Date: 20130913

File: 561-02-638

Citation: 2013 PSLRB 110

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS

Complainant

and

TREASURY BOARD

Respondent

Indexed as
Professional Association of Foreign Service Officers v. Treasury Board

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

REASONS FOR DECISION

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations Board

For the Complainant: Andrew Raven and Morgan Rowe, counsel

For the Respondent: Richard Fader, counsel

Heard at Ottawa, Ontario,
August 21, 2013.

I. Complaint before the Board

[1] The complainant, the Professional Association of Foreign Service Officers (PAFSO), alleges that the respondent, the Treasury Board, violated paragraph 106(*b*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the *Act*") by purporting to agree to final and binding determination pursuant to section 182 of the *Act* while imposing conditions that the complainant could not reasonably be expected to accept.

II. Summary of the evidence

[2] The parties entered as Exhibit 1 an agreed statement of facts:

> *1. The Complainant, the Professional Association of Foreign Service Officers ("PAFSO"), is the Certified Bargaining Agent for all employees of the "FS" bargaining unit. There are approximately 1,388 Foreign Service Officers working in three major departments: Foreign Affairs, Trade and Development Canada, (1006 FS employees, representing over 70% of the bargaining unit), Citizenship and Immigration Canada, (324 FS employees, representing 24% of the bargaining unit), and the Canada Border Services Agency (44 FS employees, representing 3.5% of the bargaining unit).*
>
> *2. The FS bargaining unit comprises three major occupational streams:*
>
> *1) Commercial and economic relations and trade policy – the planning, development, delivery or management of policies, programs, services or other activities directed at Canada's economic or trade relations with foreign countries, including the development, promotion or strengthening of Canada's economic or trade interests in bilateral or multilateral forums;*
>
> *2) Political and economic relations – the planning, development, delivery or management of policies, programs, services or other activities directed at Canada's political relationships with foreign countries;*
>
> *3) Immigration affairs – the delivery of management of immigration policies, programs, services or other activities in support of the Canadian immigration program abroad;*
>
> *3. In addition, the FS group comprises 31 positions in the Trade Law Bureau. Members in legal affairs positions provide legal advice on Canada's international rights and obligations, the interpretation and application of international legal obligations, the negotiation of various*

bilateral and multilateral agreements, treaties and conventions, and the defence of Canada's position respecting those obligations and agreements, including dispute settlement.

4. The collective agreement between the Complainant and the Respondent employer expired on June 30, 2011. The Complainant served Notice to Bargain on the Respondent on June 21, 2011. Negotiations proceeded until January 17, 2012 when bargaining reached an impasse. A Public Interest Commission ("PIC") was appointed, and the PIC released its report on October 22, 2012. This report was rejected by both the Complainant and the Respondent. A copy of the parties' submissions before the PIC and the PIC Report will be tendered to the Board on consent at the hearing. The parties were subsequently unable to conclude a collective agreement.

5. From March 13, 2013 to March 19, 2013, the Complainant conducted a strike vote by secret ballot in accordance with section 184 of the PSLRA*. Seventy-four percent of eligible voters cast a ballot, with eighty-two percent voting in favour of a strike. The bargaining unit was in a legal strike position as of April 2, 2013. The Complainant reported the results of the strike vote to the Treasury Board Secretariat and to the Public Service Labour Relations Board within the time frame prescribed by the Regulations.*

6. The Complainant's members began withdrawing services gradually in April, with strike action escalating throughout June. Starting on June 20, 2013, FS employees represented by the Complainant engaged in strike action at fifteen of Canada's biggest visa processing centres around the world.

7. On July 18, 2013, out of concern about the magnitude of the strike's effect on the Canadian economy, the Complainant suggested that the parties submit to binding arbitration in accordance with subsection 182(1) of the PSLRA*. Tim Edwards, President of PAFSO, wrote a letter to Tony Clement, President of the Treasury Board, with a proposal for binding arbitration that would expire at noon on July 23, 2013. This letter is attached as Appendix "A".*

8. On July 23, 2013, Mr. Clement responded to the offer by accepting binding arbitration subject to certain conditions restricting the Arbitration Board's discretion. These conditions included:

> *a) that the Board may not deviate from specific economic increases agreed upon with other bargaining agents in this bargaining round,*

> *b) that the Board be restricted from utilizing comparisons to the LA, EC, and CO groups as a basis for rendering a compensation decision, and*
>
> *c) that the Board would give primacy to recruitment and retention in its consideration of the factors outlined in section 148 of the PSLRA, and that the Complainant would be required to establish recruitment and retention issues in order to rely on factors in section 148 that require internal and external comparisons.*
>
> *Mr. Clement finished by further insisting that the striking employees return to work immediately as a precondition for arbitration. This letter is attached as Appendix "B".*
>
> *9. On July 24, 2013, Mr. Edwards responded to Mr. Clement's letter, outlining the reasons that the Complainant could not reasonably accept all of the conditions, and explaining that the Complainants were not legally required to return to work immediately. However, the Complainant did accept some of the conditions, including the condition regarding wage pattern increases. Mr. Edwards also stated that as a gesture of good faith, members would return to work once the terms of binding arbitration had been agreed upon in writing. This letter is attached as Appendix "C".*
>
> *10. On July 26, 2013, Mr. Clement responded that the remaining two conditions were "key conditions" that were in effect non-negotiable. Mr. Clement asserted that the Respondent would treat the Complainant's response as a rejection of binding arbitration. This letter is attached as Appendix "D".*
>
> *11. On July 26, 2013, Mr. Edwards responded that given the Respondent's position, the Complainants had no choice but to continue with strike action. He requested that Mr. Clement reconsider his decision. To date, Mr. Clement has not done so. This letter is attached as Appendix "E".*
>
> (*Sic* throughout).

[3] In addition to the agreed statement of facts (Exhibit 1), a copy of the complaint was submitted as Exhibit 2, the respondent's response was submitted as Exhibit 3, a package of newspaper articles reporting on the status and impact of the ongoing strike was submitted as Exhibit 4, the complainant's submission to the public interest commission was submitted as Exhibit 5 and the respondent's submission to the same commission was submitted as Exhibit 6. No other evidence was led by either party.

[4] The key relevant statutory provision in this matter is section 182 of the *Act:*

> *Alternate dispute resolution process*
>
> ***182.*** *(1) Despite any other provision of this Part, the employer and a bargaining agent for a bargaining unit may, at any time in the negotiation of a collective agreement, agree to refer any term or condition of employment of employees in the bargaining unit that may be included in a collective agreement to any eligible person for final and binding determination by whatever process the employer and the bargaining agent agree to.*
>
> *Alternate process applicable only to terms referred to it*
>
> *(2) If a term or condition is referred to a person for final and binding determination, the process for resolution of a dispute concerning any other term or condition continues to be conciliation.*
>
> *Agreement not unilaterally changeable*
>
> *(3) Unless both parties agree, the referral of a term or condition to a person for final and binding determination remains in force until the determination is made.*
>
> *Form of determination*
>
> *(4) The form of the final and binding determination must, wherever possible, permit the determination to be*
>
> *(a) read and interpreted with, or annexed to and published with, a collective agreement dealing with other terms and conditions of employment of the employees in the bargaining unit in respect of which the determination applies; and*
>
> *(b) incorporated into and implemented by any instrument that may be required to be made by the employer or the relevant bargaining agent in respect of the determination.*
>
> *Binding effect*
>
> *(5) The determination is binding on the employer, the bargaining agent and the employees in the bargaining unit and is deemed to be incorporated into any collective agreement binding on the employees in the bargaining unit in respect of which the determination applies or, if there is no such agreement, is deemed to be such an agreement.*
>
> *Eligibility*
>
> *(6) A person is not eligible to be appointed as a person who makes a final and binding determination under this*

> *section if the person has, at any time during the six months before their date of appointment, acted in respect of any matter concerning employer-employee relations as solicitor, counsel or agent of the employer or of any employee organization that has an interest in the term or condition referred for final and binding determination.*

III. Summary of the arguments

A. For the complainant

[5] The case before the panel of the Board fundamentally involves the positions taken by parties in response to the complainant's request for final and binding determination pursuant to section 182, sent via letter to the Honourable Tony Clement, President of the Treasury Board on July 18, 2013. In that letter, Tim Edwards, President of the Professional Association of Foreign Service Officers, stated:

> . . .
>
> *Dear Minister Clement,*
>
> *In light of the severe and mounting impacts of job action by the Foreign Service group on Canada's tourism, education, air transport and agriculture sectors as well as other businesses which rely on temporary foreign workers - to say nothing of the effects which delays in visa and immigrant processing are inflicting on applicants and families around the world - I am writing to you today to propose that we take our dispute to binding arbitration.*
>
> . . .
>
> *While PAFSO would prefer to reach a settlement through free collective bargaining, we are prepared to pursue this alternate route. If you sincerely believe that the Government's offer is "fair and reasonable" you should not be concerned with presenting that position to an independent third party.*
>
> . . .
>
> (Exhibit 1, Appendix "A")

[6] The respondent agreed to enter into final and binding determination subject to certain conditions outlined in his July 23, 2013 response to the complainant:

> . . .

> *The Government recognizes and fully appreciates your offer to find a solution to the current impasse in negotiations; . . . we can only consider a binding arbitration process under the following conditions:*
>
> - *The Arbitration Board cannot provide an economic increase that deviates from the established current economic increases agreed with other bargaining agents in this round:*
>
> *1.5% - in the 1st year;*
>
> *1.5% - in the 2nd year;*
>
> *1.5% - in the 3rd year;*
>
> *0.25% - in the 1st year for the elimination of voluntary severance; and*
>
> *0.50% - in the 3rd year for the elimination of voluntary severance;*
>
> - *The Arbitration Board cannot utilize comparisons to the LA, EC, and CO groups as a basis for rendering a compensation decision. However, the Arbitration Board could impose upon the Employer the responsibility of commissioning a third party to conduct an internal relativity study of the LA, EC, CO and FS groups, the results of which would be provided to both parties and would be considered in the next round of bargaining;*
>
> - *The Arbitration Board would utilize all factors listed under section 148 of the* Public Service Labour Relations Act (*PSLRA) while giving primacy to recruitment and retention. Without recruitment and retention issues being established by the bargaining agent, the internal and external comparisons would be omitted from the factors considered to establish the compensation decision; and*
>
> . . .
>
> *As a consequence of agreeing to refer this matter to binding arbitration, pursuant to section 182 of the PSLRA, striking employees must return to work immediately.*
>
> (Exhibit 1, Appendix "B")

[7] The ongoing activities of the complainant who is in a legal strike position, have had, and continues to have, a large impact both inside and outside of Canada. This impact is evidenced by the ongoing media coverage as indicated in Exhibit 4.

[8] Consistent with the bargaining agent's obligation to bargain in good faith and conclude a collective agreement on behalf of its members, the complainant proposed that the parties refer their differences to a mutually agreeable independent third party for determination via final and binding determination as provided for in section 182 of the *Act*. The respondent responded to this offer by proposing conditions on any arbitration that it knew the complainant could not accept and that violated the requirements of sections 148 and 175 of the *Act*. Both sections outline the mandatory factors for consideration by a third party during final and binding determination or at conciliation. Both sections require consideration of internal pay parity among groups in addition to examining the questions of recruitment and retention.

[9] The respondent was fully aware that throughout the negotiation process, parity between members of the PAFSO bargaining group and those employed as legal advisers (LA), economists (EC) and commerce officers (CO) employed within Canada was of primary concern to the complainant and its members. By refusing to allow the use of the LA, EC and CO comparators and by demanding that the complainant establish the existence of a recruitment and retention problem for any of the bargaining unit categories before any comparison could occur, the respondent predetermined the decision of any arbitrator agreed to by the parties. The conditions were untenable for the complainant and merely represented lip service to the proposal put forward by the complainant.

[10] By asserting preconditions that are contrary to those outlined in section 148 of the *Act*, and that the respondent knew were unacceptable to the complainant, the respondent is guilty of bargaining in bad faith. The panel of the Board has authority to deal with parties who are guilty of bargaining in bad faith regardless of whether the activity arises out of section 182 of the *Act*. The expectation is that parties considering the option of final and binding determination under section 182 deal with each other in good faith with the goal of concluding a collective agreement. Section 182 outlines the strike-conciliation route envisioned under the *Act* for resolving collective bargaining disputes. It is consistent with the mutual respect outlined in the preamble to the *Act* and the duty to bargain in good faith as identified in section 106.

[11] Objective criteria as set out in section 148 of the *Act* are necessary to give effect to the purposes and goals of interest arbitration. The goals of interest arbitration are those that would have ordinarily been achieved through collective bargaining but

which have become impossible due to the impasse between the parties (see *Vernon (City) v. CUPE, Local 626*, [2004] B.C.C.A.A.A. 17 at para 5).

[12] To achieve the results identified by Arbitrator Taylor (as cited in *Vernon*) as the objective of interest arbitration, regard must be given to the mandatory provisions of the *Act*. That which would constitute bad faith bargaining at the table would be bad faith under section 182 of the same *Act*. The duty to bargain in good faith continues through the entire process from notice to bargain to the conclusion of a collective agreement.

[13] An attempt to put emphasis on one of the statutory criteria over others impairs the arbitrator's ability to reach a decision and predetermines the result. Arbitrator Burkett at page 8 of the unreported decision *Corporation of the City of Toronto v. Toronto Professional Fire Fighters Association, Local 3888*, June 26, 2013, discussed the importance of objectivity and discretion in interest arbitrations:

> *. . . While requiring a board to put its mind to various factors that might be relevant to its ultimate determination, they do not abridge the broad discretion of an interest board of arbitration to consider and weigh all the relevant factors in any given case in coming to a freely determined result that is fair and reasonable in all the circumstances. The discretion given to an interest board in this regard is fundamental to the functioning of an interest arbitration process that serves as an alternative to free collective bargaining . . .*

[14] While the parties have discretion in the design of the arbitration process under section 182 of the *Act*, the reasonableness of the design must be read in light of Parliament's decision to mandate a specific set of factors for consideration across dispute resolution processes and in light of the fundamental importance of objective criteria in interest arbitrations. An arbitration process design which is contrary to the statutory criteria outlined in both sections 148 and 175 of the *Act* and the very purposes of interest arbitration will be unreasonable. The parties in this case cannot have a rational discussion when the comparators that are the basis for the bargaining agent's stand throughout the bargaining process to this point are taken off the table, and when a priority that does not exist in the legislation is applied to the criteria identified.

[15] According to the panel of the Board, in *Public Service Alliance of Canada v. Senate of Canada*, 2008 PSLRB 100 at para 34 and para 37:

> *34. The underlying principle of the duty to bargain in good faith is to foster a sound and effective collective bargaining process. The duty to bargain in good faith has been defined with respect to the manner in which the parties conduct themselves within the bargaining process. The parties must enter into serious, open and rational discussions with the real intent of entering into a collective agreement. That obligation implies that the parties act in a manner that is conducive to a full exchange of positions.*
>
> . . .
>
> *37. . . . The Board must be cautious not to unduly interfere in the bargaining process and not to undermine the parties' freedom to negotiate and develop their negotiation tactics. As a general principle, the Board must not assess the reasonableness of the positions taken by the parties. However, the Board must not hesitate to intervene when it determines that the behaviour of a party amounts to bad faith or prevents informed and rational discussions. . . .*

[16] The proposal put forward by the respondent would render it impossible to have a rational discussion about the complainant's position if they were not allowed to discuss the comparators which form the basis for that position.

[17] The Supreme Court of Canada decision in *Royal Oaks Mines Inc. v. CASAW, Local No. 4,* [1996] 1 S.C.R. 369, is the leading case on what constitutes bad faith bargaining. In *Royal Oaks,* the court held that the duty to bargain in good faith and the duty to make every reasonable effort to complete a collective agreement are independent but related duties. A failure to fulfill the obligations created by either duty is a breach of the relevant legislation. (See *Royal Oaks* para 42.) It is the latter duty to make every reasonable effort to conclude a collective agreement that prohibits parties from engaging in surface bargaining.

[18] Pursuant to the *Act,* surface bargaining is defined as occurring where a party puts forward the appearance of bargaining to complete a collective agreement while at the same time adopting bargaining proposals or positions that in fact aim to avoid the completion of an agreement or to destroy the collective bargaining relationship itself. Where a party maintains such proposals or positions to the point of impasse, that party must have compelling reasons for doing so and must demonstrate that it has undertaken an honest assessment of what would be reasonably required to make a collective agreement in order to avoid the conclusion that it has breached its duty to bargain in good faith. The Board can examine the entire collective bargaining process

and consider all the relevant facts to determine whether the ongoing duty to bargain in good faith has been respected. (See *Professional Institute of the Public Service of Canada v. Treasury Board,* 2009 PSLRB 102).

[19] In the *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 148-2-196 (19910916), the Board concluded that the employer breached the duty to make every reasonable effort to enter into a collective agreement by placing preconditions on bargaining. The evidence established that the employer had made its participation in negotiations contingent on the union first agreeing to abide by the employer's public service compensation restraint policy in any collective agreement that the parties reached. At page 6 the Board concluded that ". . . (t)he insistence on conditions precedent to negotiating terms and conditions of employment at the bargaining table is incompatible with the requirement to make every reasonable effort to negotiate a collective agreement." In this case, the employer's unilateral insistence on applying considerations outlined in sections 148 and 175 of the *Act* in the manner prescribed in Mr. Clement's letter is a clear breach of the duty to bargain in good faith and to make every reasonable effort to complete a collective agreement.

[20] The duty to bargain in good faith encompasses the whole of the bargaining process, including negotiations pertaining to final and binding determination under section 182. The respondent's insistence on placing preconditions on this process is no different than insisting on preconditions at the bargaining table. Where these preconditions are so unreasonable that the respondent should have known that the bargaining agent could never accept them or where the preconditions are contrary to the *Act* or public policy, the conclusion can only be that they were actually intended to avoid the conclusion of a collective agreement and otherwise frustrate the bargaining process.

[21] The respondent, in its letter of July 23, 2013, raises the application of section 148 to the arbitration process they sought to undertake. While section 182 leaves it open to the parties to fashion a dispute resolution process that would include the application of the section 148 factors, it was not open to the respondent to craft its preconditions in such a manner that it was a clear contradiction to the statutory criteria selected by Parliament for the resolution of collective bargaining. The respondent's proposal expressly seeks to distort the very process that Parliament created for these disputes.

[22] The respondent's preconditions require the bargaining agent to concede its argument on comparator groups to proceed to arbitration. This is flatly unreasonable as it requires the complainant to agree to the outcome on the very issues it wishes to arbitrate in order to be able to settle a collective agreement in the first place.

[23] As a remedy, the complainant seeks a declaration that the respondent has violated paragraph 106(b) of the *Act*, an order referring the parties' outstanding issues to final and binding determination subject only to those conditions agreed to by the complainant in its letter of July 24, 2013, an order requiring the respondent to bargain in good faith and any further order or relief this Board deems fit.

B. <u>For the respondent</u>

[24] The remedy sought by the complainant is wildly inappropriate under the *Act*. This section is independent of all other collective bargaining sections. Section 182 is a voluntary alternate dispute resolution (ADR) process. It is open to the parties to set conditions on the process. There is nothing nefarious in the respondent's conditions. It is not open to the panel of the Board to read into section 182 the application of section 148 or section 106.

[25] Had Parliament intended to restrict the conditions that either party could impose under section 182, it could have. It is a slippery slope for this panel of the Board to analyze the behaviour of the parties or the conditions they seek to impose under section 182. Making the parties actions under section 182 reviewable in light of section 106 of the *Act* creates two dispute resolution methods for those who choose the conciliation strike option under section 103. Section 103 requires the parties to select either arbitration or conciliation. There is an option to change elections under subsection 104(3) prior to notice to bargain being served; however, once notice to bargain has been served, the choice is solidified. Section 182 is not intended to allow those people who select the conciliation strike route the option of arbitration if they are unable to complete an agreement using the selected dispute resolution route.

[26] Parliament has clearly expressed its intent to control processes under Division 9 (Arbitration Route) and Division 10 (Conciliation Route) by providing detailed factors to be considered by an arbitration board or a Public Interest Commission (PIC). They could have imposed similar restrictions or factors to be considered under section 182 but chose to make the process completely consensual. Any obligation to bargain in

good faith under section 106 of the *Act* does not carry over into the consensual process as it is no longer negotiations.

[27] This case is not about a violation of section 106 of the *Act* in the course of negotiation. The complaint focuses exclusively on Mr. Clement's letter of July 23, 2013 and the conditions he imposed on the respondent's participation in the process under section 182 of the *Act*. The complaint arose on July 23, 2013. By this point, the parties were at an impasse and the PIC report had been released. There was no complaint alleging that the respondent had negotiated in bad faith prior to the request to enter into arbitration under section 182. For this reason, any jurisprudence related to bargaining in bad faith is of no assistance as the parties were no longer bargaining collectively.

[28] The complaint deals exclusively with the respondent's placement of conditions on voluntary arbitration and should not be evaluated on the basis of anything that happened prior to that date. Any agreement to proceed under section 182 is separate and apart from collective bargaining. This case turns on the application of section 182 of the *Act.* Paragraph 106(b) of the *Act* is not to be read in conjunction with the rest of the section but in a manner that does not violate the clear intent of section 182. The complainant suggests that paragraph 106(b) be read in isolation to create a positive obligation on the respondent to enter into an ADR process on conditions that it considers reasonable. The effect of this would be to make arbitration binding on the respondent, on conditions imposed by the complainant.

[29] Section 182 of the *Act* provides for an ADR process that the parties may enter into upon "whatever" conditions to which the parties "agree". What is clear is that this ADR process is consensual and for this Board to ask whether it was used in such a way as to reflect every reasonable effort to enter into a collective agreement would be to fundamentally alter the clear wording of the statute.

[30] Legislation must be interpreted as a whole. Each provision or part of a provision must be read both in its immediate context and in the context of the act as a whole. (See: *Driedger on the Construction of Statutes, Third Edition,* Butterworths: 1994 at page 245). When analyzing the scheme of an act, the court tries to discover how the provisions or parts of the act work together to give effect to a plausible and coherent plan. (See: *Driedger* at page 248.)

[31] Parliament saw fit in the *Act* to set section 182 apart from the rest of the *Act* by the use of the heading "Alternate Dispute Resolution". The view favoured by the Supreme Court of Canada is that for the purposes of interpretation, headings should be considered part of the legislation and should be read and relied on like any other contextual feature. (See: *Driedger* at page 269). Every word used in legislation has a meaning and a role in the interpretation of the statute. The panel of the Board cannot ignore that section 182 is set apart from the rest of the legislation around collective bargaining.

[32] The same *Act* that provides for section 106 also provides for section 182. Either side can agree or not agree to the ADR process in section 182. Parliament could not have intended that the Board review those choices against the "every reasonable effort" test. Had Parliament so intended they would have stated this explicitly under section 182 or identified the factors to be considered as done in sections 148 and 175. Rather, Parliament made this process purely consensual and left it to the parties to determine the process.

[33] Prior to filing notice to bargain collectively, a bargaining agent must make a very basic choice: the arbitration route or the conciliation route. Arbitration provides for mandatory binding arbitration; conciliation gives the bargaining agent the ability to strike. This is a well-established and fundamental distinction in the *Act*. The effect of granting this complaint would be to read final and binding determination into Division 10 of the *Act*. It is the position of the respondent that this complaint is based on a fundamental misinterpretation of section 182 and the overall structure of the *Act*.

[34] The actions of the respondent are consistent with the clear wording of section 182, and this complaint should be dismissed. Furthermore, this panel of the Board does not have the jurisdiction to grant the remedy sought by the complainant.

C. <u>Complainant's rebuttal</u>

[35] It is noteworthy that the respondent has made no response to the complainant's allegations that the behaviour of the respondent is contrary to reasonableness and the duty to conclude an agreement. The respondent's assertion that the obligations to act reasonably and in good faith gets parked when responding to a proposal to proceed under section 182 is not supported by law. Collective bargaining encompasses all aspects of the process from notice to bargain to the signing of the collective

agreement. (See: *Public Service Alliance of Canada and Northwest Territories Public Service Association v. Inuvik Housing Authority* (1987), 71 di 1).

[36] In the example of a mediation of a discharge case where the employer advises the grievor that it is not prepared to discuss the employee's return to the workplace, there is no duty to bargain in good faith imposed by legislation. The question to be decided is whether or not the duty to bargain in good faith applies in proceedings under section 182 or whether the duty is suspended as the counsel for the respondent argues.

[37] The respondent's stand is inconsistent with the preamble to the *Act*. The preamble to the *Act* recognizes *inter alia* that collective bargaining ensures the expression of diverse views for the purpose of establishing the terms and conditions of employment, and that the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of the terms and conditions of employment.

IV. Reasons

[38] In order to reach a conclusion in this matter, I find it necessary to respond to a series of three questions: 1) Does section 182 of the *Act* form part of the collective bargaining process? 2) If so, is it part of the collective bargaining process so as to attract the duty to bargain in good faith and to make every reasonable effort to conclude a collective agreement? 3) If it is, did the respondent's actions breach the duty to bargain in good faith?

A. Does section 182 of the *Act* form part of the collective bargaining process?

[39] Subsection 182(1) of the *Act* provides:

> *182(1) Despite any other provision of this Part, the employer and a bargaining agent for a bargaining unit may, at any time in the negotiation of a collective agreement, agree to refer any term or condition of employment of employees in the bargaining unit that may be included in a collective agreement to any eligible person for final and binding determination by whatever process the employer and the bargaining agent agree to.*
>
> [Emphasis added]

[40] I note that in either official language, subsection 182(1) of the *Act* establishes that the parties may agree to such a process "at any time in the negotiation of a collective agreement." It is clear that the authors of the legislation intended it to be a tool for use in the negotiation process. This is made even clearer in the French version of the section:

> *182(1) Par dérogation aux autres dispositions de la présente partie, l'employeur et l'agent négociateur représentant une unité de négociation peuvent, à toute étape des négociations collectives, convenir de renvoyer à toute personne admissible, pour décision définitive et sans appel conformément au mode de règlement convenu entre eux, toute question concernant les conditions d'emploi des fonctionnaires de l'unité pouvant figurer dans une convention collective.*
>
> [Emphasis added]

[41] Counsel for the respondent argued that section 182 of the *Act* is a stand-alone section of the *Act* that is not to be read in conjunction with other parts of the *Act.* The respondent's argument rests on the allegation that Parliament's intention in this regard is demonstrated by the fact that the section follows a separate header. As such, it is independent of any obligation imposed on the parties during collective bargaining to conduct themselves in good faith and to make every reasonable effort to conclude a collective agreement. Counsel draws the analogy to mediation in a termination case where the employer takes the stand that reinstatement is not an option. In the case before me, the respondent agreed to talk about certain factors but refused to consider any comparison to the LA, EC or CO classifications. According to the respondent, there is no more obligation on the respondent when involved in a section 182 final and binding determination than when trying to resolve a grievance using the mediation process.

[42] I started my review of section 182 of the *Act* by reading the section, then proceeded to review the *Act* as a whole. In assessing the validity of this argument, I am guided by *Driedger on the Construction of Statutes.* The governing principle is that one must read the whole of the statute in order to fully understand it. When analyzing the scheme of an Act, courts attempt to give effect to a "plausible and coherent plan" (see *Dreidger* at pages 245 to 249). Preambles are an important source of legislative values and assumptions.

> *By spelling out the assumptions* the legislature *takes to be true, the policies and principles* it *wants to advance and the values to which* it *is committed, the preamble offers interpreters an authoritative form of guidance . . . Since preambles are an integral part of an enactment, they are part of the context in which the words of an enactment must be read. As such, they may be relied on to help resolve ambiguity, determine scope or generally understand the meaning and effect of the legislative language.* (See *Driedger* at page 261).

[43] The preamble of the *Act* clearly states that the Government of Canada is "committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment". The scheme for achieving this principle is contained within the structure of the *Act.* Following *Driedger's* guidance, and following a review of the structure of the entire *Act*, I note that the *Act* is broken down into parts which define, through the use of divisions, the rights, roles and obligations of the employer, the bargaining agents, and the Board itself. Section 182 is found in Part 1 Labour Relations, Division 10 entitled Conciliation. Section 160 explains the application of the division:

> ***160.*** *This Division applies to the employer and the bargaining agent for a bargaining unit whenever*
>
> *(*a*) the process for the resolution of a dispute applicable to the bargaining unit is conciliation; and*
>
> *(*b*) the parties have bargained in good faith with a view to entering into a collective agreement, but are unable to reach agreement on a term or condition of employment that may be included in a collective agreement.*

[44] Despite the respondent's argument and regardless of the fact that the process under section 182 of the *Act* is identified by a header identifying it as *Alternative Dispute Resolution,* I find that it is not independent of the negotiation process. For example, section 182 dealing with final and binding determination and section 183 dealing with a minister's direction to hold a vote on the employer's last offer received by the bargaining agent are both included under separate headings. Each provides an alternative to the traditional collective bargaining impasses. Section 182 is one of the many tools available to the parties to resolve issues or conflicts which arise along the continuum between notice to bargain collectively and signing of a new collective agreement. In the current situation, it is a tool available to the parties to break the impasse in which they find themselves, given the ongoing strike and their current

inability to conclude negotiations. This interpretation is consistent with the principles outlined in the preamble of the *Act.*

[45] Part I of the *Act* is entitled "Labour Relations" and is divided into 14 Divisions and each such division sets out many things such as employee freedoms, management rights, the structure of the Board, consultation committees and co-development, certification, de-certification, bargaining unit review, successor applications, unfair labour practice complaints, prohibitions relating to strikes, and, of course, provisions related to the collective bargaining process. The provisions which deal with notice to bargain (section 105), two-tier bargaining (section 110), the duration and effect of collective agreements (sections 114 to 117), and, of interest in this case, the duty to bargain in good faith (section 106) are found in Division 7, which is entitled "Collective Bargaining and Collective Agreements". However, this division does not contain each and every legislative provision concerning collective bargaining and other such provisions can, for example be found in Division 8 (Essential Services), Division 9 (Arbitration), and Division 10 (Conciliation). Section 182 is situated within Division 10 of the *Act*, entitled "Conciliation", which division is clearly a part of the *Act* which sets out certain provisions related to the collective bargaining process in the federal public service. Despite this fact, the respondent argues that the duty to bargain in good faith, which is found in Division 7 of the *Act*, does not apply to section 182 since the process in section 182 is not part of the collective bargaining process. I find that the *Act* begs to differ.

[46] Madam Justice Gleason in *Public Service Alliance of Canada v. Attorney General of Canada*, 2013 FC 918 addressed the methods of concluding a collective agreement at paragraph 74:

> *[74] Second, the provisions of the PSLRA foresee several means for concluding collective agreements other than consensual collective bargaining. For example, a union may opt for binding third party arbitration and thus forgo its right to strike (see section 103); even if the conciliation/strike route is elected by the union for a round of bargaining, the parties may nonetheless elect to have all or part of their collective agreement settled by arbitration (see subsection 182); the parties may also elect to have all or part of a PIC report settle the issues referred to the PIC by electing that it be binding (see section 181); and the Minister may decide to order a vote under section 183 of the Act. All of these mechanisms settle the terms of collective agreements through a process other than consensual collective*

> *bargaining. Thus, the purpose of the PSLRA is not to ensure that collective agreements are settled* only *via consensual collective bargaining as there exist many other mechanisms in the statute to settle collective agreements.*

[47] Counsel for the respondent argued that if I agree with the complainant's argument, I will be giving a bargaining agent two opportunities to select a dispute resolution mechanism. Bargaining agents may choose the conciliation strike route knowing that, at the end, they can make an offer to go to final and binding determination. However, the respondent failed to note that this option remains subject to securing the employer's agreement. The legislation clearly gives the parties the authority to seek an alternate route by consent to resolve their collective bargaining issues at any point in the negotiation process. In cases where the bargaining agent is on strike, and there has been no success at the table, it may provide a method to break the impasse that has precluded the completion of the negotiation process.

[48] Counsel for the respondent seeks to convince this Board to adopt a very narrow definition of collective bargaining which sees the various processes used to achieve a settlement compartmentalized and read in isolation from the remainder of the *Act*. Madam Justice Saunders of the British Columbia Court of Appeal, in the case of *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General),* 2013 BCCA 371, turned her mind to whether a broad or narrow meaning of "collective bargaining" was more appropriate under the *Act*. In her decision at paras 26 to 32 she addresses the issue:

> *[26] . . ., I accept Council's contention that the judge erred in giving an overly narrow meaning to the term "collective bargaining" . . . (O)n a robust view of collective bargaining, one cannot draw the line between a term awarded by this Arbitration Board and a term settled at the bargaining table. . . .*
>
> *[32] With respect, I do not accept the judge's narrow view of "collective bargaining". I consider that a pragmatic view of collective bargaining is not susceptible to hiving the procedure for settlement of agreements into discreet, air-tight compartments. Doing so, in my view, risks both further complication and unforeseen consequences in the vital exercise of labour dispute resolution.*

[49] I therefore reject the respondent's argument that its obligations under section 182 are similar to its obligations when negotiating a settlement of a termination grievance. In addition, having found that the duty to bargain in good faith attaches to

the parties' obligations under section 182, I also reject the respondent's argument as there is no statutory requirement through which the duty to bargain in good faith would attach in the respondent's analogy.

[50] Having concluded that section 182 is part of the negotiation process and it is not a separate process to be "hived off" from the rest of the bargaining process, I must now answer question 2.

B. Is it part of the collective bargaining process so as to attract the duty to bargain in good faith and make every reasonable effort?

[51] Section 106 of the *Act* falls under that part of the *Act* which pertains to the negotiation of collective agreements. It provides that:

> *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,*
>
> *(a) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> *(b) make every reasonable effort to enter into a collective agreement.*
>
> [Emphasis added]

[52] Given that section 182 can be accessed by the parties at any point during the negotiation process, and that its intent is to assist the parties to conclude a collective agreement and resolve any outstanding issues between the parties that prevent the conclusion of the collective agreement, clearly the obligations attach and continue until such time as an agreement has been reached. The respondent was not obligated to agree to participate in final and binding determination under section 182, but once it entered into negotiation of the conditions under which the determination would occur, it was under the obligation to bargain these conditions in good faith and to make every reasonable effort to conclude a collective agreement as per section 106. Section 182, its use and the negotiation of the conditions for its use are all part of the negotiation process.

[53] Having concluded that the duties to bargain in good faith and to make every reasonable effort to conclude an agreement are applicable to final and binding determination under section 182, I must now answer the next question.

C. Did the respondent's actions breach the duty to bargain in good faith?

[54] Mr. Clement, in his letter of July 23, 2013, agreed to enter into final and binding determination of the matters outstanding between the parties on certain conditions: that the bargaining agent accept the wage pattern agreed to by other bargaining groups within the public service, that the Arbitration Board could not utilize comparisons to the LA, EC, and CO groups as a basis for rendering a compensation decision, that the "Arbitration Board" (see Exhibit 1, Appendix 2) utilize all factors listed under section 148 of the *Act* while giving primacy to recruitment and retention, and, as a consequence of agreeing to refer this matter to final and binding determination pursuant to section 182 of the *Act*, that striking employees must return to work immediately.

[55] The complainant agreed to accept the wage pattern and to have its members return to work once the parties had agreed to the conditions under which the process would proceed. The complainant raised no issue in this complaint regarding the latter condition and the issue of accepting the wage pattern had already been raised at the table by the respondent. However, the issues of rejecting internal comparisons and the primacy of factors were new approaches raised by the respondent in Mr. Clement's letter. It was these two conditions which were the focus of this complaint. It was an impossibility for the complainant to put forward its argument concerning wage parity, which it held throughout the negotiation process, without its primary comparators. Furthermore, to have the threshold for any consideration of wage parity by the arbitrator set at the establishment of issues of recruitment and retention of those positions, essentially prohibited the complainant from making any representations to an arbitrator on its key bargaining issue.

[56] The respondent knew or ought to have known what the result of these conditions would be on the complainant's ability to put forward to the final and binding decision maker the case they had in order to support their demands for wage parity. There was no obligation on the respondent to accept the offer of arbitration under section 182 put forward by the complainant. However, section 106 requires the respondent to participate in good faith and in a reasonable fashion to conclude the

collective agreement between the parties. In essence, by putting forward conditions which the respondent knew or ought to have known could not be accepted by the complainant, the respondent has shut down the complainant and made it unlikely, if not impossible, for the parties to break the impasse between them. The only factors a decision maker appointed under section 182 would have to consider would be the respondent's. This is not reflective of the bipartite nature of collective bargaining.

[57] Section 182 presumes that the parties will mutually agree to conditions under which the identified issue is to be referred to final and binding determination. Mr. Clement clearly stated in his letter that "[t]he Arbitration Board would utilize all factors listed under section 148 of the *Public Service Labour Relations Act*. . . ." Any evaluation under section 148 of the *Act* requires the parties to act in good faith and reasonably when participating in the arbitration process. There is no primacy of factors to consider within section 148 of the *Act*. To insist on primacy of one factor over another is not in and of itself bad faith bargaining. However, given the circumstances of the current bargaining situation, and knowing that the complainant has been precluded from putting forward its primary position, puts only the respondent's position before the decision maker. Both parties are entitled to put forward their arguments to the decision maker who will use the factors identified in section 148 of the *Act* to assess the demands of both parties and craft a final and binding determination binding on both parties.

[58] Section 182 specifies that the parties may refer any term or condition for final and binding determination "*by whatever process"* they may agree (emphasis added). The key word in this phrase is "*process*". This is confirmed by sub-section 182(2) which confirms that if the *"process*" under section 182 is agreed to by the parties, the *"process*" for dispute resolution that was chosen prior to negotiations remains in place. The use of the word *"process"* a second time in the same section of the *Act* is significant particularly in reference to what is truly a process under the *Act*. The mutually agreed upon process under section 182 is just that, a process for dispute resolution, and does nothing to change the substantive nature of the legislation with regard to dispute resolution and therefore the factors which Parliament clearly intended to have considered apply.

[59] Rather than setting out the process under which the voluntary arbitration under section 182 of the *Act* would occur, the respondent, by proposing these unreasonable

terms, seeks capitulation by the bargaining agent prior to engaging in a section 182 process. This is contrary to the preamble and the intent of section 106 of the *Act*.

[60] The Supreme Court of Canada in the *Royal Oak Mines* case stated that the duty to bargain in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard, which can be measured by the Board looking to comparable standards and practices within the particular industry. This objective standard, the Court stated, prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.

[61] Can the conditions proposed by the respondent in Mr. Clement's letter be seen as being situated within the norms of the labour relations regime in which the parties function? Any conditions that preclude a bargaining agent from putting forward its argument to a third party when undertaking the process under section 182, and which necessarily pre-determine the decision of the decision maker in favour of the party imposing the conditions cannot be viewed as reasonable.

[62] The decision in *Royal Oak Mines* confirmed that the duty to make every reasonable effort to conclude a collective agreement and prohibits surface bargaining. (See para 42). Surface bargaining has been defined or described in jurisprudence as occurring where a party puts forward the appearance of bargaining to complete a collective agreement while at the same time adopting bargaining proposals or positions that aim to avoid the completion of any agreement or destroy the collective bargaining relationship completely. (See *Professional Institute of the Public Service v. Treasury Board*, 2009 PSLRB 102 at para 85).

[63] Hard bargaining is the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms. The line between surface bargaining and hard bargaining is a fine one. The question to ask in the case at hand is whether the respondent demonstrated, through its proposals and actions, its intention not to enter into a collective agreement? (See *Professional Institute of the Public Service v. Treasury Board*, 2009, at para 85). By proposing conditions that the respondent knew could not be accepted by the complainant and that would prevent them from putting forward any argument on behalf of the bargaining unit goes beyond hard bargaining and crosses into surface bargaining. The respondent's conditions required

the complainant to abandon the position it's held throughout the negotiations. What then would be the purpose of any arbitration undertaken by the parties pursuant to section 182 of the *Act*? The process would be moot.

[64] I conclude that the respondent engaged in bad faith bargaining in its approach to final and binding determination under section 182. Having concluded that the respondent has violated section 190 of the *Act* by imposing conditions on arbitration under section 182 which are not reasonable, thereby not complying with its statutory obligations under section 106 of the *Act,* I must now examine one final question.

D. Do I have the authority to order parties to participate in final and binding determination under section 182?

[65] The complainant asks that, in addition to providing a declaration that the respondent is guilty of bargaining in bad faith, I order the parties to participate in final and binding determination under section 182, and that I strike out the offensive provisions of the respondent's agreement to participate in final and binding determination under section 182. Counsel for the respondent argues that I have no such jurisdiction. My remedial authority in cases of complaints under section 190 of the *Act* rests in section 192(1):

> *192. (1) If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of . . .*

I also note section 192(2) which reads as follows:

> *Person acting on behalf of employer*
>
> *(2) If the order is directed to a person who has acted or purported to act on behalf of the employer, the order must also be directed to the Secretary of the Treasury Board in the case of the core public administration and, in the case of a separate agency, to its deputy head.*

[66] By strict interpretation of section 192, I find that I have the authority to provide the complainant with the declaration that they demand. I would also have the authority to make any other order that I consider necessary. However, I do not believe that it is conducive to good labour relations to order parties to participate in final and binding determination when such arbitration is voluntary in the first place.

[67] I encourage the parties to be guided by my comments in this decision and to renew their attempts at arriving at mutually agreeable conditions under which final and binding determination under section 182 can be used to break their impasse, in the event that their inability to resolve their differences at the bargaining table continues.

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

(The Order appears on the next page)

V. Order

[69] The complaint is allowed.

[70] I declare that the respondent has violated its duty to bargain collectively in good faith and make every reasonable effort to enter into a collective agreement as required by section 106 of the *Public Service Labour Relations Act* by attempting to impose unreasonable conditions on final and binding determination under section 182 of the *Act.*

[71] I encourage the complainant, the respondent and the Secretary of the Treasury Board to renew their attempts at arriving at a mutually agreeable process under which final and binding determination under section 182 of the *Public Service Labour Relations Act* can be used to break their impasse, in the event that their inability to resolve their differences at the bargaining table continues.

September 13, 2013.

Margaret T.A. Shannon,
a panel of the Public Service
Labour Relations Board