her request to allow her grievance to proceed to adjudication without the support of her bargaining agent, as required by the *Act*. She asks that the Board reconsider its decision not to accept her grievance filed in Board file 566-02-42257 for adjudication.

[2] The basis of the request to proceed to adjudication was that the applicant had the right to as the grievance had been filed under s. 208 of the *Act*, which means that it did not require a bargaining agent's support to proceed to adjudication. The Board Member assigned to the file determined that s. 209(2) requires that grievors have a bargaining agent's support for all grievances related to the interpretation of a collective agreement to proceed to adjudication. As the applicant's grievance was related to matters of a collective interpretation issue, the Board determined that she did not comply with the requirements set out in s. 209 to permit the referral of her grievance to the Board and ordered that her file be closed without proceeding to adjudication.

II. Overview

[3] The issue between the parties arose over the question of the applicant's leave record. The Board decided the question of whether it would hear her grievance in *Kruse v. Treasury Board*, 2020 FPSLREB 85. The grievance was dismissed, and the applicant did not seek judicial review of that decision. Nevertheless, she proceeded to file another grievance under s. 208 of the *Act* related to the same subject matter, without the support of her bargaining agent. When the grievance was referred to adjudication, the Board Member received written submissions from the parties as to the Board's jurisdiction to hear the matter. Having considered the submissions, the Board directed its Registry to refuse to accept the referral to adjudication and to close the file (Board file no. 566-02-42257), as it did not comply with the provisions of the *Act*. That decision became the subject of this application for review under s. 43.

[4] After this application was filed, the Board directed the parties to provide submissions on the question of whether the Board could use its powers under s. 43 of the *Act* to review a decision made under Part 2 of the *Act*.

[5] The applicant presented her argument as to why s. 43 should apply in this case. For the purposes of this matter, the respondent, the deputy head of the Canada Border Services Agency, did not oppose the Board's jurisdiction, However, the respondent stated that it was not necessary to make any decision with respect to the jurisdiction to act under s. 43. It objected to the application of s. 43 in this case as the applicant's request is not rightly a request to review, rescind, or amend a Board order or decision but rather an attempt to reargue the merits of the case.

[6] Whether the Board's power under s. 43 could be used to review a decision made under Part 2 is an open question. However, I agree with the respondent that it is unnecessary at this time to make a decision on the question of the application of s. 43 to Part 2 decisions. As will be set out in greater detail, even if s. 43 could be used, the applicant failed to lay the necessary foundation to trigger its application.

III. Summary of the arguments

A. For the applicant

[7] The applicant seeks the review of the order, and she proposed an alternate solution. According to her, if the panel of the Board still maintains that the grievance in Board file no. 566-02-42257can be nothing other than an interpretive grievance that requires union support, despite what has already been presented, she proposed two options to make her point and to alleviate any related concern.

[8] The first proposal was that if the respondent can admit that the applicant's personal-leave status report was altered to reflect a five-year absence beginning on the date she was hired, which does not accurately account for her attendance for that period, the Board could issue an order directing the respondent to correct the personal-leave status report by replacing the false start date of continuous service of November 15, 1995, with the original and correct date of March 19, 1990.

[9] Alternatively, the applicant proposed that the panel of the Board review the two before-and-after personal-leave status reports and issue an order based on the recorded facts. There is no need for her to refer to or argue the interpretation of any

collective agreement provision to establish her right to an accurate attendance record under the law.

[10] Allowing the applicant to exercise one of these options would be consistent with the exception noted in s. 43(2) of the *Act* as there was no right acquired by virtue of the Board's previous decision refusing the right to the referral to adjudication.

B. For the respondent

[11] The power to review, rescind, or amend a Board order or decision pursuant to s. 43 does not preserve the Board's jurisdiction to make a new determination on the same facts. The Federal Court of Appeal has confirmed that a "… request for reconsideration under section 43 of the PSLRA is neither an appeal nor a request for a redetermination" (see *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376 at para. 8; and *Bernard v. Canada (Revenue Agency)*, 2017 FCA 40 at para. 14). Therefore, even if s. 43 could apply with respect to decisions made under Part 2, it would not displace the common law doctrine of *functus officio* (the principle that an office holder having discharged their duty no longer has authority to continue making decisions) or the principle that Board decisions are final pursuant to s. 34(1).

[12] Thus, the powers under s. 43 are not an alternative method of appeal. The applicant seeks only to attack the Board's central determination on its merits, without bringing fresh evidence or new arguments that could not have been brought earlier. This is apparent throughout her submissions, in which she explains how she disagrees with several excerpts of the Board's decision and rewords arguments that were already submitted to the Board.

[13] As the power to review, rescind, or amend a Board order or decision excludes an appeal or a redetermination, s. 43 is inapplicable to preserve the Board's jurisdiction in this case. The Board would lack jurisdiction to do so whether that decision had been rendered under Part 1 or Part 2.

[14] Section 43 does not preserve the Board's jurisdiction when the applicant seeks to relitigate the merits of the case instead of following the normal recourse to challenge the correctness or reasonableness of a decision (see *Bialy v. Gordon*, 2016 PSLREB 109 at paras. 8 and 9). The doctrine of *functus officio* has exhausted its jurisdiction to issue another decision on the same facts.

[15] The applicant did not request to review, rescind, or amend the Board's decision but rather requested an appeal or a redetermination. As a result, s. 43 is inapplicable, and the Board should dismiss the application on its face.

IV. Reasons

[16] Given the structure of the *Act* and the division of powers between its Part 1 and Part 2, there is uncertainty as to whether s. 43 could be applied in this case. However, even if it could, I am of the view that the applicant did not meet her burden of establishing that a review of the decision at issue is warranted.

[17] In *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39, the Board Member set out the guidelines or criteria for reconsidering a Board decision. A decision made under s. 43 cannot relitigate the merits of a case and must be based on a material change in circumstances or present new evidence or argument that could not reasonably have been presented at the original hearing (see paragraph 29). The applicant did not bring forward any new evidence or argument; nor did she allege a material change in support of a s. 43 application. Instead, it is evident that she seeks only to reargue the matter as she disagrees with the outcome.

[18] The crux of the applicant's argument is that the Board was incorrect in determining that the matter raised in Board file no. 566-02-42257 could not proceed to adjudication. She did not present any new evidence. Instead, she merely restated her view that "all grievances filed in accordance with section 208 of the *Act*, unless otherwise stipulated, are considered and treated in the same manner, meaning that all are equally adjudicable".

[19] This points to a fundamental misunderstanding of the authority granted by the *Act* to the Board to hear a grievance. The applicant may assert that all matters that may be presented under s. 208 are equally adjudicable under s. 209, but that is not so, as was explained to her in the decision she wishes the Board to review.

[20] The applicant restated her argument that the Board should rehear the matter as it relates to the interpretation of a statute (the *Criminal Code of Canada* (R.S.C., 1985, c. C-46)). This is not a new argument, and even if it were, it is not a ground for a referral to adjudication. Alternatively, the applicant argued that the matter could be referred under s. 209(1)(b). However, she did not bring forward any new facts or

argument to support her contention that the matter at issue related to any disciplinary action to bring it within the scope of that provision.

[21] I agree with the respondent that this is an attempt to relitigate decisions made by a panel of the Board. The applicant seeks to have the Board change its mind and allow the grievance, filed ostensibly under s. 208 of the *Act*, to be referred to adjudication. The applicant seeks to secure an outcome different from that obtained in the grievance in Board file no. 566-02-42257 without providing any foundation for making an application under s. 43. She provided no new information that was unavailable when the original grievance was filed. She seeks a reversal of the original decision based solely on her disagreement with its conclusion Accordingly, her recourse does not lie with this Board.

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

(The Order appears on the next page)

V. Order

[23] The application is dismissed.

March 18, 2021.

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