Date: 20220601

File: 561-34-44262

Citation: 2022 FPSLREB 46

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

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Musolino v. Professional Institute of the Public Service 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: Martin Ranger, counsel

Decided on the basis of written submissions, filed December 2, 2021, and February 17, March 21, and April 15, 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 his bargaining agent, the Professional Institute of the Public Service of Canada ("the respondent"), and his employer, the Canada Revenue Agency ("the employer").

[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 complaint stated that both the employer and the respondent breached the collective agreement and committed an unfair labour practice by implementing a certain policy.

[4] On December 2, 2021, the respondent asked for further particulars, as it was unclear from the complaint what actions were considered an unfair labour practice.

[5] On December 6, 2021, the Board requested further particulars from the complainant, as it had concerns of its own. The request was worded as follows:

> *The Board requests that the Complainant provide particulars to the above-cited complaint. Until the Board receives these particulars, the respondents do not have to respond.*
>
> *In more detail, the particulars that are required are:*
>
> 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.

[8] The complainant argued that s. 187 applied to the respondent. That section reads as follows:

> ***187*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[9] 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. He further alleges that the policy was developed with the respondent's support.

[10] The complainant argues that there is nothing to support a 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 policy had to be imposed, and it is also unclear what analysis the respondent carried out before deciding to support the employer in this endeavour.

[11] 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.*

…

[12] 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, yet the respondent has done nothing to protect employees against such abuse.

[13] 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).

[14] 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.

[15] As to his specific complaint against the respondent, its agreement with the employer's actions of imposing the vaccination policy and denying employees their rights violated its duty to represent its members fairly.

[16] The respondent agreed with the employer's decision to create administrative leave without pay, which deprived the complainant of his salary. The respondent failed to protect employees' interests and enforce the terms of the collective agreement.

[17] The employer denied the complainant the possibility of using his vacation leave to cover the leave without pay. The respondent refused to represent him in this matter because according to it there is no collective agreement violation.

[18] Despite including the respondent in his complaint, the complainant did not ask for any specific remedy stemming from his dispute with the respondent. All requested remedies were directed at the employer.

[19] The Board directed that the complaint be split in two. One complaint, bearing file number 561-34-44262, is the complaint against the respondent under s. 187 of the *Act*. The other complaint, bearing number 561-34-44263, is a complaint against the employer under s. 186(2)(a)(iv). This decision deals only with the first complaint. The other one is dealt with in another decision.

II. The respondent's position

[20] On October 6, 2021, the federal government announced the vaccination policy, which was mandatory, applying to employees in the core public administration (Treasury Board employees). The respondent states that it was not consulted on this policy. It retained the services of an experienced labour relations consultant to assess the merits of challenging the policy. The advice it received was that it was probable that an adjudicator would uphold the policy as reasonable.

[21] The respondent also consulted other experienced labour lawyers, who came to the same conclusion. A number of the complainant's statements were considered, in the consultant's legal opinion, as likely arguments to challenge the vaccination policy, such as the following:

- The scientific justification of the vaccination policy is not valid.
- Masking and rapid testing should be sufficient to protect public servants' health and safety.

- Mandatory vaccination should apply only to employees working with medically vulnerable people.
- Mandatory vaccination should not apply to those working from home.
- The vaccination deadline should be extended for workers who would not return to the workplace in the foreseeable future.
- Mandatory vaccination breaches s. 7 of the *Charter* as well as the *Privacy Act* (R.S.C., 1985, c. P-21).
- Mandatory vaccination is discriminatory.

[22] Given this legal opinion, the respondent's president determined that the respondent would not file a policy grievance to challenge the federal government's vaccination policy but that it would consider individual grievances. The respondent's board of directors confirmed that decision at its November 3 and 4, 2021, meeting.

[23] On November 8, 2021, the employer adopted the same mandatory vaccination policy as had the Treasury Board. The respondent did not collaborate on developing the employer's policy; nor was it consulted. It was briefed in late October 2021.

[24] According to the respondent, the complainant asked it to file a policy grievance against the vaccination policy. It declined but stated that it would consider an individual grievance from him, based on his circumstances.

[25] The complainant insisted on a policy grievance and stated that he was not interested in an individual grievance.

[26] The respondent's response to the complainant's contention that it failed its duty of fair representation is summarized in these three paragraphs of its response, which read as follows:

> …
>
> *18.* [The complainant] *filed detailed particulars in support of his duty of fair representation complaint. The particulars focus exclusively on the merits of challenging the Agency's mandatory vaccination policy.* [The complainant] *does not rely on any facts that could possibly establish that the Institute acting* [*sic*] *in a manner that was arbitrary, discriminatory or in bad faith in deciding that it would not file a policy grievance.*
>
> *19. The Institute sought both labour relations and legal advice concerning the merits of challenging the Agency's mandatory vaccination policy. In accordance with that advice, and in considering the best interests of the bargaining unit as a whole, the Institute chose not to file a policy grievance. Instead, it was prepared to file individual grievances on a case-by-case basis where unique circumstances warranted. Consistent with this*

> *strategy, it advised* [the complainant] *that it would consider filing a grievance based on the fact that he worked exclusively from home and therefore should not need to be vaccinated.* [The complainant] *expressly rejected any consideration of filing an individual grievance on his behalf.*
>
> *20. The Institute asks that* [the complainant]*'s complaint be summarily dismissed as it raises no reasonable prospect of success.*
>
> …

[27] The respondent cited several cases to illustrate the duty of fair representation in the context of mandatory vaccination policies. I will come back to the relevant case law in my analysis.

[28] Finally, the respondent notes that the complaint was made in November 2021. The vacation leave was denied in January 2022. Therefore, the bargaining agent's refusal to represent the complainant on that issue cannot be part of this complaint.

III. The complainant's reply

[29] On April 15, 2022, the complainant replied.

[30] He stressed the bargaining agent's role to fairly represent the interests of the bargaining unit members.

[31] He did not dispute the respondent's assertion that he had refused to be represented in an individual grievance to challenge the vaccination policy.

IV. Analysis

[32] The summary dismissal of a complaint requires that there be no arguable case; that is, even taking all the complainant's allegations as true, nothing in them supports a case against the bargaining agent for breaching the duty of fair representation.

[33] The duty of fair representation is defined in the negative in the *Act* at s. 187, which reads as follows:

> ***187*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[34] It is well established that the duty of fair representation is not a duty to respond to every member's wish in terms of representation, grievances, and strategy. One of the most relevant cases is a recent decision of the Canada Industrial Relations Board (CIRB), *Watson v. Canadian Union of Public Employees*, 2022 CIRB 1002. The facts are similar. Ms. Watson made a complaint against her union, alleging a breach of its duty of fair representation because it had decided that based on legal advice, it would not file a policy grievance against the employer's (Air Canada's) mandatory COVID-19 vaccination policy. The CIRB dismissed the complaint, stating that the union had no obligation to pursue a particular grievance to arbitration, as that decision was entirely the union's decision to make. The union, according to the CIRB, had fulfilled its duty of representation by turning its mind to the issue and taking all necessary steps to evaluate the chances of successfully challenging the policy.

[35] Similarly, in *Bloomfield v. Service Employees International Union*, 2022 CanLII 2453, the Ontario Labour Relations Board dismissed a complaint for lack of *prima facie* evidence of any breach of the duty of fair representation. The employees complained that the union did not represent their interests and their choice not to be vaccinated. The following paragraphs reflect that board's reasoning in dismissing the complaint summarily:

> …
>
> *18. It is clear, plain and obvious that the applicants have no reasonable chance of success in establishing a violation of the duty of fair representation. The application is about the employer's policy, the applicants' decision to remain unvaccinated, and their belief that the union should support their position without qualification or question. This is not an application about the union's conduct in any way being arbitrary, discriminatory or in bad faith.*
>
> *19. In the application and at the consultation, the applicants asserted that the employer's policy was unfair, contrary to the collective agreement, and/or failed to provide reasonable and available alternatives. One of the applicants read a letter at the consultation which expressed her views about the vaccine and various statistics related to the vaccine. These complaints are not about the union's conduct. As this Board has previously concluded, a duty of fair representation application is about a union's conduct in the representation of its members and is "not the forum for debating or complaining about vaccination in general, this vaccine in particular, scientific studies, the government's directions, and/or a particular employer's policy":* Tina Di Tommaso v Ontario Secondary School Teachers' Federation, *2021 CanLII 132009 (ON*

> *LRB). To the extent that the applicants seek to challenge the employer's policy and/or to have the Board order the employer to change that policy or provide compensation, a section 74 complaint is simply not the right forum and those remedies are not available.*
>
> …

[36] I find that the complainant has not alleged anything in the respondent's conduct that can be considered arbitrary, discriminatory, or in bad faith. The complainant's allegations concern the vaccination policy. The only allegation against the respondent is that it failed to oppose the vaccination policy.

[37] The respondent did not act in an arbitrary fashion by deciding not to pursue a policy grievance against the vaccination policy. It sought legal opinions from several sources, considered the emerging case law in similar cases, and concluded that a policy grievance had little to no chance of success. The test is not whether the respondent is right or wrong but rather whether it studied the question seriously (see *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509).

[38] The respondent did not discriminate against the complainant. In fact, it asserts that it offered to pursue an individual grievance, which he declined. In his reply, he did not contradict this assertion. By declining to represent him for the denial of his vacation leave, the bargaining agent based itself on the collective agreement's wording. In any event, I agree with the bargaining agent that events subsequent to a complaint are not part of the complaint. Since the denial of vacation leave occurred in January 2022, it cannot be covered by a complaint filed in November 2021.

[39] The respondent did not act in bad faith. It considered the matter seriously and made decisions for the whole of its members. There was no animosity or hostility, but simply, it made a decision according to its best judgment, considering the whole of the situation.

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

(The Order appears on the next page)

V. Order

[41] The complaint is dismissed.

June 1, 2022.

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