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Citation: 2024 FPSLREB 125

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

SYLVIE MADELEINE GAUTHIER

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
Gauthier v. Canadian Association of Professional Employees

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Jean-Michel Corbeil, counsel

Decided on the basis of written submissions, filed May 8 and 14, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **(FPSLREB TRANSLATION)**

I. Complaint before the Board

[1] Sylvie Madeleine Gauthier, the complainant, alleged that the Canadian Association of Professional Employees ("the respondent" or CAPE) violated ss. 106, 110(3), and 190(1)(b), (d), and (g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[2] The statement of complaint states this, among other things:

> [Translation]
>
> …
>
> *In recent negotiations* [of the collective agreement expiring in 2026], *CAPE failed its duty of fair representation to its retired ex-members who were active in 2021-2022. The agreement that compensates ECs in place as of June 29, 2023, with a one-time pensionable lump-sum amount of $2500, was negotiated in bad faith. In addition, no official document detailing the parameters of the agreement is available (it is not included in the 2022-2026 collective agreement).*
>
> …

[3] The complainant requested that the Board require that the official agreement between CAPE and the employer, the Treasury Board, on the lump-sum payment and all related documents be made public and that the parties confirm the context in which that compensation was negotiated. Finally, she asked that the Board determine whether there was bad faith and a discriminatory reason for not paying the lump-sum payment to CAPE's ex-members who were active in 2021-2022.

[4] In response to the complaint, the respondent raised three preliminary objections. First, it argued that ss. 106 and 110(3) of the *Act* have no application. Therefore, the Board should reject any allegation that those provisions were contravened. Alternatively, it asked that the complaint be summarily dismissed without a hearing because it was made late and because it does not disclose any arguable case that the duty of fair representation, under s. 187 of the *Act*, was violated.

[5] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) allows the Board to decide any case or question that it is seized of without holding a hearing. In the interest of transparency and procedural

fairness, in an email dated April 25, 2024, I informed the parties that the preliminary objections would proceed by way of the written arguments in the Board's file, and I offered them the possibility, if they wished, to make additional written arguments.

[6] For the reasons that follow, I find that the complainant did not have the legal standing required to make a complaint under ss. 106 and 110(3) of the *Act*. I find that the complaint was made late and that there are no grounds to support extending the time limit. Therefore, the complaint is dismissed.

II. Summary of the facts

[7] The facts underlying the complaint are not in dispute. The complainant is a former EC-group employee. She was a CAPE member in 2021 and 2022. As of the date on which the complaint was made, November 27, 2023, she was retired. She submitted that she was informed of the lump-sum payment on November 8, 2023.

[8] It appears from the written arguments that the complainant was not a CAPE member when its current collective agreement with the Treasury Board for the EC group was signed on June 29, 2023. She did not dispute that fact.

[9] The previous collective agreement expired on June 21, 2022. The CAPE and Treasury Board negotiating teams met on March 17 and 18 to begin the negotiation process to renew the collective agreement.

[10] In the context of their collective bargaining, CAPE and the Treasury Board were part of a mediation session that was held on November 3 and 4, 2022. They reached an impasse, and CAPE made a request to settle the new collective agreement by interest arbitration. The Board set an arbitration date of June 19, 2023.

[11] Several federal public service bargaining agents were in the collective bargaining process at the same time as was CAPE. On April 19, 2023, more than 155 000 members of the Public Service Alliance of Canada (PSAC), working for the Treasury Board and the Canada Revenue Agency, began an indefinite strike.

[12] On May 1, 2023, PSAC announced that it had reached an agreement in principle for 120 000 members working for the Treasury Board that set out a one-time pensionable lump-sum payment of $2500. PSAC indicated on its website that that

payment would be granted to everyone who was a member of the bargaining unit as of the date on which the collective agreement was signed.

[13] In early May 2023, CAPE and the employer agreed to hold discussions to resolve their outstanding issues before the interest arbitration scheduled for June 19, 2023.

[14] As part of the May 2023 discussions, the Treasury Board proposed the same salary increases that were provided to PSAC, including the one-time pensionable lump sum of $2500.

[15] CAPE was aware that the Treasury Board was unlikely to offer more favourable monetary proposals than what PSAC obtained through the 11-day strike. According to CAPE, the alternative to a negotiated settlement was the interest arbitration scheduled for June 19, 2023. It was likely that an arbitration board would award monetary proposals similar to those that PSAC and the Treasury Board negotiated. Thus, there was very little discussion about the lump sum or the conditions under which it would be paid.

[16] On May 18, 2023, CAPE and the Treasury Board reached an agreement in principle, resolving all outstanding issues for the EC collective agreement renewal. It was confirmed in a memorandum of understanding that the parties signed. It included the same salary increases as those granted to PSAC, including the one-time $2500 pensionable lump sum. The conditions for the lump-sum payment were the same as those in the PSAC and Treasury Board's agreement. The lump sum would be paid to the bargaining unit members active on the date on which the collective agreement was signed. CAPE's members were to ratify the agreement.

[17] On May 18, 2023, CAPE announced publicly that an agreement in principle had been reached. Its terms were available on CAPE's website and on social media. The information was emailed to all the members who subscribed to CAPE's mailing list. The announcement was published in several online media outlets, including *CTV News*, *La Presse*, and the *Ottawa Citizen*. The respondent provided links to all the sites on which the announcement was made.

[18] On May 24, 2023, CAPE announced on its website and on social media that it would organize two webinars for EC group members on May 30, 2023, one in English, and one in French. The negotiating team attended the virtual information sessions,

which were held to provide members with more details about the agreement and to answer their questions. The agreement was detailed, including the salary increases and the lump sum.

[19] On June 9, 2023, CAPE published information for its members on its website about the ratification vote for the new collective agreement. The agreement and frequently asked questions were available on the website. The frequently asked questions clearly stated, "Retired members, as of the date of the signature of the collective agreement are not eligible to receive the allowance."

[20] The ratification vote took place between June 5 and 16, 2023. On June 17, 2023, CAPE announced that its members had voted in favour of ratifying the agreement in principle. The collective agreement was signed on June 29, 2023. The lump sum amount was paid to the members on November 8, 2023.

[21] The complainant did not receive the lump sum because she was retired when the collective agreement was signed. She alleged that she was informed of the lump-sum payment on November 8, 2023, the date on which it was paid to the current ECs.

III. Reasons

A. The complainant did not have the required legal standing to make a complaint under ss. 106 and 110(3) of the *Act*

[22] The complainant made her complaint under s. 190(1) of the *Act*, which provides that the Board "… must examine and inquire into any complaint made to it …" with respect to, among other things, a complaint under s. 190(1)(b) that "… the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith) …", along with a complaint under s. 190(1)(d) that "… the employer, a bargaining agent or a deputy head has failed to comply with subsection 110(3) (duty to bargain in good faith) …".

[23] The collective-agreement bargaining regime is well documented in *Public Service Alliance of Canada v. Treasury Board*, 2023 FPSLREB 31 (see paragraphs 100 and 101). In that case, the Board examined the collective bargaining regime set out in the *Act*. It held that the duty to bargain in good faith set out in s. 106 arises directly from the provisions of s. 105 on the notice to bargain. Those two provisions read as follows:

Negotiation of Collective Agreements	***Négociation des conventions collectives***
Notice to bargain collectively	***Avis de négocier collectivement***
…	[…]
105 (1) *After the Board has certified an employee organization as the bargaining agent for a bargaining unit and the process for the resolution of a dispute applicable to that bargaining unit has been recorded by the Board, the bargaining agent or the employer may, by notice in writing, require the other to commence bargaining collectively with a view to entering into, renewing or revising a collective agreement.*	***105 (1)*** *Une fois l'accréditation obtenue par l'organisation syndicale et le mode de règlement des différends enregistré par la Commission, l'agent négociateur ou l'employeur peut, par avis écrit, requérir l'autre partie d'entamer des négociations collectives en vue de la conclusion, du renouvellement ou de la révision d'une convention collective.*
When notice may be given	***Date de l'avis***
(2) *The notice to bargain collectively may be given*	***(2)*** *L'avis de négocier collectivement peut être donné :*
(a) *at any time, if no collective agreement or arbitral award is in force and no request for arbitration has been made by either of the parties in accordance with this Part; or*	***a)*** *n'importe quand, si aucune convention collective ni aucune décision arbitrale n'est en vigueur et si aucune des parties n'a présenté de demande d'arbitrage au titre de la présente partie;*
(b) *if a collective agreement or arbitral award is in force, within the four months before it ceases to be in force.*	***b)*** *dans les quatre derniers mois d'application de la convention ou de la décision qui est alors en vigueur.*
Copy of notice to Board	***Copie à la Commission***
(3) *A party that has given a notice to bargain collectively to another party must send a copy of the notice to the Board.*	***(3)*** *Copie de l'avis est adressée à la Commission par la partie qui a donné l'avis.*
Effect of notice	***Effet de l'avis***
Duty to bargain in good faith	***Obligation de négocier de bonne foi***

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 given unless the parties otherwise agree,*	***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 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.*

[24] In *Public Service Alliance of Canada*, the Board continued its analysis by stating that s. 105 of the *Act* refers to negotiating a collective agreement and that the definition in s. 2(1) provides that a written collective agreement, entered into under Part 1 between the employer and a given bargaining agent, contains provisions on terms and conditions of employment and related matters. The Board noted as follows at paragraph 103:

> *[103] It is also important to note that ss. 105 and 106 are contained within Part 1 of the* Act, *which concerns labour relations generally. That part of the* Act *sets out the framework for collective bargaining in the federal public service, starting with the establishment of bargaining units, the certification of bargaining agents, the choice of process for dispute resolution, and the collective bargaining process. Provisions for essential services, arbitration, conciliation, and strike votes are also set out in this part.*

[25] Section 110(3) of the *Act* specifically addresses that same obligation for two-tier negotiations; that is, between a bargaining agent and the employer and deputy head responsible for a department or other part of the federal public administration under s. 110(1). That obligation is breached when one of the parties behaves in such a way as to obstruct the negotiation process.

[26] I agree with the respondent that those provisions do not create an obligation for a bargaining agent to its members. The obligation under ss. 106 and 110(3) of the *Act* to bargain in good faith exists between the parties that are bound by those provisions; that is, between the bargaining agent and the employer or deputy head.

[27] The complainant disputed the content of the collective agreement that CAPE negotiated. In her complaint, she submitted that "[translation] … the $2500 [lump sum] was negotiated to compensate for the difference between the 2021-2022 wage increase (1.5%) and the consumer price index, which increased from 3.10% (June 2021) to 8.10% (June 2022)". She questioned why the amount would be pensionable if it did not compensate for hours worked. She accused CAPE of accepting the offer in bad faith, knowing that its ex-members no longer had the right to vote because the employer had offered to pay the lump sum to only the current ECs as of the collective agreement's signing date.

[28] In response to that allegation, the respondent argued that the parties entered into a collective agreement, which demonstrates that CAPE did not breach its obligations under the *Act*. It argued that to the extent that CAPE acted in bad faith toward its members, which it denied, by accepting certain proposals in the context of collective bargaining, it would constitute a breach of the duty of fair representation under s. 187 of the *Act*. I agree.

[29] Sections 190(1)(b) and (d) of the *Act* are based on legislative provisions that relate exclusively to obligations between the employer and the bargaining agent. Those provisions do not provide for an individual right of appeal. There is no evidence that CAPE failed to meet its obligations under ss. 106 and 110(3) to bargain in good faith and to conclude a collective agreement as quickly as possible. Having read the complainant's allegations, I have no reason to doubt that the collective agreement was negotiated in the interest of all public service employees and that it complies fully with the *Act*'s requirements.

[30] In *Najem v. Public Service Alliance of Canada*, 2011 PSLRB 83, the former Board had before it a member's complaint that alleged that PSAC failed its duty to bargain in good faith by accepting the employer's proposal to terminate the payment of severance pay set out in the collective agreement. At paragraph 18, the Board ruled as follows:

> *[18] The legislative provisions of the* PSLRA *are founded on the exclusive and mutual obligations of the bargaining agent and the employer to engage in collective bargaining with a view to concluding a collective agreement. Consequently, any recourse with respect to the duty to bargain in good faith under paragraphs 190 (*b*) and (*d*) lies with these parties and excludes employees*

> *represented by the bargaining agent from exercising individual rights to complain about the collective bargaining process. In point of fact, paragraphs 190(1)* (b) *or* (d) *preclude the complainant, as an individual member of the bargaining unit, from presenting a complaint before the Board disputing the collective bargaining process* ….

[31] As in *Najem*, ss. 190(1)(b) and (d) of the *Act* did not allow the complainant to make a complaint with the Board, as a particular bargaining unit member, challenging the collective bargaining process between CAPE and her former employer. As a result, she did not have the legal standing required to make an unfair-labour-practice complaint under ss. 106 and 110(3). It follows that the Board does not have jurisdiction to investigate that part of the complaint. For those reasons, I dismiss that part of the complaint. Moving now to the next question, which is whether the complaint was made within the time limit set out in s. 190(2).

B. The duty-of-fair representation complaint was made late, contrary to s. 190(2) of the *Act*

[32] The complaint was made on November 27, 2023. The complainant maintained that she was informed of the lump-sum payment on November 8, 2023. She alleged that CAPE acted in bad faith and that it discriminated by negotiating the lump-sum payment's terms. In summary, she objected to the fact that only employees who were members of the bargaining unit at the moment the collective agreement was signed were eligible.

[33] The respondent requested that the complaint be dismissed on the grounds that it was made late, contrary to s. 190(2) of the *Act*, which provides that a complaint under s. 190(1) must be made within 90 days after the date on which the complainant knew or should have known of the circumstances that give rise to it.

[34] The respondent argued that the complainant knew or should have known of the action that gave rise to the complaint well before November 8, 2023. CAPE extensively published the details of the agreement in principle that was reached to renew the collective agreement, including the lump sum, as of May 18, 2023. That information was published on CAPE's website, as well as on several social media sites, including Facebook. In addition, had the complainant asked to be placed on CAPE's distribution list, she would have also received several emails containing the relevant information. The respondent stated that the frequently asked questions posted on the CAPE's

website on June 9, 2023, clearly and explicitly stated that retirees as of the date on which the collective agreement was signed would not be eligible to receive the payment.

[35] The respondent argued that the 90-day period is mandatory and that the Board has no discretion to extend it. The Board's only discretion is to determine when the complainant "should have" known of the acts or circumstances that gave rise to the complaint. For the complaint to have been made within the time limit prescribed by the *Act*, the circumstances that gave rise to it should have occurred on or after August 29, 2023. To support those claims, the respondent referred me to *Nemish v. King*, 2020 FPSLREB 76 at paras. 32 to 36.

[36] Responding to the respondent's objection, the complainant stated that she was a CAPE member until March 31, 2023. Before that date, CAPE never informed her that the parties had signed an official and final agreement about the $2500 pensionable amount. When the collective agreement was signed and made public, she looked for the lump-sum clause in the collective agreement but found nothing. She waited for the official agreement for the $2500 pensionable lump sum to be made public, but it never was. When the lump sum was paid to current CAPE members in November 2023, she requested a copy of the official agreement from CAPE. However, she was never able to obtain one. According to her, an agreement in principle is not an official agreement. That is why she made her complaint on the date on which the lump sum was paid, November 8, 2023.

[37] The respondent demonstrated to me that the agreement and the lump-sum amount were the subjects of at least eight announcements on its website between May 18 and June 29, 2023. Several media announcements were made that an agreement had been reached. CAPE demonstrated that the information was widely disseminated on its website, on social media, and by email. It made the agreement's details available on its website and through virtual meetings. I accept its position that it would be unreasonable to take the date of November 8, 2023, as the date on which the complainant became aware of the facts that gave rise to the complaint for the calculation of the 90-day period. She had the onus of doing what was necessary to inform herself about the terms of the agreement that affected her well before August 29, 2023.

[38] I accept the respondent's argument that anyone interested in the outcome of collective bargaining between it and the Treasury Board for the EC Group, whether or not he or she is a bargaining unit member, would have been reasonably informed of this matter well before August 29, 2023. The respondent was correct in stating that an agreement in principle is enforceable. Well before August 29, 2023, the complainant was aware that only members who were working at the moment the agreement was signed would have been entitled to the lump sum.

[39] I agree with the respondent that the complainant's comments in response to its objection to dismiss the complaint confirm that she was aware of the CAPE-Treasury Board agreement in principle, including the lump-sum payment, well in advance of the 90 days before she made the complaint. In her February 26, 2024, reply, she stated that when the collective agreement was signed and made public, she looked for the clause in it but found nothing. The new collective agreement was signed on June 29, 2023. She had the burden of proof of demonstrating that the complaint was made within the time limit prescribed by the *Act*. In addition, she did not provide any satisfactory explanation to justify why she was unable to make her complaint within the prescribed time limit.

[40] In a recent Board decision, *Beaulieu v. Public Service Alliance of Canada*, 2023 FPSLREB 100 at paras. 38 and 44, the complainant in that case asked the Board to extend the time limit for making his complaint against his union. First, the Board considered whether it had the authority to extend the time limit under s. 190(2) of the *Act*. Departing from the case law, it concluded that it did indeed have a limited, implicit power to release part of the consequences of failing to comply with the time limit if there was a valid reason justifying the delay, which the complainant could not have foreseen or controlled. The Board went on to indicate that that power should be exercised only in exceptional or unusual circumstances. Given the facts of that case, the complainant did not meet that very demanding standard, since the circumstances that he invoked were neither unusual nor exceptional. As in *Beaulieu*, I find no unusual or exceptional circumstances that prevented the complainant from making her complaint before August 29, 2023. The complaint was made late, and the Board does not have jurisdiction to proceed on the merits of the case.

[41] Since the complaint is late, I will not address the issue of whether it establishes an arguable case of a breach of the duty of fair representation under s. 187 of the *Act*.

[42] Therefore, the complaint is dismissed.

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

(The Order appears on the next page)

IV. Order

[44] The complaint is dismissed.

September 11, 2024.

FPSLREB Translation

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board