Federal Court  Cour fédérale

Date: 20100617

Docket: T-2049-09

Citation: 2010 FC 661

Vancouver, British Columbia, June 17, 2010

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

IRENE J. BREMSAK

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] By motion brought pursuant to Rule 467 of the *Federal Courts Rules*, the Applicant, Irene Bremsak (Ms. Bremsak), seeks an order requiring the Respondent, Professional Institute of the Public Service of Canada (Institute), to appear before the Court at a contempt hearing.

[2] It is not disputed that the Institute has not complied with an order of the Public Service Labour Relations Board (Board) requiring the Institute to reinstate Ms. Bremsak's status as an elected official of the Institute. The Institute claims, however, that it could not

comply with the reinstatement order because Ms. Bremsak's membership was suspended after the issuance of the Board order, thereby preventing Ms. Bremsak from holding any elected position in the Institute.

[3] The issue on this motion is whether a *prima facie* case of contempt has been made out against the Institute, and if so, whether the matter should proceed to a contempt hearing.

Ex parte Motion

[4] Although Rule 467(2) of the *Federal Courts Rules* provides that a motion for a contempt hearing may be made *ex parte*, the Court has the discretion to require the moving party to provide notice of the motion to the alleged contemnor: *Canada (Canadian Human Rights Commission) v. Winnicki*, 2006 FC 350.

[5] Ms. Bremsak and her representative, Mr. John T. Lee, filed affidavits in support of the motion. Both deponents repeatedly refer to "Respondents" who are alleged to have violated Ms. Bremsak's rights and refused to follow the orders of the Board. Mr. Lee also alleges that unnamed respondents trumped up fake charges of harassment in order to bypass the court order and have placed themselves above the law. As it was unclear from the material filed by Ms. Bremsak who was being targeted by the motion and what conduct was alleged to be in contempt, the Institute was afforded an opportunity to make representations that the record does not establish a *prima facie* case of contempt.

[6] The Institute elected to file the affidavit of Isabelle Roy, legal counsel with the Institute, and written representations in response to Ms. Bremsak's motion. Ms. Roy subsequently filed a supplementary affidavit to correct an error in her original affidavit. Cross-examinations were conducted and the parties were granted leave to file supplementary motion records. The following is a summary of the relevant facts and an analysis of the parties' positions.

Facts

[7] Ms. Bremsak has been employed by Health Canada for a number of years, most recently as an inspector of medical decisions. She has also held a number of elected and appointed positions within the bargaining agent. Back in 2007, Ms. Bremsak was a shop steward and occupied elected positions within the following four constituent bodies of the Institute:

(a) British Columbia Yukon Executive;

(b) Applied Science and Patent Examination (SP) Group Executive;

(c) Greater Vancouver Branch; and

(d) Vancouver Sub-Group of the Applied Science and Patent Examination (SP) Group.

[8] In September 2007, the Institute's Executive Committee asked Ms. Bremsak to apologize for comments she had made in an e-mail accusing a member of unethical behaviour. When Ms. Bremsak refused, its Board of Directors apologized for her remarks. Ms. Bremsak complained to the Board that the Institute's conduct in apologizing amounted to discipline applied in a discriminatory manner (First Complaint).

[9] At the time, the Institute had a policy which automatically prevented members who occupy Institute positions from continuing to hold those positions while pursuing an outside complaint against the Institute. In accordance with this policy, Ms. Bremsak was temporarily suspended from all of the elected and appointed positions she held pending the resolution of her First Complaint to the Board.

[10] On April 11, 2008, Ms. Bremsak initiated another complaint to the Board alleging that the bargaining agent had violated paragraph 188(e)(ii) of the *Public Service Labour Relations Act* (*PSLRA*) by suspending her from her elected and appointed positions within the bargaining unit (Second Complaint).

[11] A hearing of the two complaints was conducted by Board Member John Steeves commencing in October 2008. The hearing resumed in May 2009.

[12] On or about April 2, 2009, the Institute received a group complaint of harassment filed by five members of the Institute against Ms. Bremsak. Each of the five complainants submitted a separate statement of allegations. In June 2009, four members of the Institute made new allegations of harassment against Ms. Bremsak. The Institute retained an investigator, Randy Mattern of North Shore Investigation Services, to investigate both sets of complaints and prepare a report of findings. The investigation was carried out over the following months.

[13] By decision dated August 26, 2009[1], the Board concluded that there was no merit to Ms. Bremsak's First Complaint alleging disguised discipline. The Board decided, however, that the incident involving Ms. Bremsak was minor and therefore did not justify her temporary suspension. In upholding the Second Complaint, the Board concluded as follows:

> 131 Finally, I consider that the real harm in this case has to be the complainant's suspension from her elected positions and that the objective of any remedy must be, as much as practicable, to correct that harm and to restore her to the situation she was in before her suspension. Therefore, I direct that the suspensions of the complainant from elected and appointed offices be rescinded. Furthermore, the fact that the membership and officials of the bargaining agent were told of the complainant's suspension is significant, and I conclude that it is appropriate to direct that the membership and officials be told the suspensions have been rescinded. Unlike in *Veillette* 2, I find that I have the authority to intervene in the bargaining agent's internal affairs to fashion a remedy that relates to the matters set out in subparagraph 188(*e*)(ii) of the *Act*. These include penalties imposed by a bargaining agent because a person has made an application to the Board and, in this case, the penalty was suspension from office. This Order is not intended to override the normal operation of the constitution and by-laws of the bargaining agent in matters such as the usual expiry of the terms of elected or appointed offices.
>
> 132 For these reasons, I consider it necessary in the circumstances of this case to direct the bargaining agent to publish the following announcement in a prominent place in the next edition of one of its regular and significant publications to the membership (this may be an online announcement):

[1] *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103

Announcement to all members
and officials of the Institute

On April 9, 2008, Ms. Irene Bremsak was temporarily suspended from her positions of Member-at-Large, SP Vancouver Sub-Group, President, Vancouver Branch; Member-at-Large, B.C./Yukon Regional Executive; and Sub-Group Coordinator, SP Group Executive. This suspension was a result of the Institute's "Policy Relating to Members and Complaints to Outside Bodies" and a complaint filed by Ms. Bremsak with the Public Service Labour Relations Board.

The Public Service Labour Relations Board has recently directed, pursuant to subparagraph 188(e)(*ii*) *and section 192 of the* Public Service Labour Relations Act*, that the Institute rescind this policy as it applies to the circumstances of Ms. Bremsak and to amend the policy to ensure that it complies with the* Public Service Labour Relations Act. *The Board also concluded that there may be different circumstances when it is appropriate to suspend a member from elected or appointed office. Finally, the Board directed that this announcement be made to members and officials of the Institute.*

Therefore, Ms. Bremsak is reinstated to all her elected and appointed positions effective immediately, subject to the normal operation of the Institute's by-laws.

[14] The operative paragraphs of the Board's Order are the following:

143. The bargaining agent is directed to rescind the application of its "Policy Relating to Members and Complaints to Outside Bodies" to the complainant.

144. The bargaining agent is directed to amend its "Policy Relating to Members and Complaints to Outside Bodies" to ensure that it complies with the [PSLRA].

145. The bargaining agent is directed to restore the complainant's status as an elected official of the bargaining agent and to advise its members and officials, in the form described in paragraph 131 of this decision, that she has been reinstated to all of her elected and appointed positions subject to the normal operation of the constitution and by-laws of the bargaining agent.

[15] On September 1, 2009, Ms. Bremsak made a request that the Board file a certified copy in the Federal Court of its decision dated August 26, 2009. The request was made pursuant to section 52 of the *PSLRA*.

[16] The Institute commenced an application for judicial review on September 2, 2009 (Court File No. A-337-09) to challenge the Board's decision dated August 26, 2009, including its jurisdiction to make its remedial orders. The Institute moved contemporaneously before the Federal Court of Appeal for a stay of the Board's decision.

[17] On October 14, 2009, Mr. Mattern issued a final report in which he found that 16 of the 19 allegations of harassment directed against Ms. Bremsak were well-founded. At a meeting of the Institute's Executive Committee on October 20, 2009, the Committee considered the report of the investigator, and concluded that Ms. Bremsak's behaviour demonstrated an unacceptable pattern of threats and intimidation of its members. The Committee concluded that Ms. Bremsak created a toxic environment and led otherwise committed members to question their involvement with the Institute. A decision was made to suspend Ms. Bremsak from membership in the Institute for a period of 5 years effective that date. During this period, Ms. Bremsak would not be permitted to be a candidate for office, to vote for officers or to otherwise participate in the affairs of the Institute.

[18] The Institute's motion to stay the Board's decision dated August 26, 2009 was dismissed by a judge of the Federal Court of Appeal on October 28, 2009. Mr. Justice Pelletier rejected the Institute's primary concern of avoiding having a member occupy a leadership position while at the same time challenging the Institute before an outside tribunal, reasoning as follows:

> [9] While the present circumstances create an awkward situation for the Institute, they do not, in my view, rise to the level of irreparable harm. Ms. Bremsak may be opposed to her union with respect to a specific dispute but there is no reason to believe that she does not support the union's overall goals and objectives and is incapable of distinguishing between her interests and those of the membership of the union. If events should show that Ms. Bremsak has abused her position, then the normal disciplinary procedure, as provided in the Bylaws, would apply.

[19] The Institute's 2009 Annual General Meeting was held on November 6 and 7, 2009. At that meeting, a revised policy relating to members and complaints to outside bodies was presented, and was approved by the Institute's Board of Directors the following week.

[20] In a decision dated December 4, 2009 dealing with Ms. Bremsak's request for the filing of the Board order dated August 26, 2009 in the Federal Court[2], Board Vice-Chairperson, Marie-Josée Bédard, found that the Institute had adequately complied with the order to amend its policy. She held, however, that the Institute had not complied, and had no intention of complying, with the order to reinstate Ms. Bremsak in her elected positions. The Vice-Chairperson concluded that filing the Board's earlier decision in the Federal Court would serve a useful purpose for the following reasons.

[2] *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 159

> 34. Parliament, in section 52 of the *Act*, vested the Board with the authority to determine whether parties comply with its decisions, but it has not vested the Board with the authority to enforce a decision once it has determined that its decision has not been complied with. Parliament chose to vest the Federal Court with that authority and provided, in section 52, a mechanism to file the Board's decisions in the Federal Court. Once a decision has been filed in the Federal Court, it becomes an order of the Court and it may be enforced as such (subsection 52(2)). I consider that the question of whether a Board decision is enforceable is quite different from the question of whether a decision has been complied with: the former question should be determined by the body vested with the authority to deal with the matters related to the enforcement of an order. For the above reasons, I therefore conclude that the respondent has not convinced me that filing decision 2009 PSLRB 103 in Federal Court would serve no useful purpose.

[21] The Board's Order dated August 26, 2009 was filed with the Federal Court Registry on December 8, 2009. On that date, the Board's Order became an Order of this Court. By then, the terms of office in relation to two of Ms. Bremsak' four positions had expired. Her term on the BC-Yukon Regional Executive is set to expire in June 2010, and her position on the SP Vancouver Sub-Group Executive is set to expire in September 2010.

[22] On December 22, 2009, the Institute published on the Internet, at the top of its home page, a link to the announcement directed by the Board. The link had the following heading in bold: "Important follow up regarding a PSLRB Decision Re Ms Irene Bremsak", and contained the first portion of the required announcement. By clicking on the link, the reader is taken to the full announcement as required by the Board's Order. Immediately following the full announcement, the Institute added the following:

> *Please note that, due to subsequent events, Ms. Bremsak is not currently holding those positions.*
>
> *Following this decision of the PSLRB, the Institute amended its Policy on Members and Complaints to Outside Bodies.*
>
> *It should also be noted that the above-noted decision is currently the subject of a judicial review application before the Federal Court of Appeal.*

Analysis

[23] Orders of administrative tribunals are meant to be complied with. However, the Institute's lack of compliance with the Board's Order dated August 26, 2009 is not the issue before the Court on this motion. In accordance with Rule 466(b) of the *Federal Courts Rules*, a contempt will occur only when a party "disobeys a process or order of the Court". The proper focus in the context of this motion for a contempt hearing, therefore, is whether the Institute disobeyed the Court's Order, rather than the Board's Order.

[24] In addressing Ms. Bremsak's allegations of contempt, it is necessary to consider the three components of the Court's Order: (i) the amendment of the Institute's Policy to bring it in compliance with the *Act;* (ii) the publication of the required announcement; and (iii) Ms. Bremsak's reinstatement.

[25] As succinctly stated by Madam Justice Hansen in *Sherman v. Canada (Customs and Revenue Agency*), 2006 FC 1121 at para. 11, there are essentially three elements of any civil contempt motion:

> *Where the alleged contempt is the disobedience of a court order, the essential elements are the existence of the court order, knowledge of the order by the alleged contemnor and knowing disobedience of the order.*

(i) *Amendment of the Institute's Policy*

[26] The first component of the Court Order directed the bargaining agent to rescind the application of its "Policy Relating to Members and Complaints to Outside Bodies" to the complainant and amend its policy to ensure that it complies with the *Act*.

[27] The Institute submits that its revised Policy is in compliance with the *Act*, as ordered by the Board. Ms. Bremsak asserts, however, that the revised policy does not satisfy the decision.

[28] In light of the finding by the Board on December 4, 2009, that the revised Policy is satisfactory and complies with decision dated August 26, 2009, I conclude that a *prima facie* case of contempt has not been made out as it relates to amendment of the Institute's policy.

(ii) *Publication of the Required Announcement*

[29] At paragraph 145 of the Board's decision, the Institute was directed to advise its members and officials, in the form described in paragraph 131 of its decision, that Ms. Bremsak "has been reinstated to all of her elected and appointed positions" subject to the normal operation of the Institute's constitution and by-laws. At paragraph 132, the

Board directed the Institute to publish an announcement in a prominent place in the next edition of one of its regular and significant publications to the membership.

[30] The Institute clearly did not comply with the Board's Order to publish the announcement in a prominent place "in the next edition of one of its regular and significant publications to the membership". The requirement to comply with the Board's Order crystallized on December 8, 2009, when the Board decision became a Court Order. Although an announcement was published by the Institute on December 22, 2009, there was a two week delay in doing so. The announcement was placed at the bottom of the Institute website over the winter holiday period, when few members would be accessing the site. It also included a disclaimer. On the evidence before me, I conclude that the placement of the announcement and disclaimer, combined with the unexplained delay in posting it on-line, did not comply with the terms and intent of the Court Order.

[31] The presence or absence of good faith on the part of the alleged contemnor is not relevant in determining whether or not there is a *prima facie* case of contempt. In the circumstances, I am satisfied that a *prima facie* of contempt has been made out as it relates to publication of the announcement.

(iii) *Ms. Bremsak's Reinstatement*

[32] The Institute offers two reasons for not reinstating Ms. Bremsak to all her elected and appointed positions, as directed by the Board decision dated August 26, 2009. First, at the time of the Court's Order, the terms of two of her positions had already expired.

Secondly, at the time of the Court's Order, Ms. Bremsak had been suspended for five years from Institute membership as a result of her own misconduct in relation to proven allegations of harassment. According to the Institute, the suspension resulted from 16 well-founded complaints of harassment by Institute members against Ms. Bremsak, imposed following an independent investigation, and took effect on October 20, 2009. As a suspended member, Ms. Bremsak could not be reinstated.

[33] There is no precedent for reinstating a union officer into a position whose term has since expired: *Taylor v. Atkinson*, [1984] O.J. No. 399 (S.C.) at paras. 3 and 120. Moreover, the Board itself stated that this was not required. In the circumstances, I conclude that a *prima facie* case of contempt has not been made out with respect to reinstatement of Ms. Bremsak to the two positions whose terms had expired at the time the Board decision was filed with this Court.

[34] The Institute points out that the Board stated in its decision that its direction in relation to reinstatement was not intended to override the normal operation of the Institute's by-laws, which in this case prevents a suspended member from holding office within the Institute. The Institute submits that any ambiguity in the Board's Order should be determined in its favour. It claims that it proceeded on a reasonable interpretation of the order in question, which constitutes a complete answer to charges of contempt.

[35] According to the Institute, Ms. Bremsak's suspension, imposed in good faith, amounts to a lawful reason for not reinstating Ms. Bremsak. The Federal Court of Appeal

itself, in dismissing the Institute's motions for a stay of the Board proceedings, noted that the Board's Order did not prevent the Institute from disciplining Ms. Bremsak should she subsequently engage in conduct worthy of such discipline.

[36] Although Ms. Bremsak's five year suspension may be viewed as a subsequent and intervening event which provided the Institute with a lawful excuse for not reinstating Ms. Bremsak, that is not a matter to be determined at the first stage of the contempt proceeding. An application for a contempt hearing is not the proper forum to consider challenges to the particularity of the order or to decide the merits of any defence available to the alleged contemnor.

[37] On the basis of the material before me, I am satisfied that a *prima facie* case that the Institute disobeyed this Court's order to reinstate Ms. Bremsak to her two positions whose terms had yet to expire on December 8, 2009.

[38] The rules provide the right to a full hearing to determine whether explanations offered by the Institute are legitimate and excuse its conduct. Ultimately, a finding of contempt must be based on proof beyond a reasonable doubt. Given the seriousness of a contempt finding, "the court's contempt power should be exercised with scrupulous care and only when the circumstances are clear and beyond reasonable doubt": *Rogacki v. Beir* (2003), 67 O.R. (3d) 330 (C.A.) at para. 32, *Quebec (Commission des valeur mobilieres) c. Lassonde,* [1994] A.Q. no 1073 (C.A.) at para. 20.

[39] The Court retains a discretion not to issue a contempt citation, even where a *prima facie* case of contempt: *Angus v. Chipewyan Prairie First Nation*, 2009 FC 562 at para. 36. However, I am not satisfied that the failure by the Institute to immediately reinstate Ms. Bremsak or to issue the required announcement was beyond its power and control. Nor is it absolutely certain that the alleged breaches do not deserve to be punished.

Other Respondents

[40] Ms. Bremsak submits that there were many respondents named in her Second Complaint and that an order to appear should be issued against members and officers of the Institute. Given the seriousness of a contempt order and the quasi-criminal nature of such proceedings, it would not be appropriate to issue a show cause order as against any particular individual member or representative of the Institute on the basis of scant evidence filed on this motion.

[41] The Board decision dated August 26, 2009 and the Court Order only refer to the Institute as a responding party and no individual member has been named in the notice of motion. While Ms. Bremsak's representative e-mailed numerous Institute Members attaching the Court Order, there is no evidence that any particular member or officer played a lead or primary role in relation to the alleged acts of contempt, and apart from one Board member, the Court's Order was not personally served.

ORDER

THIS COURT ORDERS that:

1. A representative of the Institute shall appear before a judge at a place and time to be fixed by the Court to hear proof of the following acts, purportedly committed by the Institute, with which it is charged herein, and to be prepared to present any defence that it may have to the charges.

   The acts with which the Institute is charged is that the Institute breached the Order of this Court filed on December 8, 2009 by failing , in a timely manner, to restore the status of the Applicant as shop steward, and member on the British Columbia Yukon Regional Executive and SP Vancouver Sub-Group Executive, and to advise its members and officials, in the form described in paragraph 131 of this decision, that the Applicant has been reinstated to all of her elected and appointed positions subject to the normal operation of the constitution and by-laws of the bargaining agent.

2. Costs of the Applicant's motion are reserved to the judge presiding at the contempt hearing.

"Roger R. Lafrenière"
Prothonotary

SOLICITORS OF RECORD

DOCKET:	T-2049-09
STYLE OF CAUSE:	IRENE J. BREMSAK v. PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 26, 2010
REASONS FOR ORDER AND ORDER:	LAFRENIÈRE P.
DATED:	June 17, 2010

APPEARANCES:

Ms. Irene Bremsak	SELF-REPRESENTED APPLICANT
Mr. Steven Welchner	FOR THE RESPONDENT

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