Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Public Service Alliance of Canada,

complainant,

and

Hamlet of Kugaaruk,

respondent.

Board File: 28273-C
Neutral Citation: 2010 CIRB **554**
December 1, 2010

A panel of the Canada Industrial Relations Board (the Board) composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and John Bowman, Members, considered the above-noted complaint.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), provides that the Board may decide any matter before it without holding an oral hearing. The Board further notes that none of the parties in this matter requested an oral hearing. Having reviewed the submissions from the parties, the Board is satisfied that the documentation before it is sufficient for it to decide the matter without holding an oral hearing.

Parties' Representatives of Record

Ms. Heather Longstaff, for the Public Service Alliance of Canada;
Mr. Paul N.K. Smith, for the Hamlet of Kugaaruk.

These reasons for decision were written by Mr. John Bowman, Member.

I–Nature of the Complaint

[1] On July 20, 2010, the Public Service Alliance of Canada (PSAC or the union), filed a complaint with the Board alleging that the Hamlet of Kugaaruk (the Hamlet or the employer), breached section 24(4) of the *Code* when it changed the terms and conditions of employment of its employees during a period when the union's application for certification was pending before the Board. The union also alleged that the employer breached section 50(b) of the *Code* because the changed terms and conditions remained in effect following certification of the union and the issuing of notice to bargain to the employer.

II–Background and Facts

[2] The relevant facts in this matter are not in dispute. On August 31, 2009, the union applied to the Board to be certified for a unit of employees of the Hamlet. The union also filed an unfair labour practice complaint against the employer regarding a letter that was issued to the employees, which was upheld in *Hamlet of Kugaaruk*, 2010 CIRB 502.

[3] On January 8, 2010, the employer issued a notice to all employees advising them of a number of changes that had been made as a result of a meeting of the Hamlet Council held the previous evening. The notice stated that changes had been made to the employment By-Law, and that employees should speak to their supervisor regarding the changes. The employment By-Law sets out the terms and conditions of employees who work for the Hamlet.

[4] The union was certified by the Board on March 12, 2010, to represent a bargaining unit described as:

> all full-time, part-time and seasonal employees employed by the Hamlet of Kugaaruk, Kugaaruk, Nunavut excluding the Senior Administrative Officer, the Assistant Senior Administration Officer (Office Manager), the Director of Finance and casual employees.

[5] The union served the employer with notice to bargain on March 23, 2010. In May 2010, a representative of the union travelled to Kugaaruk to meet with the members to prepare for collective bargaining. On May 11, 2010, the representative was advised by the members that the employer had changed some of their terms and conditions of employment as a result of a new By-Law that was passed by the Hamlet Council on January 7, 2010. The changes included some reductions in terms and conditions of employment for members of the bargaining unit, including an increase in the probationary period both for new employees and employees transferred to a new position; a reduction in both the overtime premium and the amount of hours for which overtime could be claimed; and a reduction of one day in the annual leave entitlement for some employees. The union met with a representative of the employer on May 11, 2010, raised its concerns regarding the changes to the terms and conditions of employment, and asked the employer to reinstate the previous terms and conditions. When the terms and conditions were not restored, the union filed its complaint with the Board.

III–Positions of the Parties

A–The Union

[6] The union submits that the employer altered the terms and conditions of employment while an application for certification was pending, and that it did so without advising or consulting with the union. The union further submits that the alteration of the terms and conditions was a breach of section 24(4) of the *Code*, the freeze period following an application for certification, and that the employer has not been able to show that the changes it implemented were consistent with its past practice. Since the changes to the terms and conditions of employment continued following the certification of the union, the union also submits that the employer breached section 50(b) of the *Code*, which is the freeze provision that comes into effect once notice to bargain has been served on the employer.

[7] As a remedy for the alleged breaches of the *Code*, the union seeks a declaration from the Board that the employer breached sections 24(4) and 50(b) of the *Code*, an order that the employer issue a letter to the employees advising them that the changes to their terms and conditions have been rescinded, and an order that employees be made whole for any losses they have incurred due to the changes to their terms and conditions of employment.

B–The Employer

[8] The employer does not deny that it changed certain terms and conditions of its employees in January 2010. It states that the Hamlet is an incorporated body governed by the provisions of the *Hamlets Act*, R.S.N.W.T. (Nu.) 1988, c. H-1 (the *Act*). The Hamlet has no independent taxing authority, and receives its revenues from the Government of Nunavut, the Nunavut Housing Corporation, and from various fees for providing services. Under the *Act*, the Hamlet is required to eliminate any deficit that exists at the end of the fiscal year by the end of the following fiscal year.

[9] The employer submits that in December 2009, it became evident that the Hamlet was in a deficit position. In an effort to reduce costs, it was decided to make the changes to the Hamlet's Employment By-Law, which were made in January 2010. All of the changes were made in order to reduce the deficit by lowering payroll costs.

[10] The employer submits that under both sections 24(4) and 50(b) of the *Code*, an employer is able to change the terms and conditions of employment if it can show that its actions were part of its normal course of doing business, referred to as the "business as before" or "business as usual" test (see *BHP Billiton Diamonds Inc.*, 2006 CIRB 353). The employer submits that the reduction in terms and conditions of employment were simply a normal part of the employer's duty to manage its financial affairs responsibly, and that it had therefore met the "business as before" test. The employer asked the Board to dismiss the complaint.

IV–Analysis and Decision

[11] The union submits that the employer has breached sections 24(4) and 50(b) of the *Code*. Section 24(4) reads as follows:

> 24(4). Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until
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> > (a) the application has been withdrawn by the trade union or dismissed by the Board, or
> >
> > (b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit, except pursuant to a collective agreement or with the consent of the Board.

[12] Section 50(b) of the *Code* reads:

> 50. Where notice to bargain collectively has been given under this Part,
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> ...
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> (b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

[13] There is no dispute that the employer changed the terms and conditions of employment for its employees during the period where an application for certification was pending before the Board, and that these changes continued after the union was certified and issued a notice to bargain to the employer. The parties have acknowledged that an employer can change the terms and conditions of employment during a statutory freeze period if the changes are consistent with the employer's normal past practice. The question before the Board is whether the employer, having acknowledged making changes to the terms and conditions of employment during the statutory freeze periods, has provided sufficient evidence to demonstrate that such changes were consistent with the "business as before" test.

[14] The purpose of the freeze provisions has been described in various decisions of the Board. In one of the cases cited by the employer, *Purolator Courier Ltd.* (1987), 71 di 189; and 87 CLLC 16,053 (CLRB no. 653), the purpose of the freeze provision under what was then section 148(b) of the *Code* (now section 50(b)) was described as follows:

> There are two basic reasons for the freeze provision in section 148(b). It is firstly to ensure that, at the commencement of collective bargaining, the employer does not by its actions diminish, in the minds of the employees, the attempts by the bargaining agent to secure a collective agreement with the employer by modifying terms and conditions of employment beyond what is normal. Any modifications beyond the norm would be viewed, subtly or otherwise, as a demonstration by the employer of its power and, as a corollary, show up any weaknesses in the union. Secondly, it is to ensure that, at the commencement of collective bargaining, both parties work from a solid and known, base as opposed to a movable base in order to effectively negotiate a collective agreement.
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> (pages 200–201; and 14,417–14,418)

[15] In *BHP Billiton Diamonds Inc.*, *supra*, the Board stated the following regarding the obligations of the employer during the section 50(b) freeze period:

> [49] In essence, a review of the jurisprudence confirms that the freeze provisions under the *Code* do not impose an absolute freeze on all terms and conditions of employment. Rather, it imposes a regime of business as usual such that the employer may alter terms and conditions of employment without union consent, if the change is one that is customary or established practice such that it constitutes in itself a term or condition of employment.

[16] In their submission to the Board, the parties have suggested that a finding of anti-union animus is required before the Board can find a breach of section 24(4) of the *Code*. This is not the case. In *Crosbie Offshore Services Limited* (1982), 51 di 120 (CLRB no. 399), the Board stated:

> Anti-union motives are not a necessary ingredient for a finding of a contravention of the "freeze" provisions of the *Code*:
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> > In the context, it must be considered that the prohibitions in section 124(4) and 148(b), (now sections 24(4) and 50(b)), have as their primary focus the objective they seek to achieve rather than the employer's motive.
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> > (*Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches* (1979), 34 di 651; [1979] 1 Can LRBR 266 ; and 80 CLLC 16,001 at pp. 669; 280; and 14,012).
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> (page 126)

[17] While evidence of anti-union animus is not required in order to show a breach of the freeze provisions of the *Code*, the Board will consider such evidence when evaluating whether the actions of the employer were consistent with the "business as usual" approach. In *Québec Aviation Limitée* (1985), 62 di 41 (CLRB no. 522), the Board stated:

> Although the primary focus of the Board is an objective one, that does not mean that it will not look at evidence that anti-union animus was the real reason behind the change. If this proof is made by the union, which has the burden of proof in a section 124(4) complaint, then the Board would be in a position to determine that the change no longer falls within the principle of "business as before" as the change will have been motivated for other than normal ongoing business considerations...
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> (page 58)

[18] The employer submits that its changes to terms and conditions of employment were necessary to meet the employer's obligations under the *Act*, and that therefore, such changes meet the "business as before" test required by the Board during the freeze period. The employer did not provide any evidence that it had ever reduced the terms and conditions of employment in the past, nor did it provide any evidence of whether or not the Hamlet had incurred a deficit in any previous years. The employer also did not provide any evidence to indicate that the terms and conditions of staff who were outside of the bargaining unit were reduced. The employer did not consult the union before implementing the reductions, nor did it seek the permission of the Board to change the terms and conditions, which it could have done pursuant to section 24(4) of the *Code*. The employer did not explain why it did not pursue either of those options. While the union has suggested that the employer's decision to change the terms and conditions of employment is motivated by anti-union animus, it is not necessary for the Board to make such a finding in order to find a breach of the freeze provisions of the *Code*. Changes to terms and conditions of employment that are not consistent with an employer's normal business operations are a breach of the freeze provisions of the *Code*, regardless of what motivated such changes.

[19] The Board finds that the employer has not demonstrated that the reductions in terms and conditions of employment that were announced in January 2010, were consistent with the employer's normal business practices and therefore met the "business as before" test required under the *Code*.

The Board therefore finds that the changes were in breach of section 24(4) of the *Code*. It is not necessary for the Board to determine whether the changes were also a breach of section 50(b) of the *Code*.

[20] As a remedy for the breach, the Board orders:

> i) the changes made to the terms and conditions of employment that were announced in January 2010 shall be rescinded and the former terms and conditions of employment are to be maintained;
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> ii) the employer is to provide a copy of the Board's decision to each member of the bargaining unit; and
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> iii) employees in the bargaining unit are to be made whole for any losses that they incurred due to the reduction in terms and conditions of employment that were announced in January 2010. The Board will remain seized of the matter in the event that there are any difficulties determining the amounts, if any, to be paid.

[21] This is a unanimous decision of the Board.

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Graham J. Clarke
Vice-Chairperson

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André Lecavalier
Member

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John Bowman
Member

JB/th