Date: 20240228

File: 771-02-41941

Citation: 2024 FPSLREB 27

Federal Public Sector Labour Relations and Employment Board Act and *Public Service Employment Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PIER-LUC OUIMET

Complainant

and

DEPUTY HEAD
(Department of National Defence)

Respondent

and

OTHER PARTIES

Indexed as
Ouimet v. Deputy Head (Department of National Defence)

In the matter of a complaint of abuse of authority under section 77(1)(b) of the *Public Service Employment Act*

Before: Goretti Fukamusenge, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Alexandre Toso, counsel

For the Public Service Commission: Louise Bard, senior analyst

Decided on the basis of written submissions,
filed June 13 and 28 and July 6, 2023.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Application before the Board

[1] Pier-Luc Ouimet ("the complainant") requested that proceedings be resumed after his union representative withdrew his complaint and the file was then closed. The Department of National Defence ("the respondent") objected. Relying on the law of agency, it maintained that the complainant was bound by his representative's actions because his representative had acted as his agent. Furthermore, it submitted that the withdrawal is irreversible and that in effect it rendered the Federal Public Sector Labour Relations and Employment Board ("the Board") *functus officio* (meaning "discharged"). According to the respondent, the Board no longer has jurisdiction in this matter.

[2] For the reasons that follow, the request to resume the proceedings is allowed. The complainant and his union representative did not have a principal-agent relationship. Thus, the representative's withdrawal was null, invalid, and without effect. It did not deprive the Board of its jurisdiction, and the concept of *functus officio* does not apply in this case.

II. Procedural history

[3] On July 31, 2020, the complainant made a complaint with the Board. He alleged that the respondent abused its authority under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) in an appointment process for a planner-electronic analyst position classified EL-05.

[4] From when the complaint was made until it was withdrawn, the complainant was represented by a representative of the International Brotherhood of Electrical Workers, Local 2228 (IBEW or "the union").

[5] On March 24, 2023, the parties were notified that the complaint was scheduled for a Board hearing on May 23 and 24, 2023.

[6] A pre-hearing conference was held on April 24, 2023. The respondent, the Public Service Commission, the complainant, and two IBEW representatives (Mr. Lessard and Mr. Dionne) participated.

[7] On May 1, 2023, at 14:55, Mr. Dionne, a chief steward at the IBEW, sent a message withdrawing the complaint to the Board and the other parties. The complainant was not listed as a recipient. The message read in part as follows: "[translation] The IBEW wishes to advise the Board of its decision to withdraw grievance [*sic*] 771-02-41941 and thus not proceed with the adjudication of the dispute. Please advise the interested parties that the May 23 hearing is no longer required …".

[8] On the same day, at 15:18, the Board emailed an acknowledgement that it had received the notice withdrawing the complaint and informed the parties' representatives that therefore, the file had been closed. As a result, the following message was sent to the complainant's email address: "[translation] We have received your notice of withdrawal with respect to the noted complaint. Therefore, this file is now closed. Please note that the hearing scheduled for May 23 and 24, 2023, is cancelled."

[9] A few minutes later, at 15:20, the complainant messaged the Board, indicating that he had not withdrawn his complaint. The other parties and the IBEW's representatives were not recipients to the message, which reads as follows: "[translation] I have not decided to withdraw my complaint. My union refuses to represent me …".

[10] The Board then organized a case management conference that took place on May 12, 2023. The union received the invitation but did not participate. At the conference, the Board received brief comments from the complainant and the respondent on the validity of the complaint's withdrawal.

[11] The respondent objected to reopening the proceedings. It argued that the withdrawal was valid and that the Board had accepted it.

[12] The complainant indicated that he had discussions with his union 10 days before the April 24, 2023, pre-hearing conference. He said that he did not feel supported. He added that he has been "[translation] fighting" with his union ever since. He maintained that he did not consent to withdrawing the complaint.

[13] At the Board's request that he provide an exchange with his union about the complaint's withdrawal, the complainant submitted an email exchange, including a

message from his union on May 1, 2023, at 14:42, shortly before the complaint was withdrawn. It advised him that the union did not intend to proceed with the complaint and read in part as follows:

> [Translation]
>
> *Hello Pier-Luc,*
>
> *For the reasons that follow, and with due respect, Local 2228 will not refer the grievance to adjudication, and we will communicate that decision to the Public Service Labour Relations Board [sic].*
>
> *-You have indicated to us quite categorically that your interest in the initial grievance remedy has been abandoned, which, for all practical purposes, would be sufficient to establish that you have abandoned the grievance itself.…*
>
> …

[14] The complainant responded to the message on May 2, 2023. His reply read in part as follows:

> [Translation]
>
> …
>
> *You changed your tune almost 3 years later, and now you're withdrawing my complaint without my consent.*
>
> *And, when the grievance in question was filed, my union checked the whole thing, and now you're telling me that my grievance was filled out poorly!!*
>
> …

[15] On May 29, 2023, the Board invited the parties to submit additional comments on the withdrawal's validity and the file's closure and on *Fontaine v. Robertson*, 2021 FPSLREB 19.

[16] The parties submitted their written submissions on June 13 and 28 and July 6, 2023.

III. Summary of the arguments

A. For the complainant

[17] The complainant indicates that he did not want to withdraw his complaint and that he did not instruct his bargaining agent to do it. He compared his situation with

that in *Fontaine*. The following excerpt from the arguments contains some things related to the complaint's withdrawal:

> [Translation]
>
> *… In my case, exactly 36 minutes passed between my union informing me by email that it would not carry on with my grievance at adjudication and me receiving the FPSLREB's email informing me that Mr. Dionne had closed my complaint. That time frame demonstrates that Mr. Dionne acted in bad faith. He never wanted to discuss my complaint with me verbally, and without waiting for my opinions, he withdrew it.*
>
> …

[18] In his reply to the respondent's answer, he explained as follows:

> [Translation]
>
> …
>
> *For my part, I remind you that I never wished to withdraw my complaint; nor did I tell my representatives that I wished to. And at no time did they inform me that I could represent myself alone if they wished to withdraw from the complaint.*
>
> *My representative, Mr. Donald Dionne, took* **the initiative** *of closing my complaint on May 1, 2023, without my consent, and without first speaking to me about it, and I remind you again, without ever asking me for my version of the facts. He simply emailed me, indicating that the IBEW wished to withdraw from the grievance! A few minutes later, he emailed the FPSLREB, indicating that I was withdrawing my complaint.*
>
> …
>
> [Emphasis in the original]

[19] He added that the decisions (*Canada (Attorney General) v. Lebreux*, [1994] F.C.J. No. 1711 (C.A.)(QL); *Ding v. Canadian Merchant Service Guild*, 2018 FPSLREB 50; and *Howarth v. Deputy Minister of Indian Affairs and Northern Development*, 2009 PSST 11) that the respondent cited can be distinguished from this case because they deal with cases in which the complainants reportedly accepted settlements or withdrew their complaints on their own.

B. For the respondent

[20] On one hand, the respondent argues that the complainant is bound by his union representative's withdrawal since the representative acted as his agent. It insists that his union represented him from when the complaint was made until its withdrawal and

that there is no evidence demonstrating that the extent of the representation was limited in any way or that the representation ceased or changed at any time.

[21] To make that argument, the respondent refers to *Scherer v. Paletta*, [1966] 2 O.R. 524-527; and *Ding*. It notes that in *Ding*, the Board considered that counsel's withdrawal of a complaint could bind their client. It infers from this that the same conclusion applies when the union represents a complainant.

[22] On the other hand, the respondent argues that the withdrawal was a unilateral and irrevocable act that ended the Board's jurisdiction over the complaint.

[23] To support that argument, the respondent relies on the Federal Court of Appeal's decision in *Lebreux*. It notes that in that case, the Federal Court of Appeal concluded that after a withdrawal, "[translation] … the Board and the designated adjudicator are *functus officio* because they are relieved of the case, and the withdrawal constituted a unilateral legal act to abandon the proceedings, which the Board could only take note of and then close its file."

[24] The respondent argues that the Board should follow the Court's reasoning in *Lebreux* and simply find that the complaint was withdrawn administratively. It also quotes Board decisions that reiterate the reasoning in *Lebreux*, including: *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3; *Fournier v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 65; *Maiangowi v. Treasury Board (Department of Health)*, 2008 PSLRB 6; and *Howarth*.

[25] Finally, the respondent maintains that *Fontaine* can be distinguished from the facts of this case. Initially, it conceded that the staffing complaint, as the complainant made it, belonged to him and that it did not require the union's support. However, it pointed out that that case was about a duty-of-fair-representation complaint, while in this case, "[translation] The Board is not currently seized of issues that affect the complainant's recourse against his union and therefore cannot remedy the consequences of the union's breaches, even if they are established".

IV. The issue to decide

[26] The complainant contests the validity of the withdrawal and requests that the proceedings be resumed. The respondent maintains that the withdrawal is valid and irrevocable and that the Board lost jurisdiction over it by the principle of *functus*

officio. Thus, the withdrawal's validity becomes the central point of the dispute and is the main issue to clarify.

V. Reasons

A. The union representative's withdrawal of the complaint without the complainant's authorization was invalid

[27] In staffing-complaint proceedings, any person may represent themselves or be represented before the Board by another person, including a union representative, a lawyer, or any other person, and at any step of the complaint process.

[28] In this case, the union represented the complainant until it withdrew the complaint. He contests the withdrawal on the grounds that he did not authorize it. For its part, the respondent maintains that the union representative acted as an agent and thus had the authority to withdraw it. That is based on the principles of the law of agency that were established in *Scherer* and that have been adopted in other decisions in different jurisdictions, including the Board's decision in *Ding* (see paragraphs 56 and 57). In *Yourkin v. The Queen,* 2014 TCC 48 (CanLII) at paras. 14 and 15, the Tax Court of Canada referred to *Scherer* and to *Sourani v. Canada*, 2001 FCA 185, and reiterated those principles as follows:

> *[14] …*
>
> *… A client having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained. In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited by agreement or special instructions but as regards third parties the authority which the agent has is that which is reasonable to be gathered from the nature of his employment and duties.…*
>
> *A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to*

> *enquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. .... If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.*
>
> *[15] In* Sourani v. Canada*, [2001] F.C.J. No. 904, Justice Malone of the Federal Court of Appeal observed at paragraph 4:*
>
> *… A lawyer is a client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceeding for which he has been retained.…*
>
> …

[29] Given the facts, I cannot consider this case as one in which contractual obligations arising from a principal-agent relationship can be imposed.

[30] For agency to exist, three essential ingredients are required, as described in the Federal Court of Appeal's decision in *Kinguk Trawl Inc. v. Canada*, 2003 FCA 85 (see paragraphs 35 and 36, and see *Vocan Health Assessors Inc. v. The Queen*, 2021 TCC 49 at paras. 51 and 52). According to those decisions, the essential ingredients of agency are as follows:

> …
>
> *1. The consent of both the principal and the agent;*
>
> *2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position;*
>
> *3. The principal's control of the agent's actions.*
>
> *In reality, points 2 and 3 are often overlapping, as the principal's control over the actions of his agent is manifested in the authority given to the agent.*
>
> …

[31] In this case, the union was not obligated to represent the complainant, and there is no evidence of a contract or express representation agreement. Thus, one can conclude only that the complainant provided implied consent to representation by his union.

[32] In the absence of a written agreement, the jurisprudence recommends examining the parties' conduct, to determine whether implied agency exists (see, for

example, *GEM Health Care Group Limited v. The Queen*, 2017 TCC 13 (CanLII) at para. 29, which refers to *Fourney v. The Queen*, 2011 TCC 520). Although those principles were developed in the context of tax law, I find that they can serve as a reference point in this case. They read as follows:

> …
>
> *a) In the absence of a written agency agreement, a court must closely examine the conduct of the parties to determine whether there was an implied intention to create an agency relationship.*
>
> *b) In reviewing the conduct of the alleged principal and the alleged agent,* ***a key consideration is to determine the level of control which the former exerted over the latter****.*
>
> *c)* ***The alleged principal's control over the actions of the alleged agent may be manifested in the authority given by the former*** *to the latter. In other words, the concepts of authority and control sometimes overlap.*
>
> …
>
> [Emphasis added]

[33] Based on the conduct of the complainant and his union representative, implied consent to representation can be concluded. The documents instituting this case indicate the name of a union representative who was the point of contact for all communications about this case. That representative participated in the Board's proceedings until the complaint was withdrawn.

[34] However, it is clear that the complainant did not have control over his representative's actions; nor did the representative have the authority as agent to modify the complainant's legal position by withdrawing the complaint. The email exchanges set out that the complainant wanted to pursue his complaint and that the union representative was not authorized to terminate the process before the Board. Had the complainant had control over his representative's actions, no withdrawal would have occurred without his consent.

[35] Therefore, I find that two of the three essential ingredients that constitute agency, namely, the control of the agent's acts by the principal and the agent's authorization, as described in *Kinguk Trawl Inc.* and *Vocan Health Assessors Inc.*, are absent in this case.

[36] However, in *Glengarry Bingo Assn. v. Canada*, 1999 CanLII 7738 (FCA), [1999] F.C.J. No. 316 (C.A.)(QL) at paras. 32 and 33, the Federal Court of Appeal noted that the absence of the agent's power to modify the principal's legal position indicates conclusively that there is no agency. Following the reasoning in that case, I find that this case had no principal-agent relationship.

[37] Furthermore, I consider that the circumstances in *Ding* can be distinguished from those in this case because of the facts. In *Ding*, a law firm withdrew a duty-of-fair-representation complaint that a complainant had made against his union. The Board then closed the case. A few weeks later, the complainant informed the Board that he had not authorized his complaint's withdrawal.

[38] *Ding* referred to an email in which the complainant indicated that he was wondering whether "… the withdrawal will be regarded as try [*sic*] all the other resources or NOT …". Although he later stated that he had not given written authorization to withdraw the complaint, it appeared that he and his counsel had discussed the issue of withdrawing it in a meeting, which is not so in this case. In this case, I received no evidence indicating that the withdrawal issue was addressed before the notice was issued that the union representative had withdrawn the complaint, dated May 1, 2023.

[39] The union representative was not authorized to withdraw the complaint. Given the facts of this case, my opinion is that there was no principal-agent relationship. Therefore, the withdrawal was null, invalid, without effect, and not enforceable against the complainant.

B. The principle of *functus officio* does not apply

[40] The principle of *functus officio* removes a tribunal's jurisdiction once it renders a final decision on the merits (see *Canadian Broadcasting Corporation v. Manitoba*, 2021 SCC 33 at para. 33; and *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 860).

[41] Relying on the principle of *functus officio*, which the Federal Court addressed in *Lebreux*, the respondent also argued that the withdrawal was unilateral and irrevocable and that it had the effect of depriving the Board of jurisdiction to hear the case. For his part, the complainant explained that his situation is different from that described in

Lebreux since in his case, the withdrawal is contested. I concluded that the withdrawal was invalid and without effect. In the same vein, it did not result in a loss of jurisdiction.

[42] I do not find that the principle of *functus officio* applies in this case. As stated earlier, since the union did not have the authority to withdraw the complaint, the withdrawal was invalid and did not produce legal effects. Additionally, the Board did not examine the question initially before it, namely, the complainant's allegation of abuse of authority. No decision was rendered or order made on the merits, so there is no question of rehearing or redeciding the issues on which the complaint is based.

[43] The respondent also referred to *Howarth*, *Maiangowi*, and *Fournier*. However, they are all based on *Lebreux*. As in *Lebreux*, those cases involved requests to reopen proceedings after withdrawals, the validity of which had not been contested. Instead, they are about the consequences of a voluntary or an uncontested withdrawal. As the Board explained at paragraph 17 of *Palmer v. Canadian Security Intelligence Service*, 2010 PSLRB 11, *Lebreux* was rendered in a context in which the grievance's withdrawal was not questioned. In this case, the withdrawal's very validity is at issue. For the reasoning in *Lebreux* to apply, the withdrawal must be legally valid.

[44] In *Lebreux*, the grievor had entered into an agreement with the employer about his grievances and had withdrawn them. After the Board closed the files, the grievor returned and asked that they be reopened because the parties apparently had not reached a satisfactory agreement. The Board reopened the files. However, on judicial review, the Federal Court of Appeal held that an adjudicator did not have jurisdiction to hear a grievance once it had been withdrawn because the Board had been relieved of it.

[45] I do not agree with a rigid application of *Lebreux*. In this case, this rigorous approach is tempered by the context in which the complaint was withdrawn. The union representative withdrew the complaint from the Board without the complainant's consent. Contrary to *Lebreux*, *Fournier*, *Maiangowi*, and *Howarth*, there is no evidence in this case that indicates that the complainant either consented to or authorized the complaint's withdrawal. On the contrary, the evidence indicates that he contested the withdrawal as soon as the Board informed him of it.

[46] Instead, I consider that the Board's reasoning in *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 124, applies in this case. In *Ménard*, the dispute arose from a duty-of-fair-representation complaint in which the complainant won her case against her union. The union had withdrawn her grievance, which was found arbitrary. The debate then reverted to assessing the remedy.

[47] At paragraph 42 of *Ménard*, the Board noted that it could order the union to proceed with the grievance since it found the withdrawal unlawful. The Board annulled the withdrawal and indicated that it had been done in contravention of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2). At paragraphs 44 and 45, the Board set out the following about the applicability of *Lebreux*:

> ***44*** *Unlike in* Lebreux*, the discontinuance of the grievance in this case was a breach of the* Act*. In* Lebreux*, the union sought to reactivate the grievances because the employee was unsatisfied with the agreement between the parties. That discontinuance was legitimate and was permitted by the* Act*. For the Court, the act of discontinuance terminated the grievance. However, the rule in* Lebreux *does not apply to cases in which the discontinuance was unlawful.*
>
> ***45*** *In such a case, the Board has the authority to rescind the discontinuance and reactivate the grievance; otherwise, it would not be able to directly reinstate the recourse that was unlawfully denied the employee.…*

[48] In *Fontaine*, the Board stated that the respondent acted arbitrarily when it accepted an offer from the employer on behalf of an employee without the employee's consent, to settle a grievance. Note that for the adjudication process, the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") requires the respondent's support. At paragraph 29 of the decision, the Board reiterated that according to the *Act*, the grievance belonged to the grievor, and only he could accept a settlement offer from the employer under the statutory rights of that Act.

[49] The main issue in this case is a staffing complaint made under the *PSEA*. Thus, the union's support was not required for the adjudication process before the Board. Generally, a union that decides to represent an employee in a *PSEA* staffing matter does so voluntarily.

[50] Following *Fontaine*'s reasoning, the complaint belonged to the complainant, and even more so, only he could have made the decision to withdraw it. The union could

have withdrawn only its representation. Thus, it did not have the authority to withdraw the complaint, and the Board's opinion is that it cannot accept the withdrawal received from the union. In *Ménard*, the Board found that the union's decision to withdraw the grievor's grievance without her consent was arbitrary and stated that it had the "… authority to rescind the discontinuance and reactivate the grievance; otherwise, it would not be able to directly reinstate the recourse that was unlawfully denied the employee."

[51] Given all that, the Board concludes that the union did not have the authority to withdraw the complaint. Since it did not have the mandate to withdraw the complaint, the withdrawal was not valid. Thus, the Board did not lose jurisdiction to examine the complaint on its merits.

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

(The Order appears on the next page)

VI. Order

[53] The complainant's request to resume the proceedings is allowed.

[54] The respondent's objection to the Board's jurisdiction is dismissed.

[55] I revoke the closure of the case.

[56] A hearing date will be set to hear the merits of the complaint.

February 28, 2024.

FPSLREB Translation

Goretti Fukamusenge,
a panel of the Federal Public Sector
Labour Relations and Employment Board