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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

JOEL ROEDIGER

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as

Roediger v. National Research Council of Canada

In the matter of an individual grievance referred to adjudication

Before: Joanne Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Chris Finding, Professional Institute of the Public Service of Canada

For the Employer: Benoit Nadeau, senior labour relations advisor

Decided on the basis of written submissions,
filed June 23, July 31, and August 10, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On May 23, 2023, Joel Roediger, the grievor, filed an individual grievance with the Federal Public Sector Labour Relations and Employment Board (“the Board”) concerning an appointment process for the position of Astronomer, classified at the RO-03 group and level (“the appointment process”), and the allegedly unreasonable and arbitrary application of management rights by the National Research Council of Canada (“the NRC”).

II. Preliminary objection

[2] The grievor is an astronomer who occupies a position classified at the RO-03 group and level. He is a member of the Professional Institute of the Public Service of Canada (“PIPSC”). His employment is subject to the Research Officer and Research Council Officer (RORCO) collective agreement between the NRC and PIPSC that expired on July 19, 2022 (“the collective agreement”).

[3] The grievor applied as a candidate in an RO-03 process and was not selected for appointment. He filed a grievance in accordance with article 9 of the collective agreement, as follows:

I grieve the staffing process and results for the Research Officer (Astronomer) – Canadian Gemini Office (14301) staffing action as not treating me fairly in the application of the NRC Hiring Policy and Procedures as outlined at 2.1.14.1 of the NRC HRM Manual, an unreasonable and arbitrary application of Article 4 – Management Rights of the collective agreement and an abuse of authority based on merit contrary to Sections 30(2) and 77(1)(a) of the PSEA.

[4] The NRC denied the grievance at both levels. The grievor then referred it to the Board.

[5] The NRC objects to the Board’s jurisdiction over the grievance. Firstly, it argues that the *National Research Council Act* (R.S.C., 1985, c. N-15; “the NRC Act”) grants it authority over its staffing. It is not subject to the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”), to which the grievor refers. Secondly, staffing does not fall within the Board’s adjudicative authority under s. 209(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “FPSLRA”). Thirdly, the management

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rights in article 4 of the collective agreement do not create a duty and therefore are not adjudicable under the *FPSLRA*.

[6] In response to the objection, the grievor acknowledges that the NRC is not subject to the *PSEA*. However, he argues that during the appointment process, the NRC acted unreasonably in the administration of its staffing policies. Further, the grievance involves the interpretation of article 4 of the collective agreement and was appropriately referred to the Board in its role as a third-party adjudicator.

[7] Pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may decide any matter before it without holding an oral hearing.

[8] For the reasons that follow, the NRC's preliminary objection is allowed, and the grievance is dismissed.

III. Analysis

[9] Under Schedule V to the *Financial Administration Act* (R.S.C., 1985, c. F-11), the NRC is a separate agency of the Government of Canada. It is given the authority to negotiate collective agreements with its employees.

[10] Section 5(1)(g) of the *NRC Act* provides as follows:

5 (1) Without limiting the general powers conferred on or vested in the Council by this Act, the Council may

...

(g) appoint such scientific, technical and other officers as are nominated by the President, fix the tenure of their appointments, prescribe their several duties and, subject to the approval of the Governor in Council, fix their remuneration

5 (1) Dans l'exécution de sa mission, le Conseil peut notamment :

[...]

g) nommer les experts et autres membres du personnel proposés par le président, définir leurs fonctions et la durée de celles-ci et, avec l'approbation du gouverneur en conseil, fixer leur rémunération [...]

[11] The grievor, an NRC employee, filed a grievance concerning an appointment process, in accordance with the process defined by the collective agreement. The NRC denied the grievance, and the grievor referred it to the Board.

[12] The Board is an administrative tribunal created by statute. Its adjudicative authority is circumscribed by s. 209(1) of the *FPSLRA*. Relative to the grievor's referral of his grievance to the Board, it provides the following:

209 (1) *An employee who is not a member as defined in subsection 2(1) of the Royal Canadian Mounted Police Act may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*

(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty*

209 (1) *Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la Loi sur la Gendarmerie royale du Canada, peut renvoyer à l'arbitrage tout grief individuel portant sur :*

a) *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*

b) *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire [...]*

[13] As noted, the Board's jurisdiction extends to the interpretation or application of a collective agreement or an arbitral award and to disciplinary action resulting in termination, demotion, suspension, or financial penalty.

[14] On a plain reading of the legislative provision, staffing does not fall within the scope of any of the enumerated categories. It follows, then, that the Board is without authority to hear the aspects of the grievance that address the staffing matter.

[15] The grievor also alleges the "... unreasonable and arbitrary application of Article 4 - Management Rights ...".

[16] Article 4 of the collective agreement follows:

ARTICLE 4 - MANAGEMENT RIGHTS

4.01 *All the functions, rights, powers and authority which the Council has not specifically abridged, delegated*

ARTICLE 4 - DROITS DE LA DIRECTION

4.01 *L'Institut professionnel reconnaît que le Conseil retient les fonctions, les droits, les pouvoirs et*

or modified by this Agreement are recognized by the Professional Institute as being retained by the Council.

l'autorité que ce dernier n'a pas d'une façon précise, fait diminuer, déléguer ou modifier par la présente convention.

[17] In *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8 at para. 100, an adjudicator of the Public Service Labour Relations Board, a predecessor to the Board, addressed management rights in the context of a collective agreement as follows:

100 ... The grievor's submission is that his grievance relates to the interpretation of the collective agreement because it alleges that the employer improperly applied management policies. While the employer assumes a duty in the collective agreement to treat its employees equitably according to its policies, no enforceable duty is created by the existence of this clause....

[18] The reasoning in *Pepper* applies to this case. Article 4 is a broad statement of the NRC's authority to manage its workplace, but it is not the source of an enforceable duty that would be subject to the Board's authority. As such, the Board has no authority to consider this grievance under s. 209(1)(a). It does not raise an adjudicable question concerning the application or interpretation of the management rights that are set out in article 4 of the collective agreement.

[19] Rather, I find that the essential nature of this grievance is staffing. Staffing does not fall within the purview of s. 209(1)(a). As the adjudicator found in *Malette v. Canada Revenue Agency*, 2008 PSLRB 99 at paras. 43 and 44:

43 ...To the extent that the employer may have acted arbitrarily or in bad faith or discriminated against the grievor regarding the writing test or any other similar element — a possibility on which I make no finding — those actions by any reasonable assessment cannot be divorced from the context of the staffing competition that the employer conducted.

44 Paragraph 209(1)(a) of the Act does not provide for recourse vis-à-vis staffing. As recently as the decision in Hureau v. Treasury Board (Department of the Environment), 2008 PSLRB 47, an adjudicator has confirmed at para 27 that "... any argument or any remedy requested by the grievor that involves the staffing process will be considered as being outside [an adjudicator's] jurisdiction." The decision in Hureau was based in part on subsection 208(2) of the Act which reads as follows:

208. (2) *An employee may not present an individual grievance in respect of which an administrative procedure*

for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

Dhudwal et al Dhudwal v. Canada Customs and Revenue Agency, 2003 PSSRB 116] and the Federal Court's decision in Professional Institute of the Public Service [Professional Institute of the Public Service of Canada v. Canada (Customs and Revenue Agency), 2004 FC 507], cited by the employer, represent substantial confirmation that the employer's staffing program constitutes an "administrative procedure for redress" — the appropriate redress mechanism where the essential nature of the dispute involves staffing. While both decisions dealt with the issue in the context of the former Public Service Staff Relations Act, R.S., c. P-35, s. 1, the determination remains germane under the Act, as verified in Hureau.

[20] Accordingly, the Board has no authority over the grievance that was referred to adjudication.

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

(The Order appears on the next page)

IV. Order

[22] As the Board is without jurisdiction to consider this matter, the preliminary objection is allowed.

[23] The grievance is dismissed.

July 11, 2024.

**Joanne Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board**