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*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

DAVID PATERSON

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Paterson v. Public Service Alliance of Canada

In the matter of an application for a declaration that a strike vote is invalid under section 184(2) of the *Federal Public Sector Labour Relations Act*

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

For the Applicant: Himself

For the Respondent: Andrew Astritis, counsel

Decided on the basis of written submissions,
filed April 11, 17, 18, and 19, 2023.

REASONS FOR DECISION

I. Application before the Board

[1] On April 11, 2023, David Paterson (“the applicant”) made an application to the Federal Public Sector Labour Relations and Employment Board (“the Board”) pursuant to s. 184(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”) for a declaration that a strike vote held by the Public Service Alliance of Canada (“the respondent”, PSAC, or “the bargaining agent”) was invalid. He alleged that the PSAC improperly prevented him from exercising his right to vote.

[2] The applicant is not a member of the PSAC, even though he is a member of the Program and Administrative Services (“PA”) bargaining unit for which the PSAC is the bargaining agent. Employees in such positions are usually referred to as “Rands”. In his application, he alleged that he had not received notice from the PSAC of a change that had been made to the voting period. Unbeknownst to him, the voting period had been shortened by eight days. When he undertook steps to cast his vote on the last day of the shortened voting period, he was unable to register for a mandatory information session that he was required to attend in order to vote. He was unable to vote and argues that he was not provided with a reasonable opportunity to participate in the strike vote.

[3] On April 17, 2023, pursuant to s. 184(3) of the *Act*, the respondent requested that the application be summarily dismissed. The Board then invited the respondent to provide additional information with respect to the strike vote, including the bargaining units involved and the number of employees who exercised their right to vote as well as further details about its communications about the voting period. The applicant was provided the opportunity to file a reply, which he did.

[4] Although the Board has significant concerns about irregularities that occurred in the voting process, for the reasons that follow, the application is dismissed.

II. Factual context as described by the parties

[5] On January 23, 2023, the respondent announced that it would hold a strike vote for four bargaining units in the core public administration that comprise more than 120 000 employees. One unit was the PA Group, of which the applicant is a member; it comprises just over 100 000 employees.

[6] The strike vote was conducted globally for all four bargaining units, but the votes were counted for each separate bargaining unit because the respondent was required to obtain a strike mandate from each bargaining unit.

[7] The voting period for the strike vote was originally set to be between February 22, 2023, and April 19, 2023. The respondent informed the employees in the bargaining units of the voting period, along with other important information on how to vote. It did so by emailing those employees for whom it had email addresses and by sending letters to those for whom it did not. Across all bargaining units, approximately 15 000 employees received this information about the strike vote by mail because the respondent did not have email addresses for them. In the PA Group alone, 14 188 employees were notified of the voting period by mail. The applicant was one of them.

[8] The applicant received notice of the strike vote and of the voting period by letter from the PSAC. The letter stated that the voting period would extend from 8:30 a.m., Eastern Standard Time, on February 22, 2023, through to 12:00 p.m., Eastern Daylight Time, on April 19, 2023. A copy of that letter was filed with the Board, and the respondent did not dispute the applicant's description of its content.

[9] On March 6, 2023, the respondent decided to revise the voting period to end on April 11, 2023, rather than on April 19, 2023. In its response, the PSAC stated that it shortened the voting period to ensure that the vote would be completed before its upcoming mediation session with the Treasury Board.

[10] The PSAC submits that it communicated the change to the voting period in numerous ways, as follows:

- by updating its main webpage to reflect the new voting deadline;
- by updating the VoGo website, which would be used as the online voting platform for the strike vote, to reflect the new voting period. That webpage was changed to read, "Please note the deadline to cast your vote in PSAC strike votes for Treasury Board members in the PA, TC, EB and SV is now April 11, 2023 at 11:59 pm (midnight) rather than April 19";
- by updating previous online posts that referred to the voting period to reflect the revised voting deadline;
- as of March 6, 2023, by changing generic and targeted emails to employees to include the revised voting period;
- by making several social-media posts with links to content that included the revised voting period; and

- by including, in a digital advertising campaign, links to content that included the revised voting period.

[11] The respondent also submits that media reports and publications about the strike vote and its negotiations with the Treasury Board described the voting period as ending on April 11, 2023.

[12] The PSAC's constitution and regulations require that an employee must attend an information session to be entitled to take part in a strike vote. According to the respondent, those sessions are to inform employees of the outstanding bargaining issues and of the reasons that a strike vote is, in the bargaining agent's opinion, necessary. The PSAC held approximately 100 such information sessions during the voting period. They were held in-person and online and at different times of day, to accommodate different employee work schedules. According to the PSAC, it held 22 online information sessions and 72 in-person information sessions between February 27 and April 11, 2023. The in-person sessions were held across the country.

[13] Employees were required to register for the online information sessions. Space was limited to 5000 participants at each online session. In its submissions, the respondent suggested that the information sessions were brief, perhaps as brief as 10 to 15 minutes.

[14] On April 11, 2023, the applicant attempted to register for an online information session. He was unable to. By consulting the PSAC's website, he learned that the voting period was ending that same day and that the final information session being offered that day was at full capacity. As he was unable to attend an information session, he was unable to cast a ballot. Shortly after that, he made this application.

[15] According to information provided by the respondent, for all bargaining units combined, 42 421 employees exercised their right to vote. In the PA Group alone, 38 207 employees voted. Of them, 31 348 voted in favour of a strike, and 6831 voted against one.

[16] Of the 14 188 employees in the PA Group who were notified of the voting period by letter, 2278 voted.

[17] More than 80% of employees in every bargaining unit voted in favour of a strike.

III. Written submissions of the parties

[18] In addition to the information in his application that has already been summarized, the applicant filed a written reply to the respondent's request for summary dismissal.

[19] The applicant acknowledges that the respondent had the right to amend the voting period and that it was a valid tactical move on the respondent's part to shorten the voting period so that it would align with the mediation session with the Treasury Board. However, he argues that he was not provided with a reasonable opportunity to participate in the strike vote because he was not informed that the voting period had been shortened by 8 days. The only communication that he received from the respondent was an initial letter informing him that the voting period would run from February 22 to April 19, 2023. As were the approximately 15 000 employees with whom the PSAC was able to communicate only by mail, he was not informed of a material change to the voting period. The roughly 15 000 bargaining unit members who relied in good faith on the information provided by the respondent were not provided updated information, despite the respondent's knowledge that its only confirmed means of communication with those members was by mail.

[20] Although he recognizes the respondent's right to amend the voting period, the applicant submits that amending it without making explicit and deliberate efforts to inform bargaining unit members of the change was procedurally unfair and fell short of the standard required of bargaining agents by s. 184(1) of the *Act*; that is, the duty to conduct a strike vote in a manner that ensures that all employees are given a reasonable opportunity to participate in that vote.

[21] Lastly, the applicant submits that the requirement imposed on him and other bargaining unit members to attend an information session so that they could vote is not a relevant to the issue before the Board; nor did it present a barrier to his participation in the strike vote. It was the respondent's change to the voting period, specifically shortening it, which deprived him of a reasonable opportunity to participate in the vote.

[22] The respondent submits that the Board can and should summarily dismiss the application pursuant to s. 184(3) of the *Act*. It argues that it ensured that employees

were given a reasonable opportunity to participate in the strike vote, as required by s. 184(1) of the *Act*.

[23] The PSAC acknowledges that it changed the voting deadline and that it did so after it sent letters to employees advising them that the voting period would end on April 19, 2023. However, it submits that it made significant efforts to publicize the revised voting deadline through emails, social-media posts, online posts, and the news media.

[24] The respondent does not dispute the fact that the applicant did not learn of the new voting deadline through the PSAC's other means of communication and that he did not learn of the change to the voting deadline until the final day of voting. However, it argues that the situation he described does not constitute a voting irregularity justifying the invalidation of the strike vote. Most employees in the bargaining units received information about the strike vote by email, and the PSAC sent several emails updates that contained the new voting deadline. Accordingly, most employees in the bargaining units were informed of the new voting deadline. Furthermore, the group of approximately 15 000 employees with whom the PSAC communicated via mail is not large enough to have affected the outcome of the vote. Moreover, there is no evidence capable of suggesting that most of those 15 000 employees were unable to vote and that had they voted, they would have voted against the strike.

[25] According to the respondent, bargaining agents have considerable leeway in how a strike vote is organized and conducted. The *Act* does not prescribe specific requirements or methods for conducting a strike vote. When it organizes and conducts a strike vote, a bargaining agent is entitled to impose reasonable preconditions for participating in it, including attending an information session. The PSAC submits that a range of options for conducting a strike vote constitute providing employees with a "reasonable opportunity" to vote and that its chosen method of conducting this strike vote fell within that range.

[26] Ample opportunity was provided to attend an information session and participate in the strike vote. It is acknowledged that if employees waited until the final day of the voting period to register for an information session, they would have been unable to once the final session was at full capacity. However, the respondent

submits that that does not constitute a breach of its duty to ensure that members have a reasonable opportunity to participate in the strike vote. The standard to meet is one of reasonableness, not perfection. In the present case, it would be unreasonable to presume that enough employees were denied access to the final information to have affected the outcome of the vote.

[27] The respondent asks that the Board summarily dismiss the application because the applicant did not present sufficient information and evidence to demonstrate that the alleged irregularities, if they did occur, would have affected the outcome of the vote. The result would have been no different despite the alleged irregularities.

[28] The respondent relies on *Chatellier and Viau*, 2008 CIRB 417, in support of its request that the Board summarily dismiss the application. In *Chatellier*, the Canada Industrial Relations Board (“the CIRB”) summarily dismissed an application challenging a strike vote despite concluding that there had been voting irregularities that had resulted in some bargaining unit members not receiving ballots for a strike vote. The respondent asks the Board to adopt an analysis focused on the number of votes cast and the voting margins, as the CIRB did in *Chatellier*. Because the voting margin in that case was demonstrably larger than the number of members denied access to the vote, the CIRB was satisfied that the alleged irregularities could not have affected the outcome, and it summarily dismissed the application. The respondent asks the Board to conclude the same in the present case.

[29] The respondent argues that 38 207 employees in the PA Group voted during the voting period and that the voting margin — that is, the difference between those who voted in favour and against the strike — was 24 517. As outlined earlier, 14 188 employees were notified of the voting period by letter. Of that group, only 2278 voted. Even if all 11 910 of the remaining employees were denied the opportunity to participate in the vote and would have voted against the strike, the outcome of the vote would still have been the same. To change the outcome of the vote, nearly as many employees as cast a vote in the period leading up to April 11, 2023, would have to have been denied access to voting on April 11, and all of them would have had to have voted against the strike. The respondent argues that this is not within the realm of possibility.

IV. Reasons

[30] Canadian courts have recognized the right to strike as a component of the right to bargaining collectively; see *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, which in turn is part of freedom of association; see *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27. Freedom of association is protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms* (enacted as Part I of the *Constitution Act, 1982*, itself enacted as Schedule B to the *Canada Act, 1982*, 1982, c. 121 (U.K.); “the Charter”).

[31] The application before the Board must be assessed against that legal backdrop, as it relates to the right, protected by s. 184 of the *Act*, of all employees in the bargaining unit to participate in a strike vote. The Board’s role is to protect the integrity of the strike vote process, in harmony with the guiding principles expressed in the preamble to the *Act* as well as the rights protected by the *Charter* and the values underlying it.

[32] The *Act* provides in its English version that it is the bargaining agent’s responsibility to ensure that all employees are given a reasonable opportunity to vote, expressed as follows in s. 184(1):

184 (1) *In order to obtain approval to declare or authorize a strike, an employee organization must hold a vote by secret ballot among all of the employees in the bargaining unit conducted in a manner that ensures that the employees are given a reasonable opportunity to participate in the vote and be informed of the results.*

184 (1) *L’organisation syndicale doit, pour obtenir l’approbation de déclarer ou d’autoriser une grève, tenir un vote au scrutin secret auprès de tous les fonctionnaires de l’unité de négociation, de façon que tous les fonctionnaires aient la possibilité d’y participer et d’être informés des résultats.*

[33] The French version of s. 184(1) does not characterize the bargaining agent’s duty as an obligation to provide employees with a “reasonable opportunity to participate” in a vote. Rather, it requires that the bargaining agent provide all employees with the opportunity to participate in a vote, without any further qualification.

[34] When interpreting bilingual statutes, the Board must first determine whether there is discordance between the French and English versions of the provision at issue;

see *R. v. Daoust*, 2004 SCC 6, at para. 27. As noted above, there is a discordance. The French version of s. 184(1) states more broadly that all employees must be provided with the opportunity to participate in the vote.

[35] Neither the French nor English versions of s. 184(1) are ambiguous. Accordingly, the Board must look for the common meaning that is consistent with Parliament's intent.

[36] The Board finds that the French version of s. 184(1) better accords with Parliament's intent and the preamble of the *Act*; see *Daoust*, at para. 30. It emphasizes the right to vote and is consistent with the purpose of the *Act* and the *Charter*-protected right to strike. An employee's right to vote can be undermined if irregularities impede the employees' participation.

[37] As the respondent pointed out, a strike vote for a national bargaining unit is a significant undertaking. Some minor errors and irregularities may occur, and a standard of perfection in such circumstances would be inappropriate (see *Chatellier*, at paras. 21 and 22).

[38] Bargaining unit members who allege irregularities in the voting process may apply to the Board to have the vote declared invalid pursuant to s. 184(2), which reads as follows:

184 (2) An employee who is a member of a bargaining unit for which a vote referred to in subsection (1) was held and who alleges that there were irregularities in the conduct of the vote may, no later than 10 days after the day the results of the vote are announced, make an application to the Board to have the vote declared invalid.

184 (2) Le fonctionnaire de l'unité de négociation visée par un vote de grève qui affirme que le déroulement du scrutin a été entaché d'irrégularités peut, dans les dix jours suivant la date à laquelle les résultats sont annoncés, demander à la Commission de déclarer le vote invalide.

[39] The Board may choose to summarily dismiss the application, despite the irregularities, if it is satisfied that the irregularities, even if ascertained, would not have made a difference to the outcome of the vote, as stated as follows in s. 184(3):

184 (3) The Board may summarily dismiss the application if it is satisfied that, even if the alleged

184 (3) La Commission peut rejeter de façon sommaire la demande de déclaration d'invalidité du vote si

irregularities did occur, the outcome of the vote would not have been different. *elle est convaincue que les irrégularités soulevées n'auraient eu aucune incidence sur le résultat du vote.*

[40] The respondent requested that the Board summarily dismiss the application. To succeed, the respondent must satisfy the Board that the irregularities would not have changed the final outcome. This burden falls squarely on the respondent. The applicant is not required to show that the result of the vote would have been different if the irregularities had never happened. A summary dismissal request will be denied if the Board is in doubt about whether the irregularities would have impacted the ultimate result of the vote.

[41] The respondent admits that the voting period was reduced and that there was more demand for registration in the final April 11, 2023, information session than could be accommodated. The applicant submits that it was unfair to deprive those informed by mail of a proper notification of the change in dates. The respondent argues that even if all the 11 910 employees who were notified by mail but did not cast a vote had actually voted against a strike, the number would not have been sufficient to reverse the outcome of the vote.

[42] This argument presupposes that when examining the impact of strike vote irregularities, the Board is limited to considering those individuals whose circumstances closely parallel those of the applicant, or the impacted individuals cited by the applicant: in this case, those who received notice of the strike vote by mail. The respondent offers no explanation as to why the Board's consideration of the impact of the irregularities should be construed so narrowly. The allegation fundamentally concerns the defective communication of a change in dates. It is clear that the impact of unannounced changes to voting dates and insufficient information session capacity extends considerably beyond those bargaining unit members who were notified of the strike vote by mail, potentially encompassing every bargaining unit member who did not cast a vote. Once an allegation of irregularity is made, the Board must consider the full scope of the potential impact of the alleged irregularity, consistent with s. 184(1) of the *Act*.

[43] If the Board were in doubt as to whether the results would have changed, it could not dismiss the complaint summarily, as the Board would no longer be

“satisfied” of an unchanged vote outcome. Doubts might arise if there was no clear and pronounced probability that the voting results would remain unchanged or if there was conflicting evidence before the Board. For this reason, it is necessary to examine the nature of the alleged irregularities and their potential impact on the strike vote results.

[44] In *Chatellier*, one of the few Canadian cases to address the validity of a strike vote, the CIRB’s reasoning turned on whether the votes affected by the irregularity could have altered the outcome of the vote, given the margin by which the strike vote had been rejected. In that case, the margin was 426, and the CIRB had evidence of only 110 votes affected by the irregularity. It was numerically impossible for the vote to have changed as a result of the irregularities. Because of the broad potential impact of the alleged voting irregularities in the present application, it is impossible to reach the same conclusion on the facts presently before the Board. The analysis must go beyond a simple arithmetic exercise to determine whether the vote should be declared invalid.

[45] The alleged irregularities in this matter are the reduction of the voting period, the failure to communicate that change to the applicant and all other bargaining unit members, and the insufficient information session capacity, which prevented the applicant from exercising his vote on the day that he attempted to. These were the irregularities that were cited in the application.

[46] The elimination of eight days of voting is significant. Bargaining unit members might have wanted to wait until the end of the voting period before casting their vote, so as to have the most current information when making their decision. Unaware that the voting dates had changed, many bargaining unit members might have noted the original April 19, 2023, deadline for voting in their calendars and then disregarded further strike vote communications, being confident that they were already aware of the necessary strike vote information.

[47] As the organizer of the vote, the bargaining agent may change the voting period, which the applicant acknowledges. However, if it changes the dates, it must make a genuine and meaningful effort to announce the change to all bargaining unit members in such a way as to assure the change is likely to come to their notice.

[48] In this respect, it is of great concern to the Board that the respondent made no discernible effort to announce its reduction of the voting period. With two exceptions,

to be addressed later, none of the documents it submitted included an express statement or notice that the voting period had been shortened by eight days.

[49] A press release dated January 23, 2023, and posted on the respondent's website cited the original voting period of February 22, 2023, to April 19, 2023. After the March 6, 2023, voting-period reduction, the date of the close-of-voting was changed but without any corresponding change to the press release's date or any other indication that the voting period cited in the press release had been altered. Anyone who had read the press release before March 6, 2023, and was aware of its original contents, could have reasonably assumed that there was no need to read the press release again.

[50] Similarly, e-news updates sent by the respondent after March 6, 2023 (the respondent submitted that there were five such communications), did not draw the reader's attention to the fact of a new close-of-voting date. The new voting period was simply embedded in electronic communications that did not expressly announce the highly significant fact that the voting period had changed.

[51] In its submissions, the respondent indicates that it "purchased hundreds of thousands of dollars' worth of digital advertising linking to the content that advertised the new voting deadline, including Facebook, Instagram, YouTube and Google web ads." It would be more accurate to state that the content included the new voting deadline. Nothing before the Board indicated that the fact that the voting dates had changed was advertised on social media or in materials linked to social media.

[52] The failure to properly announce the reduced voting period falls short of the respondent's legislatively mandated responsibility to ensure that the employees are given an opportunity to participate in the strike vote. The determination of accurate balloting dates should not be turned into something akin to a scavenger hunt, in which only those who are eagle-eyed enough to notice small, unannounced changes buried in emails have the information necessary to secure their right to vote.

[53] The respondent argues that the altered time frames for voting were also shared in articles that appeared in the media. However, no press release was made announcing that the voting dates had changed. Bargaining unit members, trusting that they had already been given accurate strike vote information by their bargaining agent, might have disregarded the media articles altogether or considered any inconsistency with

respect to dates in them to be an error on the part of the media outlet. Certainly, it would be reasonable for a bargaining unit member to assume that the respondent, which had already provided them with information, was the more authoritative source for the particulars of its own strike vote.

[54] The respondent further argues that the VoGo website (which provided the electronic voting platform) expressly noted that the voting period had changed. Again, this does not adequately answer the concern that bargaining unit members were not sufficiently informed of the change to the voting dates. The VoGo website is where a member goes to cast an electronic vote. Given that it was not necessary to go to the VoGo website until a member actually voted, it was not an appropriate place to correct previously circulated information about the voting period. A member relying on the previously circulated information might have learned that the voting period had passed only when they went to cast their vote — by which point, it would have been too late.

[55] The respondent also notes that any voting credential emailed to bargaining unit members after March 6, 2023, called attention to the change in the voting period. It provided no information about how many credentials were sent after that date, nor did it suggest that it expressly informed those who had received their voting credential before March 6, 2023, of the change to the voting period.

[56] Most bargaining unit members received notice of the strike vote via a union email starting on January 23, 2023. The applicant, along with approximately 15 000 other bargaining unit members for whom the respondent did not have valid email addresses, received a letter it posted that specified the original voting dates. The letter was sent before the March 6, 2023, change to the voting dates.

[57] Although multiple emails containing the new dates embedded within them were shared with those for whom the respondent had email addresses, no further outreach was made to those for whom it did not have a valid email address. This fell short of the obligation to inform those bargaining unit members of their voting rights.

[58] This is especially true, given the relative ease with which the respondent could have avoided the irregularities, for example by expressly calling attention to the date changes in its emails, by a press release announcing the changed dates, and by a new mail-out to those it had advised of the vote by mail.

[59] The other irregularity in this matter is the lack of capacity in the information session held on the final day of voting. The applicant attempted to cast his vote on the last day on which balloting was open, April 11, 2023. He was prevented from casting his vote because there was no capacity remaining for him to join the online information session, which the respondent set as a requirement before his vote could be cast. That is a serious deficiency in the voting process.

[60] The bargaining agent was responsible for organizing the vote. Before the advent of electronic voting, in-person information sessions were held, at which bargaining unit members would cast their ballots. This time, the information sessions were held in both online and in-person formats, and the balloting was electronic. There is nothing wrong with holding an electronic vote preceded by an online or an in-person information session. However, something is definitely wrong if the online capacity is such that it deprives bargaining unit members of their right to vote. This irregularity is aggravated in a situation in which voting dates have been shortened. Again, this could have been easily corrected by ensuring adequate information session capacity.

[61] There was nothing before the Board to show that the respondent added additional information sessions to replace any sessions that may have been lost when the eight days of balloting were cancelled. This is also of significant concern.

[62] In the context of these major irregularities, it is necessary to look at the result of the vote and consider how it might have been affected. A total of 38 207 members of the applicant's roughly 103 000-member bargaining unit cast strike votes; of them, 31 348 votes were cast in favour of the strike, or just over 80% of the votes cast.

[63] Approximately 35% of the bargaining unit voted during the time allotted. It seems improbable that the voting irregularities detailed in this decision were the only thing impeding participation in the vote. Voting was available for several weeks, from February 22 to April 11; during that time, some 65% of the bargaining unit members did not vote.

[64] Voting irregularities do not fully explain the low turnout. The Board is left with a low participation rate but a very high support for the strike among those who voted. The support for the strike was high enough that even if there were no irregularities, it is very likely that the outcome would still have been in favour of a strike. The votes that could not be cast due to the irregularities might have either diluted or

strengthened the strike mandate, but it appears highly improbable that they would have reversed it. While a changed outcome is not numerically impossible, it is a sufficiently remote possibility that the Board is satisfied that in the current circumstances, the vote result would have been the same even without the irregularities.

[65] It is important to note that these findings are particular to the facts that were before the Board. Had either the voter turnout or the margin in favour of the strike been lower, the Board might have decided differently. The irregularities are of significant concern, and with different numbers, they could have resulted in the invalidation of the strike vote.

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

(The Order appears on the next page)

V. Order

[67] The request to dismiss summarily is allowed. The application is dismissed.

April 20, 2023.

**Edith Bramwell, Marie-Claire Perrault, and Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**