Federal Court of Appeal Cour d'appel fédérale

Date: 20171016

Docket: A-394-16

Citation: 2017 FCA 208

CORAM: **PELLETIER J.A.**
RENNIE J.A.
DE MONTIGNY J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 6, 2017.

Judgment delivered at Ottawa, Ontario, on October 16, 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The Attorney General applies for judicial review of a decision of the Public Service Labour Relations and Employment Board (the Board), cited as *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 85, 2016 CRTEFP 85 (Board Decision) allowing a complaint made by the Public Service Alliance of Canada (PSAC) against the employer, the Treasury Board of Canada.

[2] The underlying facts may be briefly stated.

[3] PSAC submitted a complaint with the Board alleging that the Treasury Board committed an unfair labour practice under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* (now titled *Federal Public Sector Labour Relations Act*), S.C. 2003, c. 22, s. 2 (the Act). In particular, PSAC claimed that the Treasury Board (the employer for these purposes) interfered with the "administration of an employee organization" and "the representation of employees" contrary to paragraph 186(1)(*a*) of the Act. The interference allegedly occurred when the employer denied PSAC's requests to conduct walkthroughs and on-site meetings with its members at three federal government workplaces (Board Decision at paras. 2, 6, 10).

[4] At the hearing before the Board, directors from each facility gave reasons for the denials. A Department of National Defence policy barred worksite access to bargaining agents for collective bargaining meetings. A Health Canada director asserted access would be disruptive by causing employees to become emotional and to engage in discussions during work hours. A Veterans Affairs director refused access on the basis that the time requested for the walkthrough was excessive and that employees discussed sensitive information at the workplace (Board Decision at paras. 29-30, 34, 38).

[5] Although there was evidence before the Board of previous approvals of on-site meetings and walkthroughs (Board Decision at paras. 11, 37, 44), the collective agreement does not provide access rights for these activities. Article 12.03 of the current collective agreement explicitly addresses and delineates PSAC's access right to use of the employer's premises to

conduct union business. In addition to dealing with bulletin boards or display of union information, it states that representatives "may be permitted access to the Employer's premises … to assist in the resolution of a complaint or grievance and to attend meetings called by management."

[6] Largely relying on a decision which he had previously rendered, *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 58, [2012] C.P.S.L.R.B. No. 58 (*PSAC #1*), the Board member ruled that the denial of access constituted an unfair labour practice by violating paragraph 186(1)(*a*) of the Act. Accordingly, the Board ordered the Treasury Board to cease denying requests for access in the absence of "compelling and justifiable business reasons" (Board Decision at paras. 4, 7, 70, 77).

[7] The applicant seeks an order setting aside the Board's decision, with costs, and an order remitting the complaint to a different member of the Board for a rehearing.

[8] While I have read the reasons with the principles of *Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 in mind, in my view the application should be allowed with costs.

[9] The *Public Service Labour Relations Act*, S.C. 2003, c. 22 was amended on June 22, 2017. It is now called the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2. The

amendments are of no consequence to the disposition of this application. The relevant section follows:

***Public Service Labour Relations Act*, S.C. 2003, c. 22**	***Loi sur les relations de travail dans la fonction publique*, L.C. 2003, ch. 22**
Unfair Labour Practices	**Pratiques déloyales**
Meaning of *unfair labour practice*	**Définition de *pratiques déloyales***
185 In this Division, ***unfair labour practice*** means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).	**185** Dans la présente section, ***pratiques déloyales*** s'entend de tout ce qui est interdit par les paragraphes 186(1) et (2), les articles 187 et 188 et le paragraphe 189(1).
Unfair labour practices — employer	**Pratiques déloyales par l'employeur**
186 (1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall	186 (1) Il est interdit à l'employeur et au titulaire d'un poste de direction ou de confiance, qu'il agisse ou non pour le compte de l'employeur :
(**a**) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or	**a)** de participer à la formation ou à l'administration d'une organisation syndicale ou d'intervenir dans l'une ou l'autre ou dans la représentation des fonctionnaires par celle-ci;
…	**[…]**

[10] In *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227 (*Bernard*) the Supreme Court of Canada considered paragraph 186(1)(*a*). There, the union sought access to personal information of employees (including Rand formula employees like Ms. Bernard who were not union members), such as names, addresses and telephone numbers, which would allow the union to contact all employees in the bargaining unit. The Supreme Court held that the union had a right to employee home contact information. The union's ability to contact members was

necessary for the effective representation of the employees in collective bargaining (*Bernard* at paras. 2, 24-25, 27-28).

[11] In concluding that employee home contact information had to be disclosed, the Supreme Court noted that "the union must be on an equal footing with the employer with respect to information relevant to the collective bargaining relationship" and that paragraph 186(1)(*a*) was engaged in circumstances where the fulfillment of a request was "necessary" to the collective bargaining process. The home contact information was necessary because, in the Court's words, at paragraph 27:

> The union's need to be able to communicate with employees in the bargaining unit cannot be satisfied by reliance on the employer's facilities. As the Board observed, the employer can control the means of workplace communication, can implement policies that restrict all workplace communications, including with the union, and can monitor communications. Moreover, the union may have representational duties to employees whom it cannot contact at work, such as employees who are on leave, or who are not at work because of a labour dispute.

[12] The Board did not refer to *Bernard* nor consider the criteria which the Supreme Court articulated. Rather, the Board concluded that site visits would be "more beneficial" and "preferable" and that other means of communication were not always as efficient (Board Decision at paras. 60-61, 63).

[13] These are not the right questions or considerations. The question is not whether access would facilitate the union's relationship with its members; it would be surprising if that question were not always answered in the affirmative. The question is whether access would, in the language of *Bernard*, be necessary to ensure that the union was on an equal footing with the

employer during collective bargaining, all in the context of a mature bargaining relationship in which the parties had already negotiated a clause with respect to union access to employer property for union business.

[14] Parliament has recognized the Treasury Board's right to control and manage its workplace: *Financial Administration Act*, R.S.C. 1985, c. F-11, ss. 7, 11. The employer's discretion in this respect can only be restricted by statute, or by a provision of the collective agreement: *Canada (Attorney General) v. Association of Justice Counsel*, 2016 FCA 92 at para. 24, [2016] 4 F.C.R 349; *Brescia v. Canada (Treasury Board),* 2005 FCA 236 at para. 16, [2006] 2 F.C.R. 343 (*Brescia*) citing *Public Service Alliance of Canada et al v. Canadian Grain Commission and Canada (Treasury Board) et al* (1986), 5 F.T.R. 51 (Fed. T.D.) at para. 53; *Public Service Alliance of Canada v. Treasury Board*, 2011 PSLRB 106 at para. 31, [2011] C.P.S.L.R.B. No. 105.

[15] The Board also placed an onus on the employer to demonstrate a compelling business reason for denying the request, a test for which there is no precedent in the relevant jurisprudence in respect of paragraph 186(1)(*a*) and the federal public service. Shifting the onus to the employer to justify a refusal of a request by the union to conduct business on-site and during work hours based on compelling business reasons is inconsistent with the starting point of the analysis in *Bernard*. It is also inconsistent with subsection 191(3) which expressly delineates the circumstances under which the burden shifts in the face of an allegation of an unfair labour practice.

[16] The purpose of section 186 is to establish a framework which enables the collective bargaining relationship: *Brescia* at para. 34. It is the collective agreements that provide for substantive and specific rights, such as access to the workplace. Consistent with this, access to the workplace by union representatives to conduct union business has always been a matter of collective bargaining: see *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 138 at para. 89. The Board itself recognizes this, noting at paragraph 68 that it "share[s] the employer's view that on-site meetings and walkthroughs can be bargained at the table and … that the parties should continue to strive, through collective bargaining, to agree on a use of the employer's premises …".

[17] The Board decision effectively renders Article 12 "Use of Employer Facilities" of the collective agreement moot. As noted, that article, negotiated by the parties, is a comprehensive and detailed description of the circumstances under which the union may use the employer's facilities. Indeed, the parties advised the Court that the scope of that specific article was under negotiation.

[18] I would therefore allow the application, with costs, and remit the matter to a different member of the Board for redetermination.

"Donald J. Rennie"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE PUBLIC SERVICE LABOUR RELATIONS AND EMPLOYMENT BOARD DATED SEPTEMBER 14, 2016, (2016 PSLREB 85)

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REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
DATED:	OCTOBER 16, 2017

APPEARANCES:

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