Date: 20141205

File: 166-34-34651

Citation: 2005 PSLRB 170

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

HOWARD YARMOLINSKY

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Indexed as
Yarmolinsky v. Canada Customs and Revenue Agency

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Steve Eadie, Professional Institute of the Public Service of Canada

For the Employer: Caroline Engmann, counsel

(Decision based on written submissions.)

Grievance referred to adjudication

[1] Howard Yarmolinsky was terminated from his position at the Canada Customs and Revenue Agency (CCRA) on December 12, 2003. As a result of the government reorganization announced on this same day, the CCRA's name is changed to the Canada Revenue Agency (CRA). His grievance against his termination was dismissed by an adjudicator of this Board (2005 PSSRB 6). Mr. Yarmolinsky has filed an application for judicial review of this decision with the Federal Court. He also filed a grievance alleging that he was entitled to severance pay on termination. This grievance was held in abeyance pending the decision on his termination grievance.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[3] Counsel for the employer requested that this grievance be dealt with by way of written submissions and the grievor concurred. On September 9, 2005, the Board ordered that the parties provide written submissions on the following question:

> *Do articles 39.16, 39.17 or 19.01 of the collective agreement entitle the grievor to receive severance pay in the aforementioned matter?*

Background

[4] Mr. Yarmolinsky was terminated on December 12, 2003, for misconduct in accordance with paragraph 51(1)(*f*) of the *Canada Customs and Revenue Agency Act*. He had worked for the federal government for 27 years.

[5] Mr. Yarmolinsky was an auditor and was subject to the collective agreement between the CCRA and the Professional Institute of the Public Service of Canada (PIPSC) in respect of the Audit, Financial and Scientific Group (expiry date: December 21, 2003).

[6] On January 9, 2004, Mr. Yarmolinsky grieved that he had not been paid severance pay on his termination and alleged that this was in violation of clauses 39.16, 39.17 and 19.01 of his collective agreement. The only clause argued by the bargaining agent in its submissions is clause 19.01 ("Severance Pay").

[7] In his reply to the grievance, the Assistant Commissioner, Human Resources Branch, D.G.J. Tucker, stated that the collective agreement provides no entitlement to severance pay for employees whose employment has been terminated for disciplinary reasons.

[8] At the time of his termination, Mr. Yarmolinsky was eligible for a pension under the *Public Service Superannuation* Act (*PSSA*), and is currently in receipt of a monthly pension.

Summary of the arguments

[9] The written arguments of the parties have been edited and appear below. The full written arguments are on file with the Board.

For the grievor

There is no absolute bar found in the collective agreement against severance payments being made in a situation of termination for misconduct. Some collective agreements in the private sector have clauses restricting the payment of severance in these circumstances. Mr. Yarmolinsky's does not. Had the parties wished to never permit severance pay in situations of misconduct, they would have said that. They have not.

The relevant collective agreement does not address termination for cause other than for incapacity or incompetence. These clauses are not applicable to Mr. Yarmolinsky as he was terminated by the employer under subclause 51(1)(f) of the *Canada Customs and Revenue Agency Act* and not subclause 51(1)(g).

The collective agreement sets out, however, that in certain circumstances the employee shall receive severance pay.

Article 19 ("Severance Pay") reads as follows:

> ***19.01*** *Under the following circumstances and subject to clause 19.02, an employee shall receive severance benefits calculated on the basis of his weekly rate of pay.*

One of these circumstances is retirement, which is found in clause 19.01(d) of the relevant collective agreement. The language reads*:*

> *(d) Retirement*
>
> *On retirement,* ***when an employee is entitled to an immediate annuity or to an immediate annual allowance under the Public Service Superannuation Act****, a severance payment in respect of the employee's complete period of continuous employment, comprised of one (1) week's pay for each complete year of continuous employment and, in the*

> *case of a partial year of continuous employment, one (1) week's pay multiplied by the number of days of continuous employment divided by three hundred and sixty-five (365) to a maximum of thirty (30) weeks' pay.* (Emphasis added)

Severance is paid to individuals in the circumstances above.

No definitive explanation of what retirement means can be found in the collective agreement. The qualifying phrase **"…when an employee is entitled to an immediate annuity or to an immediate annual allowance under the *Public Service Superannuation Act*…."** is the only attempt at a definition.

Mr. Yarmolinsky meets the only definition of retirement found in the collective agreement, as he was entitled to and does currently collect an **"immediate annual allowance"** under the *Public Service Superannuation Act*. Consequently, he was entitled to severance pay.

Mr. Yarmolinsky's severance from the CCRA may not fit with the traditional vision of a white haired older person walking peacefully from his work desk to his easy chair and collecting his pension happily ever after; however, he meets the only conditions necessary for retirement and severance pay found in the collective agreement.

In the *Canadian Oxford Dictionary* "retire" is defined as:

> *a) leave office or employment, esp. because of age, b) cause a person to retire from work, c) cease to employ or use (something) or remove it from service.*

One cannot say that retirement is always voluntary. The enforcement of mandatory retirement based on age is often not voluntary. So while it is a withdrawal, a retreat or a leaving, retirement is not necessarily agreed upon or voluntary.

It is Mr. Yarmolinsky's contention that while it was involuntary, and not something he had wished for, he has indeed retired from the CCRA.

His retirement date according to the Public Service Superannuation – Pension Statement is December 13, 2003. According to the same document, his date of entitlement to receive his monthly pension (the option he chose) was January 20, 2005.

In the alternative, should the Board decide not to award severance, Mr. Yarmolinsky asks the adjudicator to recommend to the employer that, in these circumstances, it look at an *ex gratia* payment for humanitarian reasons.

There are quite differing views on the purpose of severance. Mr. Yarmolinsky's position is that it is retrospective and intended to compensate long serving employees for their years of service and investment in the employer's business. Severance, under this approach, is an earned benefit and therefore it would be inequitable to pay Mr. Yarmolinsky nothing after 27 years of service.

Mr. Yarmolinsky made a profound error in judgment and committed a reprehensible act for which he takes total responsibility. He has paid for that mistake in many ways, not the least of which is the loss of his job.

Mr. Yarmolinsky implores the Board to consider his loyal service of 27 years during which period he proved himself time and time again to be worthy of the employer's trust and respect.

He asks the Board to look back past the repugnant act, which led to his dismissal, to all his exemplary years of employment.

It is one thing to say that one act has caused an irreparable breach of trust and taints the possibility of continued employment. It is one thing to say that there is no longer confidence in him as a future employee. It is quite another thing to say that he is retroactively disentitled to any of the fruits of his years of loyal service.

It is Mr. Yarmolinsky's contention that he meets the requirements for severance pay that are set forth under subclause 19.01(d) of his collective agreement, for the reasons outlined above and that he should be paid the severance pay earned in his years of service.

Alternatively, should the Board find it to be the case that he is not entitled to severance by virtue of the collective agreement, Mr. Yarmolinsky respectfully requests that the adjudicator recommend the employer look at an *ex gratia* payment.

For the employer

The employer accepts that the grievor had 27 years of service with the CCRA; however, there is no evidence before the Board as to the grievor's service record over those 27 years nor is this information relevant in determining the issues raised by the grievance.

The grievor's entitlement to pension benefits is irrelevant to the issues raised in this grievance since none of the circumstances specified in clause 19.01 of the collective agreement are applicable to the grievor's circumstances. Furthermore, pension benefits are administered exclusively by the Superannuation Directorate and different entitlement rules apply.

Issues

Analysis and argument

Interpretation of collective agreements

According to Messrs. Brown and Beatty, in *Canadian Labour Arbitration*, Third Edition, the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties to the agreement. Parties are assumed to have intended what they have expressly stated in their agreement.

The primary principle in searching for the parties' intention with respect to a particular provision of a collective agreement is the "plain and ordinary meaning rule". Arbitrators must interpret language in the document in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the agreement (*Canadian Labour Arbitration* (*supra*)).

Other guiding principles for ascertaining the intention of the parties to a collective agreement include: a) relevant contextual factors; b) harmony and consistency with the framework of the agreement; and c) reasonableness (*Re Public Service Alliance of Canada v. Alliance Employees' Union* (2002), 111 L.A.C. (4th) 402).

Adjudicators and arbitrators must be careful not to confer any additional monetary benefits to a collective agreement, unless the intention of both parties is clear and unambiguous (*Re Vancouver Hospital and Health Sciences Centre v. Hospital Employees' Union, Local 180* (1996), 54 L.A.C. (4th) 35 and *Re Brandon General Hospital v. Manitoba Nurses Union, Local 4* (1996), 56 L.A.C. (4th) 174.)

Issue One – Grievor is not entitled to severance pay under the provision of the collective agreement

The grievor did not "retire" from the CCRA.

Section 4 of the *Public Service Superannuation Act* provides:

> *4.(1) Subject to this Part, an annuity or other benefit specified in this Part shall be paid to or in respect of every person* who, being required to contribute to the Superannuation Account or the Public Service Pension Fund in accordance with this Part*, dies or ceases to be employed in the Public Service, which annuity or other benefit shall, subject to this Part, be based on the number of years of pensionable service to the credit of that person.*

Neither the *Public Service Superannuation Act* nor the collective agreement provides a definition of "retirement"; however, the Treasury Board Secretariat's policy on Termination of Employment, which was adopted by the CCRA when it became an Agency, defines "retirement" as a voluntary separation by virtue of *age* or on *health grounds*.

The dictionary definitions of "retirement" referred to by the grievor presuppose an underlying non-culpable reason for "leaving office or employment" and the example given, "because of age", is consistent with Treasury Board's definition. Thus, the reason for removing a person from service is a focal consideration in this context.

The grievor did not retire from the CCRA within the meaning of the collective agreement. He did not separate voluntarily by virtue of age or on health grounds; he was discharged for serious misconduct.

Pension entitlement does not trigger severance clause in collective agreement

It appears that the two prerequisites to trigger the provisions of the *PSSA* are that a) a person has been required to contribute to the fund; and b) that person dies or ceases to be employed in the public service. There is again no element of culpability in the criteria specified.

It appears that the grievor met both requirements and therefore became eligible for pension benefits. This is administered separately by the Superannuation Directorate and is not covered by the provisions of the collective agreement.

Subclause 19.01(d) of the collective agreement is not engaged by the facts of this case

Under the express terms of the collective agreement, the circumstances in which severance benefits may be payable are lay-off, resignation, rejection on probation, retirement, death and termination for cause for reasons of incapacity or incompetence. Termination of employment for reasons of misconduct is not one of the circumstances set forth in the collective agreement for entitlement to severance benefits.

There is no ambiguity in these provisions. Where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement even if this results in apparent unfairness (*Re Cardinal Transportation B.C. Inc. v. Canadian Union of Public Employees, Local 561* (1997), 62 L.A.C. (4th) 230). It was not the intention of the parties to grant severance pay to all employees upon termination of employment for disciplinary reasons.

An employee is not entitled to severance pay where the employee has been discharged for disciplinary reasons. In *Re Treasury Board (National Defence) v. Foster* (1996), 58 L.A.C. (4th) 325, the grievor had accumulated 28 years of service when he was convicted of an indictable offence which resulted in the termination of his employment by virtue of section 748 of the *Criminal Code*. He grieved the employer's denial of his request for severance pay and the grievance was denied. In denying the grievance, Adjudicator Turner lamented that "[a]s regrettable as this situation is for Mr. Foster, he is…unfortunately 'left in the cold' even though he had more than ten years of employment in the Public Service."

Since the grievor did not retire from the CCRA, but rather was discharged for serious misconduct, he is not entitled to severance pay under the provisions of the collective agreement. To interpret the agreement in the manner proposed by the grievor will do violence to the language and intent of the agreement.

Issue Two – The grievor is not entitled to an *ex gratia* payment

The employer's policy on making *ex gratia* payments is appended to these submissions (CCRA Policy and Guidelines and Procedures on claims by/against the Crown and *ex gratia* payments). Based on the provision of this policy there are no grounds for making any such payment to the grievor nor does the Board have jurisdiction to order the employer to make any such payment.

Conclusion

The employer respectfully requests that the grievance be denied.

Reply for the grievor

The employer discusses guiding principles for ascertaining the parties' intentions. It is our contention that it is entirely reasonable to award severance pay in these circumstances. It is not a violation of the harmony of the collective agreement. In fact, it is fully in keeping with the collective agreement both in spirit and intent.

Contrary to the employer's expressed concerns, an award establishing payment would not confer any additional benefits to the collective agreement, as it is something that would have been calculated and budgeted once Mr. Yarmolinsky passed ten years of service. This is found in the collective agreement. It is an earned benefit that the

employer had expected to pay to Mr. Yarmolinsky and other employees as they become entitled to it according to their service.

Further, in terms of the spirit of the collective agreement failure to pay Mr. Yarmolinsky severance pay, when they had been fully expecting to, would amount to a second punishment piled upon the termination.

The employer refers to the Treasury Board policy on termination of employment. This is done in an attempt to provide a definition for "retirement". The CCRA is not a Treasury Board employer; the agency is a separate employer that has adopted some of the Treasury Board policies. However, in the absence of any proof that this is one of the policies adopted by the CCRA, this definition should only be given the weight of any other external definition.

The employer challenges the definition of retirement provided by the grievor and asserts that the definition "presupposes an underlying non-culpable reason" without suggesting why they think that is the case. In the definition provided, (b) is "cause a person to retire from work" and (c) is "cease to employ or use (something) or remove it from service". It is true that we generally view retirement as a passive act, but a more active or even forced component is not necessarily excluded, as seen above.

The conclusion drawn by the employer is that: "Thus the reason for removing a person from service is a focal consideration in this context." That conclusion does not follow from the definition provided. But even on its own, is it true? No, because in at least one circumstance – resignation, which is quoted by the employer as being rightfully delineated for severance – misconduct may very well be a factor. Misconduct could very well be a factor leading up to retirement as well. And the determinative factor dictating eligibility for severance according to the collective agreement would be "…when an employee is entitled to an immediate annuity or an immediate annual allowance under the *Public Service Superannuation Act*…"

On a plain reading, using the principles cited in *Canadian Labour Arbitration* (*supra*), it would appear that it was never the intention of the parties to exclude those who committed culpable acts or acts of misconduct from the benefit of severance pay. That is neither expressly written nor can it be inferred. It is more like received knowledge.

The employer's counsel states: "It was not the intention to grant severance pay to all employees upon termination of employment for disciplinary reasons." This is true. Not all employees who were terminated for disciplinary reasons would get severance pay; only those who had earned it, according to clause 19.02.

The *Foster* (*supra*) case is quoted to establish that employees discharged for disciplinary reasons are not entitled to severance pay. While this is a fascinating case, it involves a ruling about the forced abandonment of a position under section 748 of the *Criminal Code*. This was an automatic dismissal by the "operation of the law". The arguments made were about what constituted "incapacity". It does not say that an employee who has been discharged for disciplinary reasons is not entitled to severance pay.

Sill the *Foster* case is interesting for a different reason. Mr. Tynes, for the union, seemed to be trying to determine what was actually meant by "incapacity". He suggested that it should not be interpreted as narrowly as it had been, and there were different circumstances where "incapacity" would apply. Unfortunately, the

adjudicator saw Mr. Tynes as asking him to add new meaning to the collective agreement when I believe what he was asking him to do was take a fresh look at the circumstances in which "incapacity" might apply. With respect, by suggesting to you that Mr. Yarmolinsky was retired, I am not asking you to add new meaning or amend or expand the collective agreement, but rather to discover if in fact retirement can be involuntary.

On reading the employer's policy on *ex gratia* payments, I find nothing which would disallow an *ex gratia* payment. The employer has referred us to no particular section which they indicate would bar an *ex gratia* payment in these circumstances.

The grievor understands that the Board cannot order an *ex gratia* payment. The grievor never asked the Board to direct an *ex gratia* payment, but asked that the Board recommend the employer look at an *ex gratia* payment, given Mr. Yarmolinsky's long length of service. This type of recommendation was made by adjudicator Turner in the *Foster* (*supra*) case.

Conclusion

By refusing to pay severance the employer effectively punishes Mr. Yarmolinsky twice for the same incident.

As nothing in the collective agreement disallows payment, and in fact he meets the definition of retirement in the collective agreement, it is only just and equitable to allow him the earned benefit of the money the employer has set aside for the purpose of his leaving their employ.

Alternatively, it is our view that the Board can ask the employer to look at an *ex gratia* payment.

Reasons

[10] An employee is entitled to severance pay under the collective agreement under the following circumstances: lay-off; resignation; rejection on probation; retirement; death; and termination for cause for reasons of incapacity or incompetence. Mr. Yarmolinsky was terminated for misconduct. Mr. Yarmolinsky argues that there is no bar to payment of severance for misconduct. The provisions for severance in this collective agreement are comprehensive and exhaustive. The parties put their minds to the treatment of those employees who have been terminated and concluded that severance would be available only to those employees terminated for incapacity or incompetence and not those terminated for misconduct. Although the collective agreement does not explicitly state that no severance is payable when an employee is terminated for misconduct, in my view there is no obligation to have such an explicit provision since the clause is an exhaustive list of all situations where severance is to be paid.

[11] Mr. Yarmolinsky's bargaining agent representative, Mr. Eadie, argues that Mr. Yarmolinsky retired from the CCRA since he is now in receipt of a pension and is, therefore, entitled to severance. I agree with Mr. Eadie that retirements are not always voluntary in the true sense of the word. However, retirement is an act that severs the employment relationship and not simply an entitlement to a benefit. In Mr. Yarmolinsky's case, his employment was severed by a termination for misconduct and not a retirement. The fact that he is entitled to a pension under the *PSSA* is irrelevant, since it was not his retirement that severed the employment relationship. In addition, the clause requires that the employee be both retiring and entitled to an immediate annuity. Mr. Yarmolinksy did not meet both requirements.

[12] Mr. Eadie submitted that denying severance pay amounts to being punished twice for the same incident. A loss of an entitlement under a collective agreement is a consequence of termination for misconduct and not a "further punishment". The collective agreement provides for such a result. This is the reality faced by all employees terminated for misconduct.

[13] Mr. Eadie argued that severance is an earned benefit and that it could be unfair to deprive him of that earned benefit. I do not need to decide if severance is an earned benefit or not. The collective agreement is clear that severance is not payable in cases of termination for misconduct. Whether or not severance is an earned benefit does not change the clear provision in the collective agreement.

[14] Mr. Eadie also submitted, in the alternative, that I should recommend that the employer look at an *ex gratia* payment for humanitarian reasons. Mr. Eadie submitted that in *Foster* (*supra*) the adjudicator recommended an *ex gratia* payment. However, in that case, Mr. Foster was not terminated for misconduct; he was terminated because the employer deemed him to be incapable of performing his duties pursuant to the *Criminal Code*. In the words of counsel for the employer in that case, "from an equitable position", the grievance had "some merit" since the grievor was not terminated for disciplinary reasons. In this light, the comment of the adjudicator (that the Treasury Board "may wish to exercise its discretion by making an *ex gratia* payment") is understandable.

[15] Based on the evidence available and the arguments made, I see no reason to recommend an *ex gratia* payment. There were no extenuating circumstances prescribed that would justify such a recommendation.

[16] In conclusion, Mr. Yarmolinsky is not entitled to severance pay because he does not meet the requirements of Article 19 of the collective agreement. I do not have the authority to order an *ex gratia* payment and decline to recommend such a payment.

[17] For all of the above reasons, I make the following order:

(The Order appears on the next page.)

Order

[18] This grievance is dismissed.

December 5, 2005.

Ian R. Mackenzie,
adjudicator