Date: 20210609

File: 561-02-42518

Citation: 2021 FPSLREB 64

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

JAMES TACHOVSKY

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Tachovsky v. Public Service Alliance of Canada

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Yafa Jarrar

Decided on the basis of written submissions,
filed January 27, March 1 and 15, and May 6 and 13, 2021.

REASONS FOR DECISION

I. Complaint before the Board

[1] On January 27, 2021, James Tachovsky ("the complainant") made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") against his bargaining agent, the Customs and Immigration Union (CIU), a component of the Public Service Alliance of Canada, which is the respondent in this case. The respondent is the bargaining agent that represents the complainant's bargaining unit within the Canada Border Services Agency, which is where he works.

[2] The complainant alleged that the respondent committed an unfair labour practice, based on the following action, as quoted from his initiating complaint document:

> …
>
> *My union representatives have treated certain employees differently based on the employees [sic] desire to promote themselves upward. The union has stated that any employees who have performed "managerial duties" within the last 3 months or those who are currently in a competition for promotion are ineligible to participate in the workplace OHS* [occupational health and safety] *committee. This rule was created arbitrarily by the union and singles out and discriminates against those who desire to seek development and promotion for themselves and who also wish to actively participate in their workplace OHS committee.*
>
> …

[3] As corrective action, the complainant requested "… that the union remove all discriminatory language in their selection criteria for OHS members …".

[4] In its response, the respondent argued that the complaint deals with an internal union policy, and as such, falls outside the Board's jurisdiction. In addition, there is no evidence of any breach of s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which deals with the bargaining agent's duty of fair representation.

[5] The complainant replied that the respondent breached s. 188(b) of the *Act* when it denied certain employees access to and membership in an employee organization. He argued that the OHS committee is an employee organization.

[6] After considering the complaint and further exchanges, I decided that I would render a preliminary decision on the following two questions:

> 1) Does the Board have jurisdiction to decide this complaint?
> 2) If so, was the respondent's direction with respect to OHS committee membership discriminatory?

[7] The parties were offered an opportunity to add to their arguments but essentially declined to. They simply reiterated their respective positions.

[8] For the reasons that follow, I find that the Board does not have jurisdiction over this dispute, and therefore, there is no need to answer the second question.

II. Context

[9] According to the complainant, a conflict first arose between him and CIU representatives when he was a member of the OHS committee in his workplace, the Pacific Highway Traffic Operations area within the Canada Border Services Agency. Once he discovered that the employee co-chair should be elected by the employee members and not appointed by the CIU, as was the case, he tried to force a vote. He alleges that as a result, the CIU disbanded the OHS committee and put in place a new criterion precluding any employee who had had managerial responsibilities in the previous six months (amended later to three months) from participating in the committee.

[10] The CIU did disband the employee side of the OHS committee after it discovered that people without the required authority had appointed certain members to it. The CIU executive agreed that the employee members should select the employee chairperson. It did exclude people who had had managerial responsibilities in the last six (then three) months, to ensure that members be "… free of real or apparent conflicts of interest …" . It also stated that if an employee on the committee were to carry out managerial duties on an acting basis or participate in a selection board, then the employee would need to step down from the OHS committee and apply for reappointment once the acting appointment or staffing process ended.

[11] According to the complainant, a Labour Canada investigator advised him that there was no reason to exclude an employee not currently in a managerial role from the OHS committee.

III. Summary of the arguments

A. For the complainant

[12] The complainant argues that it is discriminatory for the respondent to exclude from the OHS committee employees who seek a promotion or further experience in a managerial role, once they are no longer in such a role. In other words, while a person is in the bargaining unit, he or she should be allowed to be on the OHS.

[13] The complainant invokes s. 188(b) of the *Act*, which reads as follows:

> ***188*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> …
>
> ***(b)*** *expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner ….*

[14] According to the complainant, the OHS committee is an employee organization, charged under the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*) with protecting the health and safety of employees. This would be part of the "… regulation of relations between the employer and its employees …", which is the purpose of the employee organization as defined by the *Act*.

[15] The complainant also argues that the Board must have jurisdiction to deal with such matters; if not, the bargaining agent can freely discriminate against its members, and there is no recourse.

B. For the respondent

[16] The issue raised by the complainant is an internal union matter, over which the Board does not have jurisdiction. Section 187 of the *Act* deals with the bargaining agent's duty to fairly represent employees in their dealings with the employer. Nothing in the allegations relates to any action by the employer or any representation by the bargaining agent in the complainant's dealings with the employer.

[17] In this case, the complainant takes issue with an internal rule set up by the CIU to select members for the OHS committee. The Board has no authority under the *Act* to intervene in an internal union matter.

IV. Analysis

[18] The first question I must decide is whether the Board has jurisdiction to decide the complaint. The *Act* gives the Board limited authority to intervene in the relationship between the bargaining agent and the employees it represents. The Board may intervene if an employee alleges that the bargaining agent failed its duty of fair representation (s. 187). The parties agree that that is not at issue in this case.

[19] The Board may also intervene if an employee organization denies someone membership in it for discriminatory reasons. In this case, the complainant asserts that the respondent committed an unfair labour practice; specifically, it contravened the prohibition found at s. 188(b) — denying membership in the employee organization in a discriminatory manner.

[20] The term “employee organization” is defined in the *Act* at s. 2(1)(a) and reads as follows: “… an organization of employees that has as one of its purposes the regulation of relations between the employer and its employees for the purposes of Parts 1 and 2 …”.

[21] The definition mentions Parts 1 and 2 of the *Act*, which deal respectively with labour relations and grievances. It does not mention Part 3, which deals with occupational health and safety. Part 3 specifies that Part II of the *CLC* applies to the federal public service and that the term “trade union” used in the *CLC* must be understood as “employee organization” as defined at s. 2(1)(a) of the *Act*.

[22] The complainant argues that the OHS committee can be seen as an employee organization and that consequently, s. 188(b) applies to his situation. I cannot agree with that reasoning.

[23] There is no confusion in the *CLC* between the terms “trade union” and “OHS committee”. A trade union, defined as “… any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees …”, selects members for the workplace OHS committee (*CLC*, s. 135.1(1)(b)(ii)). The committee is established “[f]or the purposes of addressing health and safety matters that apply to individual work places …” (*CLC*, s. 135(1)). Its mandate is limited and is not that of the employee organization (under the *Act*) or the trade union (under the *CLC*).

[24] The complainant’s argument that the respondent’s action precludes membership in an employee organization must fail; an OHS committee is not an employee organization. The employee members of the committee are selected by the employee organization, which sets the selection criteria. The respondent is right to say that this is an internal union matter.

[25] I find that the Board does not have jurisdiction over the dispute between the complainant and his bargaining agent, as the *Act* provides no authority for the Board to intervene in matters such as selecting OHS committee members. Had the complainant been prevented from belonging to the employee organization that is his bargaining agent, the Board would have jurisdiction. It is not so in this case.

[26] Since the Board does not have jurisdiction to consider the matter, the second question need not be answered.

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

(The Order appears on the next page)

V. Order

[28] The complaint is dismissed.

June 9, 2021.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board