Date: 20220601

File: 561-34-44263

Citation: 2022 FPSLREB 47

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

TONY MUSOLINO

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Musolino v. Canada Revenue Agency

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: Nick Gualtieri, director, Labour Relations Division

Decided on the basis of written submissions, filed February 17 and March 21, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] On November 30, 2021, Tony Musolino ("the complainant") filed an unfair labour practice complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") against both his employer, the Canada Revenue Agency ("the respondent" or "the employer"), and his bargaining agent, the Professional Institute of the Public Service of Canada ("the bargaining agent").

[2] The complaint was made under s. 185 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which defines "unfair labour practice" as follows: "In this Division, ***unfair labour practice*** means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1)" [emphasis in the original].

[3] The complainant stated that both the employer and the bargaining agent breached the collective agreement and committed an unfair labour practice by implementing a policy. It was unclear what policy he referred to.

[4] On December 2, 2021, the bargaining agent asked for further particulars, as it was unclear from the complaint what actions had amounted to an unfair labour practice. The employer did not respond to the initial complaint.

[5] On December 6, 2021, the Board requested the following particulars from the complainant, as it had concerns of its own:

> 1. *It is unclear under what section of the* FPSLRA *the complaint is made. There is no complaint in the legislation where both the bargaining agent and the employer would be respondents. Please specify what article is invoked. Section 185 is not sufficient.*
> 2. *How are the cited articles of the collective agreement breached by either respondent?*
> 3. *What is the "policy" the complainant is referring to?*
> 4. *Has the complainant made a grievance related to the same issue?*
>
> …

[6] The Board extended the deadline for a response several times. The complainant responded on February 17, 2022. He stated that his complaint was made under s. 190(1)(g) of the *Act*, which reads as follows:

> ***190 (1)*** *The Board must examine and inquire into any complaint made to it that*
>
> …
>
> ***(g)*** *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

[7] Specifically, his complaint concerned the mandatory COVID-19 vaccination policy ("the vaccination policy") that the employer applied to all employees in November 2021, under which they had to be fully vaccinated against COVID-19 as a condition of employment; if not, they would be suspended without pay.

[8] In his response providing his particulars, the complainant detailed his case against the employer, under s. 186 (2)(a)(iv) of the *Act*, and against the bargaining agent, under s. 187 of the *Act*. The Board directed that the complaint be split in two. One complaint, bearing file number 561-34-44262, is the complaint against the bargaining agent under s. 187 of the *Act* for failing its duty of fair representation. It is dealt with in a separate decision.

[9] This decision deals with the complaint, bearing number 561-34-44263, which is against the employer for committing an unfair labour practice as defined under s. 186(2)(a)(iv) of the *Act*.

[10] Section 186(2)(a)(iv) of the *Act* reads as follows:

> ***186(2)*** *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position … shall*
>
> ***(a)*** *Refuse to employ or to continue to employ, or suspend, lay off … or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> …
>
> ***(iv)*** *has exercised any right under this Part* [Labour Relations] *or Part 2 or 2.1* [Grievances] *….*

[11] According to the complainant, the vaccination policy that the employer implemented on November 8, 2021, is unreasonable in light of the collective agreement. No provision in the collective agreement would allow the employer to impose mandatory vaccination on its employees.

[12] The complainant argues that no scientific evidence supports the vaccination policy, which amounts to imposing medical treatment on employees without their consent. According to him, it is unclear what analysis was undertaken to conclude that the vaccine had to be imposed.

[13] The complainant further argues that workplace health and safety concerns cannot extend beyond the workplace. The following extract of his February 17, 2022, response summarizes his position on the vaccination policy:

> …
>
> *COVID-19 is not a workplace risk but a universal risk and is no different from any number of communicable diseases or other day-to-day dangers like crime or air pollution. Accordingly, requiring an employee to submit to the vaccine against COVID-19 as a condition of employment is outside the employer's scope of authority.*
>
> *CRA contends that the Policy involves health and safety, and the employer's obligation to take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees absent an analysis of the data and evidence to support the scope of the Policy.*
>
> …

[14] According to the complainant, the employer has not demonstrated any risk associated with someone like him, who works from home, from not being vaccinated. The employer does not have the statutory authority to require a vaccine. Moreover, with the Omicron variant becoming dominant as the vaccination policy was put into effect, the vaccine's impact was more than questionable. According to the complainant, case rates were higher for vaccinated than unvaccinated Ontarians, until the provincial government stopped reporting test results.

[15] The complainant submits that the vaccination policy is contrary to s. 2 of the *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) ("the *Charter*"), by denying freedom of conscience and religion

and contrary to s. 7 by violating the right to life, liberty, and security and that it infringes rights protected under the *Canadian Bill of Rights* (S.C. 1960, c. 44).

[16] The employer refused to grant the complainant a religious accommodation, thus denying him his right under s. 2 of the *Charter* to freedom of religion and conscience. The vaccination policy violates s. 7 by forcing employees to submit to an experimental medical procedure contrary to their wills and without fully informed consent.

[17] The vaccination policy is also discriminatory, as it assumes without proof that unvaccinated persons pose a threat to others. This is discrimination on the basis of a perceived impairment. Even if unvaccinated persons pose a risk, many mitigation measures can be applied and were in fact applied in the preceding months. According to the complainant, vaccination may in fact pose a higher risk of contracting the Omicron version of COVID-19. By mandating the vaccine, the employer is in fact creating a dangerous workplace situation. The complainant argues that he is entitled to refuse a dangerous workplace situation, but the employer's reaction was to place him on leave without pay, which was a punitive reaction for refusing dangerous conditions at work. By creating the administrative leave without pay, the employer went beyond the terms of the collective agreement. Employees request leave; it is not imposed on them.

[18] The employer denied the complainant the possibility of using his vacation leave to cover the leave without pay. According to him, the bargaining agent refused to represent him in this matter because there is no collective agreement violation.

[19] The complainant asked for the following remedies:

- an interim award of vacation leave retroactive to the requested date, and a revision of the letter placing him on leave once the vacation leave is completed;
- a declaration that the vaccination policy is *ultra vires* the collective agreement and therefore has no force and effect;
- a declaration under s. 24 of the *Charter* that the vaccination policy violates its ss. 2(a) and 7;
- a declaration that it is unreasonable to place employees on administrative leave without pay if they do not get fully vaccinated;
- a declaration to provide a testing option to those who have not been vaccinated; and
- a declaration instructing the employer to amend the vaccination policy so that employees shall not be placed on administrative leave without pay, including full restitution to all employees currently on administrative leave.

II. The respondent's objection

[20] The respondent answered the detailed complaint on March 21, 2022.

[21] The respondent objected to the complaint, stating that the Board did not have jurisdiction to hear it. It submitted that the proper avenue for the complainant to dispute the terms and conditions of his employment is to file a grievance, which he has not done. In this case, according to the employer, the bargaining agent's support is not required, as the employer's vaccination policy falls outside the collective agreement's parameters.

[22] However, even if a grievance were filed under s. 208 of the *Act*, the Board would not have jurisdiction to hear it, since the vaccination policy does not relate to any disciplinary action, and thus, the Board would not have jurisdiction under s. 209.

[23] The complainant had until April 15, 2022, to respond to the employer's objection. He did reply on that date, but only to the bargaining agent's submissions. He did not pursue any further his case against the employer.

III. Analysis

[24] Since the complainant did not file a grievance with the employer under s. 208 of the *Act*, there is no need for the Board to pronounce further on the possibility of referring such a grievance to the Board once it has gone through all the levels of the grievance process.

[25] However, it is clear that the complaint as formulated cannot stand. The vaccination policy is not an unfair labour practice within the meaning of s. 186(2)(a)(iv). It has not deprived the complainant of his rights under the *Act* under Parts 1 and 2. It does not affect the labour relations right to form or join an employee organization or for that employee organization to bargain collectively. Nor does the policy deprive the complainant of the right to grieve under s. 208(1)(b), which reads as follows:

> ***208 (1)*** *Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> …
>
> ***(b)*** *As a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[26] The complainant argued that his bargaining agent had refused to represent him, and therefore he could not file a grievance pursuant to s. 208(4) of the *Act*, which reads as follows:

> ***208 (4)*** *An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.*

[27] Although the application or interpretation of the collective agreement could come into play when discussing leave or discrimination, the vaccination policy itself, and its consequences for unvaccinated employees, is outside the terms of the collective agreement, as the complainant pointed out. Therefore, nothing prevented him from exercising his right to grieve a policy that according to him, affected his terms and conditions of employment.

[28] The complainant has provided no allegation or argument to show how, by adopting the vaccination policy, the respondent has contravened s. 186(2)(a)(iv) of the *Act* by refusing to employ him or suspending him or otherwise discriminating against the complainant because he exercised any right under Part 1 or 2 of the *Act*. There is nothing in the allegations to show that he has exercised those rights. Consequently, I must dismiss the complaint.

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

(The Order appears on the next page)

IV. Order

[30] The complaint is dismissed.

June 1, 2022.

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