The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Applicant v. SASKATCHEWAN INDIAN FEDERATED COLLEGE, Respondent

LRB File No. 245-02; April 14, 2003
Chairperson, Gwen Gray, Q.C.; Members: Mike Carr and John McCormick

For the Applicant: Don Moran
For the Respondent: Ralph Ermel

Arbitration – Deferral to – Primary dispute relates to interpretation of letter of understanding – Collective agreement interpretation entrusted to arbitration process by virtue of s. 25(1) of *The Trade Union Act* and by provisions of collective agreement – Board defers interpretative issue to arbitration board.

Duty to bargain in good faith – Change in bargaining position – Employer negotiated letter of understanding and acknowledged retroactive pay owing to employees but later refused to make retroactive payments without explanation – Employer's conduct amounted to repudiation of collective bargaining process – Board finds violation of s. 11(1)(c) of *The Trade Union Act*.

Duty to bargain in good faith – Remedy – Board orders employer to pay employees retroactive payments plus interest based, at least, on employer's interpretation of letter of understanding negotiated by parties – Board also orders employer to provide union with details of payments made and to provide employees with copy of Board's Reasons for Decision and Order.

***The Trade Union Act,* ss. 11(1)(c) and 25(1).**

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 1975 (the "Union") is certified to represent non-academic staff at Saskatchewan Indian Federated College (the "Employer"). The Union filed an unfair labour practice against the Employer alleging that the Employer failed to bargain in good faith by repudiating an earlier agreement without justification. The Employer alleges that the dispute is over the interpretation to be placed on the agreement. A hearing was held in Regina on February 10, 2003.

Facts:

[2] The factual issues in this application are relatively straightforward but they do raise complicated legal issues.

[3] The parties concluded a first collective agreement with effective dates from the ratification date to September 30, 2001. In the agreement, Article 37 provided as follows:

> *Article 37 – Job Evaluation*
>
> *For the purpose of establishing and maintaining internal equity among CUPE positions, the College and the Union agree to use the gender neutral CUPE job evaluation method for the duration of this first Collective Bargaining Agreement.*
>
> *Every position shall have a position description compiled based on information from the job analysis upon completion of a job evaluation.*
>
> *The Human Resource Department shall initiate a job analysis and evaluation for every new permanent position.*
>
> *37.1 Transition Phase I – Internal Equity*
>
> *The following is for the purpose of this initial transitional evaluation only.*
>
> *37.1.1 Job Analysis and Evaluation*
>
> *A Job Evaluation Committee comprised of two members named by the Union and two members named by the College will be established. Each party shall also name one alternate member to the Committee. This job evaluation process shall commence within three months of this Agreement being ratified by both parties.*
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> *If the Job Evaluation Committee cannot reach a consensus for any reason on any particular process issue or evaluation outcome, the issue will initially be referred to the two alternates for a resolution recommendation. If the Committee fails to resolve the issue within 10 working days after receiving the recommendation from the two alternates, the issue shall then be referred to an arbitrator agreed upon by the Union and College, for final and binding resolution.*
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> *The College may modify job content as required by operational needs.*

37.1.2 Salary Administration

Any employee whose current position is evaluated in a pay grade higher than the employee's current pay grade shall have their pay adjusted accordingly effective the first of the month following these job evaluation outcomes.

Any employee whose position is evaluated in a lower pay grade shall have subsequent performance increments administered immediately from the new pay grade and, accordingly, within the new pay range ceiling. Notwithstanding, the employee will continue to receive general salary grid increases for as long as the employee remains in the position; in effect, the pay range ceiling is adjusted accordingly for this particular employee. When the employee leaves the position, it will be posted and filled at the evaluated pay range.

No employee will suffer a reduction in current salary as a result of a job evaluation outcome.

37.1.3 Appeal Process

Either the incumbent or the Dean, Director or equivalent may initiate an appeal of the job evaluation outcome for a position by submitting a completed Reclassification Request Form to the Human Resource Department and copied to the Union within 30 calendar days of the Advice of Rating notification. Both the employee and the Dean, Director or equivalent shall be permitted to make a presentation to the Job Evaluation Committee. The Committee shall consider the request and make a decision which shall be final and binding on all parties.

37.2 Transition Phase II – External Equity

Within one month of completing Phase I, the College and the Union will negotiate a process for determining external equity, including step compression, with the University of Regina's 1997 CUPE pay grades. The agreed upon process shall be implemented within one month, if practical, of such agreement.

When the U of R Pay Equity Job Evaluation outcomes are known, the U of R 1997 CUPE salary grid will be adjusted accordingly for the purpose of determining final parity target salaries for our CUPE members whose pay range is affected by these outcomes.

The determination and implementation of any parity payments resulting from the above shall be negotiated by the Union and the College and shall be effective or retroactive to July 1, 1999.

[4] The parties entered negotiations with respect to Transition Phase II – External Equity and arrived at an agreement at a meeting on September 18, 2002. The Letter of Understanding was signed on October 21, 2002 and it provided as follows:

> *Job Evaluation – Phase I & II*
>
> *Whereas the Employer and the Union signed a collective agreement in September 1999 for the term ending September 30, 2001;*
>
> *And whereas the Employer and the Union have agreed on September 18, 2002 that commencing on the signing of this letter the following will occur as directed;*
>
> *Therefore the parties agree that all employees currently in the CUPE bargaining unit and CUPE employees who may be in term positions in another bargaining unit, but whose permanent position is within CUPE are to be included in this package.*
>
> *And therefore the parties agree that the above mentioned employees shall have their new job evaluation weights applied to the following grid, that reflects the University of Regina Local 1997 CUPE pay grades, and shall receive that rate of pay retroactive to July 1, 1999. The retro pay shall be applied six (6) weeks from the date of signature of the LOU, with an extension by mutual agreement if required.*
>
> *And further therefore the parties agree that when the U of R Pay Equity Job Evaluation outcomes are know, the U of R 1997 CUPE salary grid will be adjusted accordingly for the purpose of determining final parity target salaries for our CUPE members whose pay range is affected by these outcomes.*
>
> *The determination and implementation of any parity payments resulting from the above shall be negotiated by the Union and the College and shall be effective or retroactive to July 1, 1999.*

[5] The Union agreed to hold off on other negotiations to permit the Employer an opportunity to calculate and prepare the retroactive pay owed to members of the bargaining unit. The parties met again on November 27, 2002 to review the matter and they discovered, at this late juncture, that they disagreed on how employees were to be placed on the new wage grid.

[6] The Union argued that employees should be placed on the new wage grid in accordance with the points assigned to their position under the job evaluation process

and in accordance with their years of service. "Years of service" is taken into account in the agreement between the University of Regina and the Union, which is the source of the external equity pay grades and pay grid.

[7] The Employer argued that employees should be placed on the new wage grid in the appropriate pay grade and at the level that is closest to their current salary. On this interpretation, all employees would commence at the same spot on the new wage grid, regardless of their years of service.

[8] At the November 27, 2002 meeting, the Union proposed to the Employer that it proceed to make the retroactive payments to employees based on its understanding of the Letter of Understanding and agree to refer the interpretative issue to arbitration. The Employer did not agree with the Union's proposal. It has not paid any retroactive pay and the Union has not filed a grievance in relation to the non-payment. The Employer is currently paying salaries at rates that accord with its interpretation of the Letter of Understanding. The difference between the parties is considerable in monetary terms.

[9] Members of the Union's negotiation team testified that Union members were angry at the Union as a result of the Employer's failure to pay the retroactive pay cheques prior to Christmas. The Union felt that the Employer was trying to place a wedge between it and its members by refusing to pay out the amount that the Employer agreed was owing in retroactive pay.

Arguments of the Parties:

[10] As a preliminary matter, the Employer argued that the Board should defer this application to the grievance and arbitration process as it entails solely a question of collective agreement interpretation. On the merits of the case, the Employer argued that it had bargained with the Union and had not acted in bad faith. The only difficulty was that the parties disagreed over the manner of implementing the Letter of Understanding signed on October 21, 2002.

[11] The Union argued that the Board has jurisdiction over the matter as it involves an allegation of bad faith bargaining. The Employer has committed a statutory

wrong that cannot be adequately addressed through arbitration. The Union also referred to previous decisions where labour relations boards have found that reneging on a negotiated deal constitutes an unfair labour practice where the conduct has the effect of undermining the strength of the union. The Union argued that similar consequences were seen in this case where the membership began to pressure and blame the Union as a result of the Employer's refusal to pay the retroactive pay in December, 2002.

Analysis:

[12] In the present case, the Union and the Employer negotiated a primary collective agreement that was signed by the parties on September 16 and 21, 1999. The primary agreement contemplated further negotiations relating to a job evaluation and pay equity plan. These negotiations were carried on in two stages and resulted in the signing of the Letter of Understanding on October 21, 2002. Sometime after the signing of the Letter of Understanding, the parties recognized that they had a dispute over the application of the new pay grid. As a result, the Employer refused to pay any retroactive pay until the matter was resolved, even though it did agree that, under its interpretation of the Letter of Understanding, some retroactive pay was owing.

[13] There are two statutory provisions, which come into play in considering the position of the parties in this case. First, s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") makes it an unfair labour practice for an employer "to fail or refuse to bargain collectively with representatives elected or appointed . . . by a trade union representing the majority of the employees in an appropriate unit." Collective bargaining is defined in s 2(b) as "negotiating in good faith with a view to the conclusion of a collective bargaining agreement . . . and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement."

[14] At the same time, s. 25(1) of the *Act* reinforces the central role of arbitration as the method of dispute resolution under collective agreements by providing as follows:

> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged*

> *violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*

[15] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Credit Union Ltd.,* [1994] 1st Quarter Sask. Labour Rep. 204, LRB File No. 213-93, the Board set out the circumstances in which the Board would defer a matter to the arbitration process set out in a collective agreement. At 207, the Board commented:

> *On the other hand, the Board has acknowledged that deference to the arbitration procedure is not automatic, nor is it unconditional. The Board must be satisfied that the dispute placed before it genuinely lies within the scope of the obligations created under the collective agreement. Though the Board has suggested that arbitration should generally be the tribunal of "first resort," it has acknowledged that this can only be the case where that tribunal can provide an effective and full resolution to the dispute. In the Western Grocers decision, supra, the Board placed the following qualifications on its willingness to defer to the arbitration process:*
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> > *.... There might be circumstances under which the Board would not defer to arbitration; though these situations could not be exhaustively catalogued, they would include the following:*
> >
> > *a) if the resolution of the grievance would not resolve the issues raised on the application before the Board; or,*
> >
> > *b) if the conduct of the employer or trade union represents a total repudiation of the collective bargaining process, including a refusal to recognize the existence of the collective agreement or the grievance/arbitration procedure.*
>
> *In United Food and Commercial Workers v. Westfair Foods Ltd. and Labour Relations Board (1992), 95 D.L.R. (4th) 541, the Saskatchewan Court of Appeal set out three principles for the guidance of the Board in deciding whether deference to arbitration is appropriate in any particular case:*
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> > *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*

> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure; and,*
>
> *(iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board.*

[16] In the present case, the primary dispute between the parties relates to the interpretation to be placed on the Letter of Understanding reached with respect to the new pay rates. The central question to be determined is whether the Letter of Understanding adopted the method of placing individuals on the pay scale that is set out in the CUPE and University of Regina collective agreement – i.e. are employees placed on scale according to their years of service. As indicated, the problem is one of collective agreement interpretation, which has been entrusted to the arbitration process by virtue of s. 25(1) of the *Act* and by the provisions of the collective agreement. An arbitrator can remedy the interpretative issue fully by determining the central question – that is, should employees be placed on the pay grid in accordance with their years of service. To this extent, the Board defers the application to an arbitration board as being the preferred method of resolving the dispute.

[17] There is one aspect of the dispute, however, that is not amenable to resolution through the grievance and arbitration process. In this instance, the Employer has taken the position that it will not make retroactive payments to employees, even the payments that it agrees are owing to employees under the Letter of Understanding. We understand that the Employer is currently paying wages in accordance with its understanding of the effect of the Letter of Understanding. However, the retroactive pay was a matter of great concern for the Union because it had told its members to expect retroactive pay cheques in early December. The Union's members were upset and angry at the Union as a result of its failure to obtain retroactive pay prior to Christmas and the Union's credibility with its members was undermined. The Union's effectiveness as a bargaining agent was called into question. The Employer did not attempt to justify its position regarding its failure to make retroactive payments based, at least, on its interpretation of the collective agreement.

[18] In the Board's view, the Employer's conduct in not making any retroactive payments at the time provided for in the Letter of Understanding amounted to a repudiation of the collective bargaining process. The Employer negotiated the Letter of Understanding with the Union; it acknowledged that retroactive pay was owing to employees even on its interpretation of the collective agreement; it was asked by the Union to make such payment to employees in accordance with the terms of the Letter of Understanding; and it refused to do so without explanation.

[19] The Board finds that the Employer failed to bargain in good faith and repudiated the Letter of Understanding by failing to carry out that part of the Letter of Understanding that is not in dispute between the parties – i.e. the retroactive pay that the Employer agrees is owing to employees. This aspect of the Employer's conduct clearly falls within the Board's jurisdiction as the guardian of the process of collective bargaining under the unfair labour practice provisions contained in s. 11 of the *Act.* The grievance and arbitration process cannot directly remedy this aspect of the application.

Conclusion:

[20] The Board therefore:

(1) Finds the Employer failed or refused to bargain collectively with the Union by failing to make retroactive payments to employees based on the Employer's interpretation of the wage rates set out in the Letter of Understanding dated October 21, 2002;

(2) Orders the Employer to make retroactive payments to all employees who are entitled to receive retroactive payments based on the Employer's interpretation of the wage rates set out in the Letter of Understanding dated October 21, 2002, within 30 days of the date of this Order with interest at the rates set out in *The Pre-Judgment Interest Act,* S.S. 1984-85-86, c. P-22.2;

(3) Orders the Employer to provide the Union with the details of the retroactive payments made to employees when the payments are made. The details shall include the employee name, the amount of retroactive

payment, the wage rate, the job classification, the interest paid and the date of payment;

(4) Orders the Employer to provide a copy of these Reasons for Decision and the accompanying Order to all employees covered by the Union's collective agreement by email within 10 days of the date of this Order;

(5) Defers the dispute over the proper interpretation of the Letter of Understanding to the grievance and arbitration process established under the collective agreement and required by s. 25(1) of the *Act*; and

(6) Reserves its jurisdiction over the subject matter of the complaint should the Board of Arbitration find that it does not have jurisdiction to hear and determine the dispute.

DATED at Regina, Saskatchewan this **14th** day of **April, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson