Date: 20070620

Files 568-34-2
566-34-608
166-34-35981

Citation: 2007 PSLRB 65

Public Service Labour Relations Act
and
Public Service Staff Relations Act

Before the Vice-Chairperson
and an adjudicator

BETWEEN

BARRY STUART LAWRENCE

Applicant and Grievor

and

CANADA REVENUE AGENCY

Respondent and Employer

Indexed as
Lawrence v. Canada Revenue Agency

In the matter of an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations,* an individual grievance referred to adjudication pursuant to paragraph 209(1)(*a*) of the *Public Service Labour Relations Act*, and in the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Michele A. Pineau, Vice-Chairperson and adjudicator

For the Applicant and Grievor: Daniel Fisher, Public Service Alliance of Canada

For the Respondent and Employer: Stéphane Hould, counsel

Heard at Charlottetown, Prince Edward Island,
February 13, 2007.

I. Application before the Chairperson and grievances referred to adjudication

[1] This is a reference to adjudication of two grievances filed by Barry Stuart Lawrence ("the grievor") concerning the denial of a request for pre-retirement retirement leave as provided in clause 53.01 of the collective agreement between the Canada Revenue Agency (CRA or "the employer") and the Public Service Alliance of Canada (Program Delivery and Administrative Services Group).

[2] The first grievance was filed on November 7, 2002 (PSSRB File No. 166-34-35981). In the final level reply, the employer objected to the timeliness of this grievance because it was submitted to the third level of the grievance procedure some eight months after the employer's response at the second level, instead of within 10 days as specified in the collective agreement. The employer responded nonetheless to the merits of the grievance. In response to the employer's objection, the grievor applied for an extension of time for filing the grievance at the final level (PSLRB File No. 568-34-2).

[3] An identical second grievance was filed on April 14, 2005 (PSLRB File No. 566-34-608), concerning the denial two years later of the same type of leave, in order to protect against the loss of any rights foreclosed by the untimeliness of the first grievance. The grievor submits that, to the extent that he is successful in having the merits of his grievances upheld, this is a continuous grievance, and he should be compensated to the full extent allowed in the collective agreement.

[4] The employer denied the grievances at each level of the grievance procedure for the reasons set out below. The employer's position is that these are individual grievances and, to the extent that the grievor is successful, compensation should be limited to the specific weeks of leave that were denied.

II. Summary of the evidence

[5] The grievor is a CR-03, employed at the Summerside Tax Centre — Tax Specialty Services of the CRA. He has been employed in this position since October 23, 1993. Prior to his employment with the CRA, the grievor was a member of the Canadian Forces from February 1966, when he joined at age 19, until April 1991, when the Summerside Air Force Base was closed. His many postings and positions held while employed in the Canadian Forces were noted but, for the sake of brevity, are omitted from this decision.

[6] The grievor's effective date of retirement from the Canadian Forces was August 2, 1992. Because of his age and length of service, he left the Canadian Forces with a full pension and without penalty. He also received severance pay upon his departure.

[7] The grievor could have accepted a promotion to a position in Halifax when the Summerside Air Force Base closed, but he opted to stay in Summerside because the move would have been too disruptive for his family, then well established in Prince Edward Island. Between August 2, 1992, and October 23, 1993, the grievor spent some two months at home and then began employment with Irving Oil in Charlottetown, before accepting a position with CRA in 1993.

[8] In 2001 the grievor received a recognition award for 35 years in the public service; in 2006, he received a similar award for 40 years of service.

[9] The grievor presently receives a full military service pension in addition to his CRA income. He is also entitled to four weeks of annual leave. He does not receive any CRA employment benefits tied to his previous military service. When he commenced employment at the CRA, his annual leave credits were the same as for any new employee. He has since acquired additional annual leave credits in accordance with his service under the collective agreement.

[10] The grievor acknowledged that pre-retirement leave was a means of topping up his current annual leave credits of four weeks by a further week in order to have the same amount of leave he enjoyed while working with the Canadian Forces. The grievor also recognized that he had lost any opportunity to convert his military pension into a public service one and that he is now accumulating a separate pension entitlement under the terms of his new employment.

[11] The grievor first applied for pre—retirement leave at the CRA in November 2002. When this leave was denied, he filed a grievance. His grievance was denied at all levels, including the final level, on the basis that his service with the Canadian Forces fell within the purview of the *Canadian Forces Superannuation Act* (*CFSA*) and not the *Public Service Superannuation Act* (*PSSA*) on which entitlement to pre-retirement leave is based. In other words, his service within the Canadian Forces could not be counted as "service" for the purpose of receiving a pre-retirement benefit in the public service.

[12] The grievor apparently relied on his bargaining agent to process his first grievance at each level of the grievance procedure. He only found out that his first grievance had not been forwarded to the final level of the grievance procedure when he decided, after several months, to ask his bargaining agent what had become of his grievance. As the grievor understood that grievances can take a certain amount of time to go through the process, he was not unduly worried about timeliness until the time of his inquiry. To protect the time limits of any further requests for pre-retirement leave and on the bargaining agent's advice, the grievor filed an identical second grievance on April 14, 2005, that was denied at all levels for the same reasons as the first grievance.

III. Summary of the arguments

A. For the applicant and grievor

[13] The grievor contends that he met all the criteria required by clause 53.01 of the collective agreement at the time that he applied for pre-retirement leave.

[14] The grievor argues that clause 53.01 of the collective agreement must be interpreted in accordance with its broadly stated terms, allowing an employee aged 55 and with a minimum of 30 years of service to benefit from pre-retirement leave. Contrary to clause 34.03, which precisely defines what is meant by "service" as it applies to the accumulation of vacation leave, clause 53.01 is silent as to the meaning of the word. Consequently, there should be no distinction as to the origin of "service" within the Government of Canada, whether with the public service or the Canadian Forces, since both are recognized and cumulated for long-service awards.

[15] The grievor further argues that the employer's interpretation of clause 53.01 of the collective agreement goes beyond what was intended at the time it was negotiated. If the limits found in clause 34.03 are also to be applied to clause 53.01, then this should be clearly stated in order to avoid any misinterpretation. As the clause is stated in broad terms, it should be interpreted in his favour.

[16] The grievor takes the view that clause 53.01 of the collective agreement was instituted to provide an incentive for employees who have reached the "85" formula — that is, the adding of age to years of service to reach a total of 85 — to continue working for a few more years by adding an extra week of vacation each year for a

five-year period. In this case, the employer's refusal of his requested leave defeats the intended purpose of the pre-retirement leave benefit.

[17] With respect to the timeliness of the first grievance, the grievor contends that paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") allows the Chairperson to exercise his or her authority to extend the time limit to file a grievance or to present it at the next step of the grievance procedure. The grievor argues that he always intended to pursue his first grievance to the final level and that he should not be penalized by the bargaining agent's omission to forward it to the final level. His intention is evident by the filing of the second grievance immediately upon learning of the bargaining agent's omission. The grievor submits that there is no undue hardship on the employer should I allow his application to extend the time limits with respect to his first grievance.

[18] The grievor concludes his case by submitting that a purposeful approach to collective agreement interpretation should be adopted in order to provide maximum benefits for all prior government service. In this case, the parties to the collective agreement chose to omit incorporating technical language to limit the benefits provided under clause 53.01 of the collective agreement. As the collective agreement language is clearly without restriction as to its application and effects, it is broad enough to support the interpretation proposed by the grievor. The grievor asks, therefore, that the grievances be upheld and that the application for an extension of the time limit be allowed.

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

[19] The employer submits that clause 53.01 of the collective agreement must be interpreted contextually, as it is tied to the retirement provisions of the *PSSA*. According to the *PSSA*, a public service employee who has reached 55 years of age and has 30 years of service may retire with an unreduced pension. Nevertheless, the parties have negotiated an incentive in the collective agreement that provides that employees eligible to retire from the public service receive additional vacation credits of one week per year for a five-year period should they delay their retirement decision.

[20] The employer argues that while the grievor was indeed over the age of 55 at the time he requested pre-retirement leave, he did not have 30 years of public service employment as understood by the *PSSA*; therefore, he was ineligible for the

pre-retirement benefit. Service in the Canadian Forces does not count for pension purposes under the *PSSA*. In support of its argument, the employer relies on the decision of the Federal Court of Appeal in *Bolling et al. v. Canada (Public Service Staff Relations Board),* [1978] 1 F.C. 85 (F.C.A.).

[21] The employer further argues that just as clause 33.05 of the collective agreement provides against pyramiding or "double dipping" for vacation purposes, the same principle applies to pension-related benefits. The grievor cannot receive two types of remuneration for the same service, since he has already received severance pay for his Canadian Forces service.

[22] With respect to the timeliness of his first grievance, the employer asserts that the grievor did not provide any compelling reasons as to why his grievance was not advanced to the third level, other than that the bargaining agent failed to forward it. The employer therefore asks that both grievances and the application for an extension of time be dismissed.

IV. Reasons

A. Context

[23] My authority to decide these matters comes under several legislative provisions. With respect to the grievor's application for an extension of time to present his first grievance to the third level of the grievance procedure (PSLRB File No. 568-34-2), the Chairperson has authorized me, in my capacity as Vice-Chairperson, under section 45 of the *Public Service Labour Relations Act* ("the new *Act*"), to exercise any of his powers or to perform any of his functions under paragraph 61(*b*) of the *Regulations* to hear and decide any matter relating to the extension of time.

[24] 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*, the reference to adjudication of the first grievance (PSSRB File No. 166-34-35981) 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").

[25] Given that the second grievance (PSLRB File No. 566-34-608) was filed after the royal assent of the new *Act*, it must be decided under that legislation.

[26] That being said, the subject matter of the second grievance is identical to that of the first. The evidence concerning the two grievances and the applicable collective agreement provisions are also the same. Since the second grievance is timely, I decided to exercise my discretion to first decide the second grievance. I would then decide the employer's objection to the timeliness of the first grievance once I had heard the merits of the second grievance and the context for the grievor's delay in submitting his first grievance to the final level.

B. Analysis

[27] Clause 53.01 is identical in both the collective agreement that expired on October 31, 2003 (in force when the first grievance was filed) and in the one scheduled to expire on October 31, 2007 (in force when the second grievance was filed), and provides as follows:

> ***53.01*** *Effective on the date of signing of this collective agreement, the Employer will provide five (5) days of paid leave per year, up to a maximum of twenty-five (25) days, to employees fifty-five (55) years old and over with a minimum of thirty (30) years of service.*

[28] The grievor directed me to four arbitration awards that he argues support a broad interpretation of what constitutes service to help interpret the clause in dispute. In *Canada Post Corporation v. C.U.P.W. (Stutt),* [2000] C.L.A.D. No. 749 (QL), the arbitrator upheld a grievance challenging the employer's blanket prohibition on the taking of pre-retirement leave during certain periods of the year because of operational considerations. In *St. Andrew's Centennial Manor v. OPSEU, Loc. 328* (1991), 23 L.A.C. (4th) 129, which concerned the interpretation of what constituted continuous service for purposes of vacation pay entitlement, the arbitrator held that the wording of the collective agreement supported a combination of both full-time and part-time employment within the bargaining unit to measure years of continuous service and excluded a pro-rating of the hours of work over those years. In *CUPW v. Canada Post Corporation (Tingley),* [2001] C.L.A.D. No. 217 (QL), the arbitrator upheld a grievance challenging the employer's denial of an employee's right to furlough leave on the basis that the collective agreement required a conclusion that the grievor was entitled to take the leave without any reduction of his usual vacation entitlement. In *SPAR Aerospace Ltd. v. International Association of Machinists and Aerospace Workers, Northgate Lodge 1579 (Switzer),* [2000] C.L.A.D. No. 166 (QL) (*Tettensor*), the arbitrator

held that, for purposes of purging an employee's disciplinary file, the term "continuous service" had to be interpreted in conjunction with the collective agreement as a whole. Thus, in order for the clean slate provisions of the collective agreement to be meaningful, "continuous service" meant a continuous period when an employee was at work; that is, starting at the end of a suspension and subsequent return to work. For the reasons set out below I do not, however, find these decisions particularly helpful in deciding the issue in dispute.

[29] On initial reading of clause 53.01 of the collective agreement, I cannot disagree with the grievor's point of view that it is extremely broad and apparently contains no particular restriction with respect to the granting of pre-retirement leave, insofar as employees meet the age and service requirements. The grievor is also correct in saying that the collective agreement does not contain a definition of the word "service." Nor can I fault the submission that if a term is undefined, it must be given its ordinary meaning. In this case, this could be interpreted to comprise the grievor's cumulative service within the Government of Canada as the employer for both the Canadian Forces and the public service.

[30] Nevertheless, the Federal Court of Appeal in *Bolling* has ruled that neither the former *Act* nor the *Public Service Employment Act* in force at that time applies to members of the Canadian Forces and that service in the Canadian Forces cannot be characterized as "service" in the public service (at paras. 3-5):

. . .

> [3]. *In our opinion, neither the general substantive provisions of the* Public Service Staff Relations Act *[the former* Act*] which confer collective bargaining rights on certain employees in the public service of Canada, nor those of the* Public Service Employment Act *which provide for selection on the merit principle, for rights with respect to promotion and for appeals, apply to members of the Canadian Forces. The terms and relationships under which they serve are prescribed by the* National Defence Act *and are largely, if not entirely, inconsistent with the application of either the* Public Service Staff Relations Act *or the* Public Service Employment Act *to them. That they are not included in the general body of persons to whom the* Public Service Staff Relations Act *and the* Public Service Employment Act *apply is borne out by the fact that they are specially mentioned in paragraph 2(2)(*b*) of*

> *the latter* Act *for the purpose of conferring particular rights on them.*
>
> [4] *It would, therefore, in our view, be wrong to read the definition of that segment of the public service of Canada which is to be referred to as the "Public Service" throughout the* Public Service Staff Relations Act, *and indeed the* Public Service Employment Act *as well, where the definition refers to and coincides with that in the* Public Service Staff Relations Act, *as embracing members of the Canadian Forces.*
>
> [5] *We are accordingly of the opinion that the adjudicator correctly decided that service in the Canadian Forces is not service within the meaning of Article 18 of the collective agreement.*
>
> *The application is dismissed.*

[31] Adjudicators of the Board have consistently applied the principles of that decision (i.e., *McCormick v. Treasury Board (External Affairs Canada),* PSSRB File No. 166-02-14340 (19940801), *Knapman v. Treasury Board (Supply and Services Canada*), PSSRB File No. 166-02-16247 (19871104), *Deniger v. Treasury Board (Transport Canada),* PSSRB File Nos. 166-02-21583 and 166-02-21584 (19920131) and *Aubin v. Treasury Board (Transport Canada),* PSSRB File Nos. 166-02-27489 and 27490 (19970429).

[32] Furthermore, with respect to the second grievance, on April 1, 2005, the *Public Service Modernization Act* came into force. As a result, the definition of "public service" in the new *Act* and the new *Public Service Employment Act* ("the new *PSEA"*) are closely harmonized. The new *Act* defines the public service in section 2 as follows:

> *"public service". . . means the several positions in or under*
>
> (a) *the departments named in Schedule 1 to the* Financial Administration Act;
> (b) *the other portions of the federal public administration named in Schedule IV to that Act; and*
> (c) *the separate agencies named in Schedule V to that Act.*

[33] The public service is similarly defined in the new *PSEA*, except that paragraph (*b*) of the definition refers to "organizations" named in Schedule IV of the *Financial Administration Act* (*FAA*), instead of "other portions of the federal public administration." The Canadian Forces are not enumerated in any of the Schedules of

the *FAA*. Therefore, unless there is some other legislative or regulatory support for an exception, the Canadian Forces are excluded from the application of the new *Act* for labour relations purposes and from the new *PSEA* for employment purposes.

[34] The second grievance under review presents a unique set of facts. The grievor completed a military career and retired with an unreduced pension under the terms of the *CFSA*. He also received severance pay on terminating his employment relationship with the Canadian Forces. In other words, the grievor commenced and completed an employment relationship for which he was fully compensated. He has now commenced a second career with the CRA. This is a new contract of employment with its own terms and conditions. The grievor admitted as much when he stated that none of the benefits he enjoys through this current employment, including the accumulation of vacation leave credits, are related to his military service.

[35] In his testimony, the grievor admitted that he could have had an opportunity to roll his military pension into the *PSSA* but that he was unable to do so because more than one year had elapsed between his departure from the Canadian Forces and the start of his new employment with the CRA. This is in keeping with the *Public Service Terms and Conditions of Employment Policy* that applied at the time the grievor was hired and that stated as follows:

> . . .
>
> *3. For the purpose of these regulations the following periods count as <u>continuous employment</u>:*
>
> *A. In respect of a person appointed to Part I Service as an indeterminate employee:*
>
> . . .
>
> ***iii. immediately prior service in the Canadian Armed Forces . . . provided that the person was honourably released and has made or makes a valid election to contribute for that service under the* Public Service Superannuation Act *(the effective date will be the date the election is completed).***
>
> . . .
>
> [Emphasis added]

[36] Accordingly, there can be no dispute that when the grievor knowingly began employment with the CRA as a new employee he did not meet the conditions for a period of "continuous employment" between the Canadian Forces and the CRA at the time of hiring.

[37] The new *Act* and the new *PSEA* are unequivocal that "public service" refers to employment within the departments, organizations and special agencies named in the Schedules to the *FAA*. The Federal Court, in *Bolling*, a decision under the former *Act*, has also made it clear that federal public service employment legislation excludes members of the Canadian Forces. There has been no substantive change in public service employment legislation or change of view by the courts that could cause me to find differently. No authority has been advanced to support the grievor's position that considerations used to confer long-service awards have a bearing on the entitlement to pre-retirement benefits.

[38] At first glance the employer's submission that the terms used in clause 53.01 of the collective agreement flow from the rules established for retirement benefits under the *PSSA* seems more consistent with the purpose of the pre-retirement benefit. Otherwise, the broad interpretation of the term "service" suggested by the grievor has the effect of creating a long-service recognition benefit for all employment within the Government of Canada, as opposed to an incentive to postpone retirement.

[39] It is useful to note that collective bargaining in the federal public service, unlike collective bargaining in the private sector, is regulated by specific and detailed legislation. Consequently, what may seem like unencumbered collective agreement language is in fact conditioned by the rules that apply to collective bargaining across the public service.

[40] Pension plans and pension rights in the public service are governed by separate legislation (the *PSSA*) that applies across most categories of employees, whether or not they are certified, and that covers a multitude of designated agencies. Therefore, pension rights are a non-negotiable benefit.

[41] This is not to say that there is no consultation between the employer and the bargaining agents concerning the pension plan and other non-negotiable benefits. However, these discussions do not take place at the individual bargaining tables but at another level, that of the National Joint Council, which provides the forum for any

revision, improvement and interpretation of public-service-wide benefits. Consequently, when it comes to interpreting collective agreement language, I must be cognizant not only of the context of the collective agreement in dispute, but also of the broader federal public service environment.

[42] The employer has argued that the vacation benefit of clause 53.01 of the collective agreement is tied to the retirement provisions of the PSSA. While the terms of the collective agreement may coincide with certain retirement provisions found in the *PSSA*, this argument remains an unproven assumption since the employer advanced no evidence to support this interpretation.

[43] It is, therefore, my finding that "service" in the Canadian Forces is not "service" within the meaning of clause 53.01 of the collective agreement. Accordingly, I do not accept the grievor's submission that "service" as used in the collective agreement unequivocally allows for a pre-retirement benefit for a combined military and public service career.

[44] Moreover, in view of the evidence brought forward at the hearing, I find that there are no compelling reasons to extend the time limit to present the grievor's first grievance to the final level of the grievance procedure. Since this is an individual grievance, the grievor bears the responsibility of being diligent in referring his grievance to each level of the grievance procedure. Absent any justification that the grievor was unable to present his grievance in accordance with the time limits in the collective agreement, I see no reason to exercise my discretion under paragraph 61(*b*) of the *Regulations*.

[45] For all of the above reasons, I make the following orders:

(The Orders appear on the next page)

V. Order

[46] The application for extension of time is denied.

[47] I order that file 166-34-35981 be closed.

[48] The grievance in PSLRB File No. 566-34-608 is denied.

June 20, 2007.

Michele A. Pineau,
Vice-Chairperson and adjudicator