Date: 20240827

File: 561-20-45918

Citation: 2024 FPSLREB 120

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

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

CANADIAN SECURITY INTELLIGENCE SERVICE

Respondent

Indexed as
Public Service Alliance of Canada v. Canadian Security Intelligence Service

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: Kim Patenaude, counsel

For the Respondent: Marc Séguin, counsel

Decided on the basis of written submissions, filed March 27, April 17, and May 1, 2024.

REASONS FOR DECISION

I. Complaint before the Board

[1] The issue in this case is good-faith bargaining.

[2] On October 24, 2022, the Public Service Alliance of Canada (PSAC or "the complainant") made a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board"), alleging that the Canadian Security Intelligence Service ("the respondent"), as the employer, had breached its duty to bargain in good faith and had committed an unfair labour practice by delaying the ratification and signing of a collective agreement that had been tentatively approved and by paying a monetary benefit to its unrepresented employees soon after the represented employees had ratified the tentative collective agreement (which was eventually signed on May 3, 2023).

[3] The parties agreed to proceed by way of written submissions. The facts are not in dispute. The dispute centres on how those facts should be seen in light of the legislation and the jurisprudence.

[4] For the reasons that follow, I find that the respondent breached its duty to bargain in good faith, interfered with employee representation, and discriminated against represented employees.

II. Context

[5] The parties provided an agreed statement of facts as background to the complaint. The following summary is drawn entirely from that document.

[6] The respondent is the federal government agency responsible for investigating threats to national security. The complainant is the certified bargaining agent of the only bargaining unit within the respondent; it consists of approximately 74 employees performing clerical and administrative duties.

[7] All the respondent's other employees are unrepresented. They may be represented by an employee association, but it is not a certified bargaining agent as defined in the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[8] The parties signed their first collective agreement on October 20, 1986. Their last one expired on March 31, 2018. On December 18, 2018, the complainant served notice to bargain.

[9] On April 1, 2021, a respondent representative provided the complainant with information on the terms and conditions of employment that the respondent had implemented for its unrepresented employees. This information included terms and conditions with respect to wage increases and compensation changes (retroactive and prospective).

[10] In bargaining with the respondent, the complainant used the terms and conditions that had been granted to the unrepresented employees as benchmarks for its demands.

[11] On February 17, 2022, the parties signed a tentative agreement that included an implementation memorandum of understanding ("the Implementation MOU"), which provided the following:

- The respondent was to pay any retroactive salary within 180 days of the parties signing the collective agreement.
- Each bargaining unit member was to receive $500, payable within 180 days of the parties signing the collective agreement.
- In the event that the collective agreement was not implemented within 180 days of being signed, a $50 payment was to be made to each bargaining unit member, with an additional $50 payment for every subsequent 90-day period without implementation.

[12] The complainant held ratification sessions and ratified the collective agreement by April 13, 2022.

[13] On April 26, 2022, the respondent announced that unrepresented employees would receive a "Temporary Recognition Lump Sum Payment" (TRLSP), equivalent to 2.5% of their base salaries, in March and September of each year until March 2024.

[14] On May 4, 2022, the complainant's negotiator, Dr. John Eustace, emailed Marc Thibodeau, the respondent's negotiator, to express the represented employees' dismay at being excluded from the TRLSP and offered to sign an MOU that would allow the respondent to pay it to represented employees.

[15] Dr. Eustace and Mr. Thibodeau exchanged emails on the matter and the collective agreement's ratification. Finally, on August 13, 2022, Mr. Thibodeau informed Dr. Eustace that the respondent would not extend the TRLSP to represented employees.

[16] On December 1, 2022, the respondent informed the Board and the complainant that the Minister had approved the tentative agreement signed on February 17, 2022, and that it would proceed to the Treasury Board Secretariat for approval. On February 10, 2023, the Governor in Council (GIC) approved the collective agreement.

[17] The respondent's chief of labour relations and a Union of Safety and Justice Employees vice president exchanged several emails on the process for the actual signing of the collective agreement, which was finally done on May 3, 2023. Salaries for the bargaining unit were adjusted by June 21, 2023; retroactive payments were completed in August 2023.

III. The positions of the parties

[18] To support their arguments, both parties presented jurisprudence. I will return to the relevant authorities in my analysis.

A. The complainant's position

[19] The complainant alleges that the respondent failed to comply with s. 106 of the *Act* (duty to bargain in good faith) and that it committed an unfair labour practice within the meaning of s. 186 of the *Act*.

[20] According to the complainant, the respondent's refusal to ratify the collective agreement for some 14 months without any reasonable explanation violated the principles of good-faith bargaining, specifically, the duty to "… make every reasonable effort to enter into a collective agreement" as stated in s. 106(b).

[21] The complainant further submits that by excluding the bargaining unit members from the TRLSP granted to unrepresented employees, the respondent committed an unfair labour practice. This action discriminated against the bargaining unit members for the sole reason of their membership in the bargaining unit, in violation of s. 186(2)(a)(i) of the *Act*. The respondent provided as an explanation that all compensation had to be negotiated through collective bargaining, yet it ignored the complainant's offer to sign an MOU. This implied that the complainant was responsible

for the TRLSP's denial, which was interference in its representation of its members, contrary to s. 186(1)(a).

[22] The complainant presented its arguments on what it considered were the four issues for the Board to decide, as follows.

1. Did the respondent violate the duty to bargain in good faith as defined by s. 106(a) of the *Act*?

[23] The respondent breached its duty to bargain in good faith when it refused to ratify the collective agreement for 14 months. From February to December 2022, it waited for the Minister's approval. Then, in March 2023, it indicated in an email that it did not know how to sign the agreement, despite the parties having had a collective bargaining relationship since 1986. By contrast, the complainant ratified the agreement within 2 months of the tentative agreement's signature.

[24] The respondent's failure to ratify the collective agreement deprived the bargaining unit members of the gains that had been negotiated and rendered useless the Implementation MOU that was negotiated to ensure the collective agreement's timely implementation.

[25] Another act of bad-faith bargaining was announcing that the TRLSP would be paid to unrepresented employees, which was done less than two weeks after the complainant had ratified the collective agreement. In a message to all staff, including to the bargaining unit members, the employer communicated that such an advantage could be achieved only through collective bargaining; the respondent refused to consider an MOU, pretexting that such a mechanism could not apply to the TRLSP, as it was temporary. This is an erroneous claim.

[26] The complainant asserts that providing unrepresented employees with a benefit denied to represented employees performing comparable work while collective bargaining is underway is contrary to the duty to bargain in good faith.

2. Did the respondent make every reasonable effort to enter into a collective agreement, in accordance with s. 106(b)?

[27] The respondent delayed ratification without any explanation. The Minister's approval was obtained only in December 2022, and by March 21, 2023, over a year after the tentative agreement was signed, the respondent inquired as to how it should

go about signing the agreement. It was signed only in May 2023. As the complainant stated, "The employer failed to make every reasonable effort to enter into the collective agreement and failed to communicate with the PSAC about any reasonable explanations for delay."

3. Did the respondent interfere with the complainant's administration and its representation of its members, in violation of s. 186(1)(a)?

[28] By stating to the represented employees that the TRLSP could be negotiated only through collective bargaining, the respondent gave those employees the false impression that their bargaining agent was to blame for them being denied the TRLSP. In addition, the length of time that the respondent took to ratify the collective agreement could have led only to dissatisfaction with representation.

[29] As the complainant stated: "The totality of the circumstances, the Respondent's reluctance to ratify the collective agreement and the coinciding provision of a unique benefit to its unrepresented employees, strongly indicates anti-union sentiment."

4. Did the respondent discriminate against the bargaining unit members with respect to their employment, pay, or any other term or condition of their employment because they are members of the bargaining unit, contrary to s. 186(2)(a)(i)?

[30] The complainant submits that the respondent discriminated against it in two ways: by announcing a special payment applicable only to unrepresented employees, and by withholding the benefits of collective bargaining by delaying the ratification of the collective agreement. Clearly, they were discriminatory actions against the employees represented by a bargaining agent. The timing strongly points to discrimination against those represented employees.

[31] Section 191(3) of the *Act* provides that a written complaint under s. 186(2) is itself evidence that a breach of that provision occurred, and that the onus is on the respondent to establish that the breach did not occur. The complainant submits that it established an arguable case that the breach occurred, and that the respondent has not provided a reasonable explanation for it.

[32] The complainant seeks the following remedies:

> *a.* [A declaration] *that the Respondent has violated ss. 106(a), 106(b), 186(1)(a) and 186 (2)(a)(i) of the* Act*;*

> *b. An order requiring the Respondent to pay $100 in damages to every member* [of the bargaining unit] *for the failure to ratify the collective agreement within 180 days of the PSAC ratifying the collective agreement, plus an additional $100 in damages to every member for every 90-day period thereafter;*
>
> *c. An order requiring the Respondent to pay the Temporary Recognition Lump Sum Payment to every member of the bargaining unit; and*
>
> *d. An order requiring the Employer to post this decision in a prominent location in all workspaces where bargaining unit members work for a period of not less than 90 days.*

B. The respondent's position

[33] The respondent frames the issues a little differently, as will be shown in the presentation of its arguments.

1. What are the applicable onuses?

[34] According to the respondent, the complainant bears the burden of establishing that the respondent breached its duty to bargain under s. 106 of the *Act*, as well as the burden to establish that the respondent interfered with the complainant's representation of employees, contrary to s. 186(1).

[35] An alleged violation of s. 186(2) is subject to a reverse onus, provided that an arguable case is made that a breach occurred.

2. Was there a breach of s. 106 of the *Act*?

[36] According to the respondent, there is no evidence that it intended to delay or avoid signing the collective agreement. Under s. 112 of the *Act*, a separate agency such as the respondent requires GIC approval to enter into a collective agreement, which was obtained in February 2023.

[37] The respondent asserts that it "remained transparent and communicative" since it responded to the complainant's emails and provided updates. It never indicated any reluctance to sign the collective agreement. It did not refuse to ratify the agreement. It signed the collective agreement on May 3, 2023.

[38] There is no evidence that it breached its duty to bargain in good faith.

[39] The respondent acknowledges that approximately 12 months elapsed between its and the complainant's respective ratifications. During that time, according to the respondent, it sought GIC approval, as stipulated in s. 112 of the *Act*. Once it was obtained, the respondent signed the collective agreement within a reasonable time.

[40] The respondent notes that the only relevant timelines in the *Act* relate to a collective agreement's implementation once it has been signed; the Implementation MOU also dealt with the implementation once the agreement was signed. The respondent respected those timelines.

[41] The complainant failed to show any prejudice due to the collective agreement's signing on May 3, 2023. All the salary commitments were honoured in a timely fashion.

3. Was there a breach of s. 186(1)?

[42] The respondent denies that it interfered in the complainant's representation of the bargaining unit's members by not granting them the TRLSP. It was not a bonus or retention allowance; rather, it was a temporary payment designed to recognize an increase in transformational initiatives and the employees' commitment in support of those changes. It was not part of the collective bargaining process.

[43] The respondent argues that granting different terms and conditions to unionized and non-unionized employees is not in itself discriminatory; nor is an employer obliged to justify providing different terms to different groups of employees.

[44] The respondent submits that it has the right to fix the terms and conditions of employment of its unrepresented employees. As for the represented employees, their terms and conditions of employment result from the collective bargaining process. The reverse onus does not apply to a complaint made under s. 186(1). Such a complaint requires evidence of anti-union animus. There is no evidence of any anti-union animus, and no evidence of any effect on the union's representation of its members.

4. Was there a breach of s. 186(2)?

[45] According to the respondent, there is no arguable case that the bargaining unit members were discriminated against.

[46] As concerns the TRLSP, the complaint was made outside the mandatory 90-day period under s. 190; the TRLSP was announced on April 26, 2022, and the complaint

was made in October 2022. Even were the Board to consider the complaint timely, nothing precludes an employer from granting different employment conditions to represented and unrepresented employees.

IV. Analysis

[47] Beyond determining whether the respondent breached ss. 106 and 186 of the *Act*, I must deal with the two preliminary issues that it raised in its arguments: timeliness, and the onus of proof.

[48] I will start with the respondent's time-limit objection that states that the complainant made a complaint about the TRLSP beyond the 90-day limit to make one.

[49] The objection was not raised before the parties engaged in the written submissions exchange, and in any event, I do not think that it has any merit.

[50] As of October 2022, the respondent still had not ratified the collective agreement. Until a collective agreement is signed, further bargaining is still possible. Thus, it was not outside the realm of possibilities that the respondent might have agreed to reopen negotiations, to grant the TRLSP to represented employees. Moreover, the definitive refusal to consider adding an MOU to the collective agreement to cover the TRLSP came in August 2022, which was within the timeline to make a complaint.

[51] I agree with the respondent that the complainant had the burden of proof for its complaint. However, the onus is reversed in the case of s. 186(2), provided that the complainant at least establishes an arguable case of the breach.

[52] I shall now deal with each of the violations that the complainant alleged occurred.

A. Did the respondent violate the duty to bargain in good faith as defined by s. 106 of the *Act*?

[53] Section 106 of the *Act* reads as follows:

106 *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is*	***106*** *Une fois l'avis de négociation collective donné, l'agent négociateur et l'employeur doivent sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le*

given unless the parties otherwise agree,	*délai éventuellement convenu par les parties :*
***(a)** meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*	***a)** se rencontrer et entamer des négociations collectives de bonne foi ou charger leurs représentants autorisés de le faire en leur nom;*
***(b)** make every reasonable effort to enter into a collective agreement.*	***b)** faire tout effort raisonnable pour conclure une convention collective.*

[54] With an alleged breach of the duty to bargain in good faith, the Board examines the whole of the bargaining process and the behaviour of the parties, to determine if the complaint has been made out (see *Canadian Union of Public Employees (Airline Division), Local 4027 v. Iberia Airlines of Spain* (1990), 80 di 165 (C.L.R.B.) at 170 ("*Iberia Airlines of Spain*"); *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78 at para. 56; and *Treasury Board v. Canadian Merchant Service Guild*, 2023 FPSLREB 7 ("*CMSG*") at paras. 64 and 68).

[55] As indicated in *Public Service Alliance of Canada v. Treasury Board*, 2023 FPSLREB 31 ("*PSAC 2023*"), a concise distillation of the principles governing the requirements to bargain in good faith and to make every reasonable effort to enter into a collective agreement can be found in *CMSG*, at para. 66, where the Board quotes as follows from the guidelines established in *Public Service Alliance of Canada v. Canada (Treasury Board)*, PSSRB File No. 148-02-16 (19770630), [1977] C.P.S.S.R.B. No. 16 (QL) at para. 11:

> …
>
> *a) The employer has the duty to recognize the union as the bargaining agent for its employees.*
>
> *b) Both the employer and the bargaining agent have the duty to share the intent of entering into a collective agreement, even though the objectives of the parties as to the content of the collective agreement might be different.*
>
> *c) The employer has the obligation to provide sufficient information in order to ensure "rational informed discussion". The reason underlying this obligation has been stated as follows:*
>
> > *As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined.*
>
> *d) The negotiation process should be looked upon as a whole.*

[56] When an employer's actions are found to have the objective of undermining the recognition of a union or bargaining agent, a violation of the duty to bargain in good faith can been found (see *PSAC 2023*, at para. 242). As the Board further identified in *PSAC 2023*, rational dialogue and discussion are also key elements of the duty to bargain in good faith (at para. 243). The importance of this principle was emphasized in *CMSG*, at para. 65, which quotes from *United Steelworkers of America on behalf of Local 13704 v. Canadian Industries Limited*, [1976] OLRB Rep. May 199 at para. 19 ("*United Steelworkers*"), in which the Ontario Labour Relations Board found as follows:

> *19. The requirement of rational discussion imposes upon the parties a duty to communicate with each other, recognizing that proper collective bargaining depends upon effective communication. Although a failure to communicate might not appear to be the same kind of wrong as an unwillingness to recognize the other party, it does, in fact, have a very serious effect on the collective bargaining process as a whole. The breakdown of established bargaining relationships, because of an unwillingness to engage in full discussion with the other party, is likely to lead to more frequent resort to economic sanctions, and to greater dissatisfaction with the collective bargaining process. The obligation to bargain in good faith recognizes the importance of collective bargaining as a structure within which a full dialogue can be conducted between a trade union and the employer.*

[57] In examining the whole of the bargaining process in this case, both parties recognized in the agreed statement of facts that many of the terms and conditions granted to unrepresented employees were used as benchmarks for the negotiations, including with respect to wages. During negotiations, the respondent provided information to the PSAC on what terms and conditions had been implemented for the unrepresented employees. Yet, there was no "full dialogue" concerning the sudden grant of the TRLSP immediately after the complainant had ratified the tentative agreement.

[58] An employer is not obligated to present terms at the table and is free to offer different terms and conditions of employment to different categories of employees (see *Canada (Attorney General) v. Social Science Employees Association*, 2004 FCA 165). However, as stated in *Iberia Airlines of Spain*, the parties' specific situation must be considered. In that case, the former Canada Labour Relations Board found that the duty to bargain in good faith had been violated because preferential treatment was offered to comparable non-unionized employees during the bargaining period.

[59] Although a tentative agreement had been reached by the time the respondent announced the TRLSP, the collective agreement was yet unsigned, even though the complainant had already ratified it. According to the arbitral jurisprudence, the duty to bargain in good faith applies until the final signing of the collective agreement (see *Public Service Alliance of Canada v. Listuguj Mi'gmaq First Nation Council*, 2021 CIRB 975 at para. 110).

[60] While the respondent was not obligated to offer the TRLSP to represented employees, it did have an obligation to provide sufficient information to the PSAC to ensure rational informed discussions, especially in a context where unrepresented employees were used as benchmarks for the negotiations. Again, no mention was made of the TRLSP during the negotiations leading up to the tentative agreement, prior to ratification, nor was the PSAC informed of the TRLSP before it was announced to all employees. All this happened within the span of approximately two months. The respondent made no attempt to explain the timing of its decision to grant the TRLSP or its announcement, whether to the bargaining agent or to the Board.

[61] Similarly, no reasonable explanation was provided to explain why the TRLSP was provided to all employees except those who are represented. According to the employer, it was a temporary payment designed to recognize an increase in transformational initiatives and the employees' commitment in support of those changes. It is entirely unclear how that same rationale would not apply to the whole of the administrative and clerical support group as well. Again, no attempt was made to show how the unrepresented employees participated in these transformational initiatives and the represented employees did not.

[62] As expressed in *United Steelworkers*, a failure to communicate can be just as harmful as an unwillingness to recognize the other party in terms of its effect on the bargaining relationship and the collective bargaining process. By all indications, the respondent's failure to communicate with the PSAC about the TRLSP and about the ratification of the collective agreement had such an impact on the bargaining process and on finalizing the collective agreement, resulting in the filing of this complaint.

[63] Following the announcement of the TRLSP, the PSAC offered to sign an MOU that would allow the respondent to pay it to represented employees. Between May and June 2022, the PSAC also followed up with the respondent about ratifying the

collective agreement. Only in August 2022, did the PSAC receive a response to its proposal about an MOU covering the TRLSP. That response did not engage with the PSAC on the issue, with the respondent simply stating that it was "… an element that we cannot add to the tentative agreement …" and that "… the employer is not in a position to extend such a measure to the bargaining unit members …". As a result, this complaint was filed on October 24, 2022. Ministerial approval for the tentative agreement did not occur until December 2022.

[64] No explanation was provided to explain the delay obtaining ministerial approval. The tentative agreement was reached on February 17, 2022; approval came on December 1, 2022. During this unexplained time that elapsed from February 2022 to December 2022, the respondent introduced the TRLSP and failed to engage with the PSAC on this issue.

[65] Thereafter, the collective agreement would take another five months to finalize, on May 3, 2023. The respondent argues that it advised the complainant that the delays in finalizing the collective agreement were due to seeking necessary approvals from the Minister, Treasury Board and enquiring into the correct signing process. However, the only argument that the respondent provided to explain those delays was the requirement to obtain GIC approval under s. 112 of the *Act*. Since the respondent does not control the GIC's actions, the 3-month delay obtaining GIC approval in February 2023 is not at issue. Otherwise, the respondent provided no explanation as to the nature of the other delays. Comparatively, the bargaining agent ratified the collective agreement with its membership in less than two months.

[66] Having examined the whole of the bargaining process and the behaviour of the parties during that process, I find that the respondent violated the duty to bargain in good faith, including to make every reasonable effort to enter into a collective agreement.

B. Did the respondent interfere with the complainant's administration and its representation of its members, in violation of s. 186(1)(a)?

[67] Section 186(1)(a) of the *Act* prohibits an employer from interfering in the administration of an employee organization or its representation of employees. In *Professional Institute of the Public Service of Canada v. Treasury Board*, 2008 PSLRB 13 at para. 58, the former Board found that there is no requirement to prove the actual

impact on the bargaining agent's capacity to represent employees or to establish that the employer's actions were animated by an anti-union animus. While the bargaining agent need not prove anti-union animus, the bargaining agent does still have the onus of establishing, on a balance of probabilities, that the employer interfered with its administration or the representation of its members. Circumstantial evidence, such as employee perceptions, may satisfy this onus (see *Lala v. United Food and Commercial Workers Canada, Local 401*, 2017 FPSLREB 42 at paras. 60 to 69).

[68] In this case, as employees in the bargaining unit were waiting for their collective agreement to be signed, they were informed that their unrepresented fellow employees would be granted a significant monetary benefit to which they were not entitled because it had not been negotiated through collective bargaining. Moreover, after ratifying the collective agreement, they waited approximately 10 months for the employer to ratify the collective agreement and over a year for the collective agreement to be finalized.

[69] Whether or not the employer's actions were motivated by an anti-union animus, I accept the complainant's submissions that this created frustration among its members and gave the impression that it was to blame, for failing to negotiate comparable terms of remuneration for the bargaining unit. Alongside these employee perceptions, I again weigh the fact that the respondent provided no explanation for the timing of its decision to grant the TRLSP or its announcement, its unwillingness to engage with the complainant on this issue, and that it did not provide an explanation for the delay obtaining ministerial approval.

[70] Overall, I find that by granting the TRLSP and delaying the ratification of the collective agreement, the respondent undermined the relationship between the complainant and the employees whom it represents. This was interference in the bargaining unit members' representation.

C. Did the respondent discriminate against the bargaining unit members with respect to their employment, pay, or any other term or condition of their employment because they are members of the bargaining unit, contrary to s. 186(2)(a)(i)?

[71] As stated earlier, a reverse onus exists for this provision. For it to apply, there has to be an arguable case (see *Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37 at para. 32).

[72] I find that the complainant has established an arguable case of discrimination.

[73] The respondent cited *Social Science Employees Association*, as follows, to support the proposition that it is not per se discriminatory to grant different conditions to unionized and non-unionized employees and that an employer is not bound to justify doing so:

> …
>
> *[42] Hence, it follows that distinctions in the conditions of employment of unionized and non-unionized employees are perfectly legitimate and cannot give rise to a complaint of discrimination under sections 8 and 9 of the Act, unless it is shown that the purpose of the distinction is to harm the unions and their members. In* Re Ontario Hydro and Canadian Union of Public Employees, Local 1000 *(1/994), 1994 CanLII 18764 (ON LA), 40 L.A.C. (4th) 135, at pages 146 and 147, a labour board makes this perfectly clear:*
>
> > *It is surprising that there are so few cases on this subject, but perhaps it simply indicates that it has been generally accepted that no-discrimination clauses of the present type, whether such clauses are interpreted narrowly or broadly, were never intended to prohibit preferential treatment of members of one bargaining unit over those of another, or of excluded employees over members of a bargaining unit or units. The very essence of collective bargaining is that such differences will be subject of [sic] negotiation separately in respect of each bargaining unit, and of corporate policy in respect of non-represented employees. It is endemic in such a legal structure that very different outcomes will arise for differently represented groups of employees; in the case of Ontario Hydro, that result is already clearly indicated in the differences between the society collective agreement and the union collective agreement, and by the quite different terms and conditions of employment applicable to non-represented employees.*
> >
> > *Clauses prohibiting discrimination on the basis of union membership have never been interpreted, nor has it even been proposed, to prohibit an employer from providing terms and conditions of employment for non-represented employees that are very different from those of bargaining unit members, even if they are in fact quite superior. […]*
>
> …

[74] I agree that an employer can offer different terms and conditions to different groups of employees. However, the events in this case are markedly different from the situation that occurred in *Social Science Employees Association*. It involved calculating

retroactive payments under the collective agreement, which were alleged to be unfavourable compared to the calculation for employees not covered by a collective agreement. The Court's reasoning appears to be that negotiated terms are not per se discriminatory.

[75] In this case, the circumstances are different. It is not a matter of the terms negotiated within the collective agreement but rather the differential treatment of employees, with the only stated reason for the difference being the fact of representation by a bargaining agent.

[76] The complainant put forth two grounds to demonstrate that discrimination occurred: delaying signing the collective agreement, thus depriving the represented employees of the benefits gained in collective bargaining after extending the same benefits to unrepresented employees, and paying a significant temporary lump sum to all employees except those represented. Taking all of the facts alleged in the complaint as true, including the timing of the TRLSP, the employer's communicated rationale for it and for the exclusion of represented employees from it, and the lack of responsiveness from the employer on this issue and in finalizing the collective agreement, I find that an arguable case of discrimination has been established.

[77] Therefore, the respondent had the burden to show that the purpose of its actions was not to discriminate against the bargaining agent or its members. It failed to do so.

[78] Aside from arguing that the complainant did not establish an arguable case, the respondent provided little in response to the complaint under s. 186(2) of the *Act*. It stated, without explanation, that there was no intent or motive to discriminate. It provided no explanation for the timing of the TRLSP or for the exclusion of represented employees from it, including after the intervention from the bargaining agent. In this regard, it argued that it is not a breach of s. 186(2), after the end of bargaining, to have different terms and conditions for non-unionized employees than those bargained for by the union for its members.

[79] The first issue with this argument is the respondent's failure to address the fact that the terms and conditions granted to unrepresented employees were used as a benchmark in negotiations. The second is that bargaining had not ended, as the

collective agreement had yet to be finalized. In fact, the collective agreement would not be finalized for another year after the announcement of the TRLSP.

V. Remedies

[80] I have concluded that the respondent breached ss. 106 and 186. I will now consider in turn the remedies that the complainant seeks, as follows:

> *a.* [A declaration] *that the Respondent has violated ss. 106(a), 106(b), 186(1)(a) and 186 (2)(a)(i) of the* Act*;*
>
> *b. An order requiring the Respondent to pay $100 in damages to every member* [of the bargaining unit] *for the failure to ratify the collective agreement within 180 days of the PSAC ratifying the collective agreement, plus an additional $100 in damages to every member for every 90-day period thereafter;*
>
> *c. An order requiring the Respondent to pay the Temporary Recognition Lump Sum Payment to every member of the bargaining unit; and*
>
> *d. An order requiring the Employer to post this decision in a prominent location in all workspaces where bargaining unit members work for a period of not less than 90 days.*

[81] Section 192 of the *Act* provides that the Board may make any order that it considers necessary in the circumstances if it determines that a complaint referred to in s. 190(1) is well founded. It also lists examples of orders, without limiting the Board to them. For failing to comply with s. 186(2)(a), for instance, s. 192(1)(b)(ii) provides for an amount not exceeding the remuneration that would have been paid had it not been for the breach.

[82] In *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence*), 2013 PSLRB 139, the former Board found that s. 192(1) provides jurisdiction to make an award of damages for a non-monetary loss and that such damages have been awarded "… where there is an important and intrinsic right to be protected or enforced and where deterrence is an important factor" (at para. 38). The former Board added that "[h]armonious labour-management relations, which are one of the objects of the *PSLRA* [now the *Act*], are not possible when one of the parties has no hesitation in ignoring provisions of the *PSLRA* designed to achieve labour relations peace" (at para. 38). Like in that case, I find that an award of damages in the circumstances of this case is necessary to emphasize that the

provisions of the *Act* are to be respected and that there are consequences for breaching them.

[83] I have found that the respondent has failed to comply with s. 106 of the *Act* and has committed an unfair labour practice within the meaning of ss. 186(1)(a) and 186(2)(a)(i). Two of the main factors in those findings were the respondent's actions around the TRLSP and its failure to finalize the collective agreement in a timely fashion. The remedies requested by the bargaining agent are directed at these two main issues.

[84] I find it necessary to award the TRLSP to the members of the bargaining unit. Again, the terms and conditions granted to unrepresented employees were used as a benchmark in negotiations. The rationale for granting the TRLSP to unrepresented employees, in recognition of the increase in transformational initiatives and employees' continued support of the changes, applies equally to the work of bargaining unit members. Like in *Federal Government Dockyard Chargehands Association*, this remedy goes to the "… heart of the relationship between the parties, and failing to rectify it in a meaningful way could give rise to cynicism about labour-management relations and could undermine the ability of the union to represent its members effectively" (at para. 41).

[85] The failure to finalize the collective agreement in a timely fashion also meant that employees in the bargaining unit did not receive the pay and benefit increases when they should have. While I accept that some of the delay in finalizing the collective agreement can be attributed to seeking out the necessary approvals, I also find that the employer did not provide sufficient justification for the extended delays in this process.

[86] I find that the respondent unduly delayed ratifying the collective agreement, but I am not willing to make an order that mirrors the Implementation MOU that the parties concluded for the collective agreement, as it appears that once the collective agreement was signed, the payments due were made in time.

[87] The complainant requested a payment of $100 for each bargaining unit member for the failure to ratify within 180 days of the complainant's ratification, and a further $100 for every subsequent 90-day period. I acknowledge that there was undue delay, and a glaring lack of explanation, but the delay is not so easily calculated. There were

further exchanges between the parties concerning the TRLSP, ministerial approval was required, as well as GIC approval. I have already decided that some periods appear unduly extended, notably for obtaining ministerial approval in December 2022 when the tentative agreement was reached in February 2022. In contrast, it was ratified by the bargaining agent within two months.

[88] Consequently, I award a payment of $100 to each employee in the bargaining unit for the undue delay concluding the collective agreement.

[89] Finally, I order the respondent to post this decision in a prominent location for a period of not less than 90 days.

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

(The Order appears on the next page)

VI. Order

[91] The complaint is allowed.

[92] I declare that the Canadian Security Intelligence Service (the respondent) violated ss. 106, 186(1)(a), and 186(2)(a)(i) of the *Act*.

[93] The respondent shall pay $100 in damages to every member of the bargaining unit for the undue delay in ratifying the collective agreement.

[94] The respondent shall pay the Temporary Recognition Lump Sum Payment to every member of the bargaining unit.

[95] The respondent shall post this decision in a prominent location in all workspaces where bargaining unit members work for a period of not less than 90 days.

August 27, 2024.

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