Date: 20070628

File: 166-02-35324

Citation: 2007 PSLRB 66

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

YVES NANTEL

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Nantel v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievor: Valérie Charette, Professional Institute of the Public Service of Canada

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Montréal, Quebec,
June 7, 2006.
(P.S.L.R.B. Translation)

I. Grievance referred to adjudication

[1] Yves Nantel ("the grievor") was working for the Correctional Service of Canada (CSC) in a materiel management officer (PG-02) position when he filed a grievance against the Treasury Board ("the employer") on July 7, 2003. The grievance reads as follows:

> [Translation]
>
> *I contest my employer's June 30, 2003 decision refusing to pay interest owed to me on the amount of $6393.01, retroactive to the date of my acting PG-02 appointment (January 5, 1993). The amount of $6393.01 was already paid to me in 2002 when the employer acknowledged the error that had slipped into the processing of my pay file.*
>
> *I claim immediate payment of the interest on this amount (at the rate set out in the attached chart), so that I would be fully compensated for the employer's error.*

[2] On April 1, 2005, the *Public Service Labour Relations Act* ("the new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Under 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] The grievance was referred to adjudication on October 27, 2004 under paragraph 92(1)(*a*) of the former *Act.*

II. Objection to jurisdiction

[4] Before the hearing, the employer asked the Public Service Labour Relations Board ("the Board") to dismiss this reference to adjudication without a hearing, on the grounds that an adjudicator does not have jurisdiction to hear this grievance claiming the payment of interest (May 10, 2006 letter, Exhibit F-3). The employer submitted that an adjudicator does not have jurisdiction to order the payment of interest, since neither the former *Act* nor the applicable collective agreement so provide. The employer also submitted that this grievance may not be referred to adjudication, since it does not relate to the matters set out in subsection 92(1) of the former *Act*.

[5] The employer cited the following decisions: *Guest et al. v. Canada Customs and Revenue Agency,* 2003 PSLRB 89, *Eaton v. Canada*, [1972] F.C. 185, and *Dahl v. Treasury Board (Agriculture Canada),* Board File No. 166-02-25535 (19950621).

[6] On May 18, 2006, the Professional Institute of the Public Service of Canada (PIPSC) responded to the employer's objection (Exhibit F-4). According to the PIPSC, the principle that interest may not be claimed against the Crown unless a statute or contract so provides no longer applies. The Crown has bargained with its employees since 1967, and the legislative changes to the *Federal Court Act* and the *Crown Liability and Proceedings Act* mean that the principles formerly recognized no longer apply. The principle to be applied now is that the grievor must be fully compensated for harm suffered. As well, the grievor's claim for interest results from the employer's error in calculating his pay, which should have been calculated in accordance with clause 45.02 of the collective agreement. This grievance may be referred to adjudication under subsection 92(1) of the former *Act*.

[7] The PIPSC cited the following decisions: *Hochelaga Shipping & Towing Company Limited v. Canada*, [1944] S.C.R. 138, *Canada v. Racette*, [1948] S.C.R. 28, *Canada v. Carroll*, [1948] S.C.R. 126, *Hallowell House Limited v. Service Employees' International Union, Local 183*, [1980] 1 Can. L.R.B.R. 499, *Air Canada v. Canadian Air Line Employees' Association* (1981), 29 L.A.C. (2d) 142, *Canada Post Corporation v. Canadian Union of Postal Workers (O'Brien)* (1985), 19 L.A.C. (3d) 211, *Canada Post Corp. v. Canadian Union of Postal Workers (Retroactivity Implementation Grievance)* (1992), 30 L.A.C. (4th) 297, *Health Labour Relations Association (British Columbia Cancer Agency) v. Hospital Employees' Union* (1993), 38 L.A.C. (4th) 236, *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1998] C.H.R.D. No. 6, *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.), *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 (C.A.), *Puxley v. Treasury Board (Transport Canada)*, Board File No. 166-02-22284 (19940705), *Eaton*, and *Dahl*.

[8] In its June 1, 2006 letter (Exhibit F-3), the employer responded that the legislative context of other jurisdictions is different from that of the Board and that, before the new *Act* came into force in April 2005, the Board had always maintained that it had no power to award interest. In enacting that an adjudicator may award interest, the legislator intended, through paragraph 226(1)(*i*) of the new *Act,* to remedy

that situation and to give adjudicators a power that they did not have before April 2005.

[9] As well, the employer submitted that this grievance is not a logical extension of the interpretation of clause 45.02 of the collective agreement, as the bargaining agent claimed. The employer corrected the error in calculating the grievor's pay and paid him the amount that he should have received under the collective agreement. The collective agreement contains no article providing for the payment of interest. The grievor is not requesting a decision on the interpretation or application to his case of an article of the collective agreement; he is claiming the payment of interest.

[10] At the beginning of the hearing, in response to an order by the Board, the parties made their submissions to me. I took the employer's objection under advisement and ordered the parties to proceed on the merits of the grievance.

III. Summary of the evidence

[11] By common consent, the parties adduced the following documents:

- Exhibit F-1: The collective agreement between the Treasury Board and the PIPSC for the Audit, Commerce and Purchasing group (expiry date: June 21, 2003);

- Exhibit F-2: A joint summary of facts, which reads as follows:

  [Translation]

  . . .

  1. At the time of his retirement on June 1, 2006, the complainant, Mr. Yves Nantel, occupied a materiel management officer position with the Correctional Service of Canada (CSC) at the La Macaza Institution in L'Annonciation, Quebec.

  2. Mr. Nantel had been an indeterminate employee of the CSC since April 2, 1984.

  3. At the time of his grievance, Mr. Nantel was governed by the Audit, Commerce and Purchasing (AV) group collective agreement that came into effect on November 19, 2001.

4. *On January 5, 1993, Mr. Nantel was appointed on an acting basis to a materiel management officer (PG-2) position at the La Macaza Institution.*

5. *On August 18, 1993, Mr. Nantel was appointed on an indeterminate basis to the position described in item 4.*

6. *On March 4, 2002, Ms. Fleurette Bruneau wrote to Mr. Nantel, informing him that an error had been discovered in the calculation of his pay following his January 5, 1993 acting PG-2 appointment, and notifying him that a wage adjustment of $6393.01 was owed to him [Appendix 1].*

7. *On March 13, 2002 Mr. Nantel received payment of the wage adjustment.*

8. *On April 8, 2002 Mr. Nantel wrote to Mr. Serge Doyon, Regional Labour Relations Manager for the CSC, claiming the payment of interest because of pay lost from January 5, 1993 to January 5, 1997 [Appendix 2].*

9. *In a May 23, 2002 email, Ms. Josée Campeau, Labour Relations Advisor for the CSC, responded to Mr. Nantel's April 8, 2002 letter, indicating that the CSC could not allow his claim for the reimbursement of interest [Appendix 3].*

10. *In a September 6, 2002 email, Mr. Nantel reiterated his claim; on September 13, 2002, Ms. Campeau responded to that claim [Appendix 4].*

11. *On December 2, 2002, Mr. Nantel sent an email to Ms. Françoise Nittolo, requesting a review of the file of his claim for the payment of interest [Appendix 5].*

12. *On December 19, 2002, Ms. Nittolo responded that she was consulting the labour relations division with respect to Mr. Nantel's claim [Appendix 5].*

13. *On January 20, 2003, Mr. Nantel asked when he would receive a response [Appendix 5].*

14. *On January 20, 2003 Ms. Nittolo informed Mr. Nantel that his request had been*

resubmitted to the labour relations division [Appendix 5].

15. *In a June 30, 2003 email, Mr. Serge Doyon confirmed to Ms. Valérie Charette that no interest would be paid to Mr. Nantel [Appendix 6].*

16. *On July 7, 2003, Mr. Nantel filed his grievance [Appendix 7].*

17. *On July 16, 2003, the acting deputy warden, management services, at the La Macaza Institution responded to the grievance at the first level of the grievance process [Appendix 8].*

18. *On July 22, 2003, the grievance was referred to the second level of the grievance process [Appendix 9].*

19. *On August 5, 2003, the parties agreed to eliminate the second level of the grievance process and to transfer the grievance directly to the third level [Appendix 10].*

20. *On September 24, 2004, Mr. Simon Coakeley, Deputy Commissioner, Human Resources Management, responded to the grievance at the third level of the grievance process [Appendix 11].*

21. *On October 26, 2004, Mr. Nantel's grievance was referred to the Public Service Labour Relations Board.*

22. *The parties reserve the right to adduce additional evidence in support of their arguments at the grievance hearing.*

. . .

- Exhibit F-3: May 10 and June 1, 2006 letters from the Treasury Board Secretariat of Canada to the Board (objection to the adjudicator 's jurisdiction); and

- Exhibit F-4: May 18, 2006 letter from the PIPSC.

[12] The grievor appended a calculation of the amounts claimed for the years 1993 to 1996 to his July 7, 2003 grievance claiming interest. The total amount of interest claimed is $7514.49, representing an annual compound interest rate of 9.50% on the

corrected amount of pay for each year. The interest rate corresponds to that which the grievor was receiving on his savings at that time.

IV. Summary of the arguments

A. For the grievor

[13] The grievor's representative reiterated the points she had made in her May 18, 2006 letter (Exhibit F-4). The Supreme Court of Canada decisions *Hochelaga, Racette* and *Carroll* specified that damages and interest may not be claimed against the Crown unless a statute or contract so provides. Those decisions were based on section 47 of the *Exchequer Court Act*, corresponding to section 35 of the *Federal Court Act*. At the time that those decisions were made, the Crown did not bargain with its employees; since 1967, that context has changed.

[14] As well, in 1990, following amendments to the *Crown Liability and Proceedings Act*, section 35 of the *Federal Court Act* was repealed and replaced by subsection 36(1), which provides that provincial legislation on interest in proceedings between individuals applies to proceedings before the Federal Court (section 31 of the *Crown Liability and Proceedings Act*, S.C. 1990, c. 8). The principle that a statute takes precedence over a common law rule also applies (*Sullivan, Sullivan and Driedger on the Construction of Statutes*, 4th ed. (2002)).

[15] Sections 36 and 37 of the *Federal Court Act* define only the powers of the Federal Court and not the powers of an adjudicator. It is erroneous to claim, as the adjudicator did in *Puxley,* that under sections 36 and 37 of the *Federal Court Act* only the Federal Court has jurisdiction to award interest against the Crown. The fact that the Federal Court has certain powers does not prevent the possibility of a legitimately appointed adjudicator having similar powers unless, of course, there is a clear and explicit provision that the power given to the Federal Court is exclusive, which is not the case here.

[16] Over the past 20 years, private-sector arbitrators have consistently considered themselves authorized to award interest when the situation before them justified it. The principle underlying such interest awards has been the desire to completely rectify the harm done to the complainant and to place that person back in the situation that would have prevailed in the absence of the error, action or inaction by the respondent. The case law refers to this approach as the “the make-whole remedy.” This approach

involves not punishing the person who makes an error for his or her wrongful action but rather fully compensating the person who is the victim of that error or action.

[17] In *Canada Post Corp. v. Canadian Union of Postal Workers (Retroactivity Implementation Grievance)*, arbitrator Burkett, referring to a February 19, 1992 decision by arbitrator Von Veh not to award interest, wrote the following:

. . .

> *Arbitrator Von Veh has mistakenly characterized interest as a form of penalty upon the employer to be imposed in response to employer recalcitrance in either making itself available for a hearing on the merits or, subsequently, making the compensatory payments ordered by an arbitrator. The requirement to pay interest is not triggered by employer recalcitrance. Rather it is triggered by the remedial objective of making the aggrieved party whole. The corporation has had the use of this money from the date as of which it was required to be paid to the aggrieved employees and, conversely, these employees have suffered the loss of this money from the date as of which it was required to have been paid.*

. . .

[18] This interpretation must be applied to this case. The payment of interest is not punishment for wrongful action by the employer; it does not constitute damages granted to the wronged party but is a way to ensure full and complete compensation.

[19] The 1993 decision in *Health Labour Relations Association* against the government of British Columbia recognized that interest was payable on back pay to provincial government employees. That decision supports the position that today the Crown is to be treated like any other employer and is liable to pay interest to fully compensate a person who has suffered harm.

[20] In *Public Service Alliance of Canada*, the Canadian Human Rights Tribunal awarded interest on pay equity amounts owed to government employees. In *Morgan* and *Rosin*, the Federal Court of Appeal recognized that the courts have the power to ensure adequate compensation for victims by awarding interest, even though no provision of the *Canadian Human Rights Act* ("the *CHRA*") expressly gives the courts that power. Tribunals have awarded interest to fully compensate persons who have suffered harm, even though no provision of the *CHRA* expressly gives them that

power. Those decisions had to do with federal government employees, and they were rendered by federal administrative tribunals similar to the Board.

[21] In *Rosin*, Justice Linden of the Federal Court of Appeal specified that the power of human rights tribunals to award compensation includes the power to award interest. In *Morgan*, Justice Marceau, also of the Federal Court of Appeal, agreed with the decision in *Rosin* that the power of human rights tribunals to ensure adequate compensation for victims allows them to award interest.

[22] Clearly, the provisions of the former *Act*, like section 53 of the *CHRA*, define the powers of an adjudicator very broadly. Nothing in the legislation or in the collective agreement applicable to the grievor limits the powers of an adjudicator to award interest.

[23] Although the legislation applicable to this case contains no explicit provision requiring the Crown to pay interest to employees in compensation for an error it may have made, on the other hand no legal provision prevents it from doing so.

[24] Nor, since its section 35 was repealed, does the *Federal Court Act* require an explicit statutory provision or contractual clause to permit the payment of interest by the Crown. Thus, in the legislative context that has prevailed since 1990, the reasoning in *Eaton* is no longer valid and should no longer be followed. The same is true for Board decisions that have followed the principle set out in *Eaton* and that were rendered after section 35 was repealed.

[25] This reference to adjudication complies with section 92 of the former *Act*. Contrary to the employer's argument, this grievance is a logical extension of an interpretation of the collective agreement. The initial issue, calculating the pay level, must be resolved under the collective agreement. The grievor claimed entitlement to pay at a higher level than that determined by the employer. Clause 45.02 of the applicable collective agreement reads as follows:

> ***45.02*** *An employee is entitled to be paid for services rendered at:*
>
> *(a) the pay specified in Appendix "A" for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment*

> *or*
>
> *(b) the pay specified in Appendix "A" for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.*

[26] An adjudicator has jurisdiction to hear a pay grievance. The claim for interest results directly from the initial pay level calculation error. It follows that the claim falls under the collective agreement since the grievor should have received the amounts concerned, according to the collective agreement, but was deprived of them because of the employer's error.

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

[27] The collective agreement stipulates that the grievor is entitled to be paid at the rates it sets out. The employer acknowledged the error in calculating pay, which was corrected by paying the grievor the amount that was owed. The collective agreement does not provide for interest in the case of an error in calculating pay. In *Puxley*, the Board found that an adjudicator does not have jurisdiction to order the employer to pay interest on amounts owed to a government employee; this decision was rendered after the *Crown Liability and Proceedings Act* was amended.

[28] Counsel for the employer submitted that the adjudicator does not have jurisdiction to hear this grievance claiming interest on the amount of the pay adjustment that the employer paid the grievor. Government employees' right to file a grievance when they consider that they have suffered harm from the interpretation or application to them of a provision of a collective agreement is recognized in subsection 92(1) of the former *Act*. In this case, the grievor does not cite any provision of the collective agreement, and no provision of the collective agreement addresses the issue of interest. The grievor may not file a grievance for such a claim. His claim may not be referred to adjudication under subsection 92(1) of the former *Act*, since it does not constitute a grievance under subsection 91(1) of the former *Act*.

[29] According to *Ogilvie v. Treasury Board (Indian and Northern Affairs),* Board File No. 166-2-14268 (19840703), and *Puxley*, interest may not be demanded against the Crown unless a statute or contract so provides. These decisions reiterate the principle set out by the Supreme Court of Canada in *Carroll* and enshrined in section 35 of the *Federal Court Act,* R.S.C. 1970, c. 10.

[30] As was emphasized by the adjudicator in *Puxley*, the *Crown Liability and Proceedings Act* amended various statutes, of which the relevant provisions now read as follows:

> ***Crown Liability and Proceedings Act:***
>
> . . .
>
> ***31.*** *(1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings against the Crown in any court in respect of any cause of action arising in that province.*
>
> . . .
>
> ***Federal Courts Act:***
>
> . . .
>
> ***36.*** *(1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.*
>
> . . .

[31] Despite these amendments, in *Puxley* the adjudicator found as follows:

> . . .
>
> *The fairly recent changes to the Crown Liability Act and the Federal Court Act specifically apply only* [*sic*] *"proceedings against the Crown" "in any court." In the Federal Court Act the word "court" is used to refer specifically to the Federal Court of Canada to the exclusion of federal boards or tribunals.*
>
> *The common law principles so clearly enunciated in Eaton (supra) continue to apply unless a precise statutory authority or federal contract exist to justify the payment of prejudgmental interest.*
>
> *I have reached this conclusion even though it appears somewhat incongruous that a grievor may be forced to seek in another forum, the interest on an award by an adjudicator under the Public Service Staff Relations Act. Be that as it may, I must conclude that I have no authority to order the payment* [*sic*] *interest to Mr. Puxley.*

. . .

[Emphasis in the original]

[32] The decisions in *Dahl* and *Guest et al.* confirmed that a legitimately appointed adjudicator does not have the power to order the payment of interest.

[33] Since no article of the collective agreement applicable to this grievance entitles a grievor to interest, the adjudicator, in allowing the grievance, would be adding to the wording of the collective agreement, which the former *Act* does not allow. Thus, according to counsel for the employer, the adjudicator must dismiss the grievance.

C. Rebuttal

[34] According to the grievor's representative, the reference to adjudication under paragraph 92(1)(*a*) of the former *Act* is valid. The wording of the grievance clearly states that the claim for interest results from the amount paid to the grievor to correct the error in calculating his pay. The collective agreement sets out the grievor's entitlement to pay, at the rate set out in its clause 45.02. The calculation of pay is set out in the collective agreement, and the employer's error in this regard must entail full compensation. *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, reviewing the 1991 Ontario Provincial Court decision, established that any problem related to the application of the collective agreement is within the jurisdiction of an adjudicator.

[35] The grievor suffered harm in the form of lost pay because of the employer's error in calculating his pay, and he is entitled to full compensation. The grievor's interest claim results from the employer's error in calculating his pay. The adjudicator clearly has jurisdiction to award full compensation to the grievor for losses suffered because of the employer's error.

[36] The decisions in *Puxley, Dahl* and *Guest et al.* do not take into account the fact that the amendments made by the *Crown Liability and Proceedings Act* altered the principle that interest may not be claimed against the Crown and that a statute takes precedence over a common law rule.

V. Reasons

A. Validity of the grievance and its reference to adjudication

[37] With respect to the issue of the adjudicator's jurisdiction to investigate the grievance, in *Shneidman v. Canada (Canada Customs and Revenue Agency)*, 2006 FC 381, Justice Simpson of the Federal Court wrote as follows:

. . .

> *The law as set out in* Burchill v. Canada, *[1981] 1 F.C. 109 (C.A.), and applied in* Shofield v. Canada (Attorney General), *[2004] F.C.J. No. 784 (T.D.) establishes that an adjudicator does not have jurisdiction to hear a complaint that is not included in a grievance. In* Canada (Treasury Board) v. Rinaldi, *[1997] F.C.J. No. 225 (T.D.) the Court held that an adjudicator may have jurisdiction where the language of the original grievance is broad enough to encompass the issue raised for adjudication. Accordingly, the issue in this case is whether the Grievance, which expressly grieves only the decision to terminate, can be read to encompass pre-termination violations of the collective agreement.*

. . .

[38] In the wording of his grievance, the grievor clearly states that the error that slid into the processing of his pay file following his acting PG-02 appointment was the basis of his claim. The grievor was deprived of pay in the amount of $6393.02 during the period from January 5, 1993 to January 5, 1997 (Exhibit F-2, Appendix 2). The wording of the grievance is broad enough to encompass the error made in applying clause 45.02 of the collective agreement to the grievor and entitles him to file a grievance under subparagraph 91(1)(*a*)(ii) of the former *Act*, since he considers that he suffered harm as a result of a provision of the collective agreement being applied to him.

[39] In the second part of his grievance, as corrective action, the grievor claims interest on the pay adjustment amount. The total amount of interest being claimed is $7514.49, calculated at a rate of 9.50% (Exhibit F-2, Appendix 2). The employer has not contested either the interest rate or the amount of interest claimed.

[40] Although the wording of the grievance claims interest, the employer’s error in calculating the grievor’s pay is nevertheless the subject of the grievance, and “the interest” is the corrective action requested.

[41] Paragraph 92(1)(*a*) of the former *Act* allows the grievor to refer his grievance to adjudication, since he did not obtain satisfaction after presenting it up to the final level of the applicable grievance process. His bargaining agent has approved the reference to adjudication and represented him at the hearing. The conditions set out in subsection 92(2) of the former *Act* have been met and the reference to adjudication was made in conformity with the former *Act*.

B. Adjudicator's jurisdiction with respect to interest

[42] The employer's main argument is that interest may not be awarded against the Crown unless a statute or contract expressly so provides. This argument is based on the common law rule expressed by the Supreme Court of Canada in, among others, *Hochelaga, Racette* and *Carroll*. This Crown immunity was set out in section 35 of the *Federal Court Act* before it was repealed in 1990. Since that time, subsection 36(1) of the *Federal Courts Act* has provided that provincial legislation on interest in proceedings between individuals applies to proceedings before the Federal Court. Also since that time, courts and tribunals have awarded interest against the Crown based on statutes authorizing this remedy. In this regard, the grievor's representative cited abundant case law examples.

[43] In *Nova Scotia (Public Service Commission) v. N.S.G.E.U.*, 2004 NSCA 55, the Chief Justice of the Nova Scotia Court of Appeal described the problematic situation of Crown immunity concerning interest as follows:

. . .

> *[27] It may be that Crown immunity from being ordered to pay interest originally reflected the common law rule that, with some exceptions, there was no right to order interest against anyone: see S. M. Waddams* The Law Of Damages *(Canada Law Book Ltd., 1983) at pp. 471 - 2. If that is so, the immunity might be seen as being affected by the significant development of the common law relating to the awarding of judgment interest: see in particular* Bank of America Canada.
>
> *[28] However, I need not pursue that broad question in this appeal. Whatever the origins and modern day limits of the Crown's immunity with respect to interest, the parties accept its existence and their position is justified by the authorities from the Supreme Court of Canada binding on me to which I have referred earlier. There is also no dispute that the* Civil Service Collective Bargaining Act *is binding on the Crown and that the Crown is a party to the Collective Agreement.*

> *The point directly in issue here is not whether there is such a Crown immunity, but rather whether it has been overcome in this case by necessary implication arising from a statute binding on the Crown or a contract to which the Crown is a party.*
>
> . . .

[44] I am not convinced that the 1990 amendment to section 35 of the *Federal Court Act* altered the common law rule as the grievor has submitted. In this case, I agree with the Nova Scotia Court of Appeal's approach and with its questioning of whether Crown immunity exists and whether it is supplanted by a statute binding the Crown or a contract to which the Crown is a party. Although in this case the legislation and the collective agreement applicable to the filing of grievances are different from those considered in the decision by the Nova Scotia Court of Appeal, that questioning is nevertheless relevant.

[45] I disagree with the findings in *Puxley* and *Dahl* that the common law rule that interest may be payable by the Crown only if a statute or contract so provides applies to claims made under the former *Act*.

[46] According to *Nova Scotia (Public Service Commission) v. N.S.G.E.U.*, the remedial power set out in the former *Act* and in the collective agreement may supplant the principle of Crown immunity:

> . . .
>
> *[31] In my view, on the authority of the Privy Council and the Supreme Court of Canada, it may. In* The Crown v. McNeil, *[1927] A.C. 380 (P.C., Australia), the issue was whether interest could be awarded against the Crown in a suit for breach of contract authorized by s. 33 of the* Crown Suits Act 1898 *of Western Australia. The section permitted actions against the Crown for breach of contract. Obviously, the* Crown Suits Act *was binding on the Crown, but it apparently did not expressly confer a power to award interest in the circumstances of that case. The Privy Council upheld the award of interest on the basis that the statute permitted actions in contract and liability to pay interest was implied in the contract because the Crown stood in a fiduciary position. The principle, therefore, appears to be this: where a statute binding on the Crown authorizes an action for breach of contract, the authority to award interest in an action under the statute will be implied in the same circumstances as it would in an action between private parties.*

> *[32] In* Canadian Industrial Gas and Oil v. Saskatchewan, *[1979] 1 S.C.R. 37, the question was whether s. 17 of the Saskatchewan* Proceedings Against the Crown Act, *R.S. 1965 c. 87 permitted an award of interest in an action against the Crown for wrongful retention of moneys compulsorily retained. The section provided that, subject to other provisions of the Act, the rights of parties in proceedings against the Crown were to be "... as nearly as possible the same as in a suit between person and person." It also authorized the court to "... give such appropriate relief as the case may require." The Supreme Court of Canada held that this latter provision should be read as supporting the power to award interest because the section required the Crown to make compensation by payment of interest on moneys improperly withheld as any other party would be required to do: 40-41. The principle that I take from this case is that the implication flowing from the broadly phrased remedial power in the statute, which was obviously binding on the Crown, was sufficient to overcome the Crown's immunity to pay interest even though no power to award interest against the Crown was expressly given.*
>
> . . .

[47] In *Nova Scotia (Public Service Commission) v. N.S.G.E.U.*, on the issue of whether this power is implicit, the Chief Justice concluded as follows:

> . . .
>
> *[36] I would hold therefore that if the power to award interest is implied by the terms of the* Civil Service Collective Bargaining Act *or by the Collective Agreement between the parties, that implicit authority is sufficient to authorize an award of interest against the Crown. Whether that power to award interest should be implied is a matter of interpretation of the governing statute and Collective Agreement.*
>
> . . .

[48] The grievor was informed of the employer's error; the employer paid a pay adjustment to the grievor to correct the error. The grievor has claimed that the payment did not fully correct the harm caused to him for the interest that he lost. The arguments made before me had to do mainly with the jurisdiction of adjudicators appointed under the former *Act* to award interest.

[49] The former *Act* recognizes that Board members assigned as adjudicators have the power to compensate government employees for harm caused to them by their

employer. This power is set out in general germs in the following provisions of the former *Act:*

> ***21.****(1) The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made hereunder or with any decision made in respect of a matter coming before it.*
>
> . . .
>
> ***96.1*** *An adjudicator has, in relation to the adjudication, all the powers, rights and privileges of the Board, other than the power to make regulations under section 22.*

[50] I cannot accept the employer's argument that I do not have jurisdiction to order interest payments because no provision of the former *Act* or of the collective agreement authorizes me to do so.

[51] In *Rosin*, a human rights complaint made by government employees, Justice Linden sets out the Federal Court of Appeal decision with respect to the power to award interest as follows:

> . . .
>
> *¶ 41 . . . First, it is contended that there was no jurisdiction to make the order allowing interest as was done under number 3. I do not accept this submission. While there is no specific provision expressly granting human rights tribunals the power to give interest, it is included in the power granted to "order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine." (see subsection 53(3)). Such awards for interest have been ordered frequently by human rights tribunals. . . .*
>
> *¶ 42 Courts, including this Court, have held that interest may be awarded in other similar contexts, under the concept of "compensation," for to deny it would be to fail to make the claimant whole, especially in these days of high interest rates. . . .*
>
> . . .

[52] That decision applies to this case since, although no provision of the former *Act* expressly gives adjudicators the power to award interest, according to the Federal

Court of Appeal the general power to fully compensate grievors encompasses the power to order interest payments.

[53] As well, in *Morgan*, another human rights complaint, the Federal Court of Canada recognized entitlement to interest on pay owed to government employees. Addressing the issue of whether courts had jurisdiction to award interest, Justice Marceau responded as follows:

> . . .
>
> *[28]*
>
> . . .
>
> *(i) There is no specific provision expressly granting human rights tribunals the power to give interest and this Court has not yet been faced directly with the question. Nevertheless, I agree with Justice MacGuigan that the tribunals were right in considering that their power to assure the victim adequate compensation entitled them to award interest. This is indeed a common sense conclusion that this Court had no difficulty to apply in its decisions in* Canadian Broadcasting Corporation v. C.U.P.E., *[1987] 3 F.C. 515 and* Attorney General of Canada v. Rosin, *[1991] 1 F.C. 391. It should be carefully noted, however, that in this perspective the awarding of interest is not left to the discretion of the tribunal nor is it solely based on the general idea applicable in tort or contract liability claims that the defendant has kept the plaintiff out of money while he has had the use of it himself. It must be required if, but only if, it can be seen to be necessary to cover the loss. This reflection is at the basis of my reaction in coming to the other questions relative to interest.*
>
> . . .

[54] According to Justice Marceau's reasoning, then, interest is awarded only if it is necessary to cover the loss. In this case, the grievor has established that he lost the amount of interest that he claims; this evidence has not been contested nor contradicted by the employer.

[55] In *Autocar Connaisseur Inc. v. Canada (Minister of Labour)*, [1997] F.C.J. No. 1363 (QL), a complaint under the *Canada Labour Code*, the Federal Court of Appeal determined that interest was incidental to the overtime and holiday pay

claimed by and owed to the respondents. Initially, the adjudicator had ordered the employer to pay not only the overtime and holiday pay, but also interest and additional compensation, non-pecuniary damages, exemplary damages and legal fees. This order was set aside by the Federal Court of Canada on the grounds that the *Canada Labour Code* makes no provision for such forms of compensation. Justice Pinard wrote as follows:

. . .

> *[11] In the case of the first part of the decision, I am of the opinion that the referee's jurisdiction is not at issue since he was authorized by the effect of subsections 251.1(1) and 251.12(4) to rule on the right claimed by the employees in their complaints to be paid for overtime and statutory holidays. . . .*
>
> *[12] However, in so far as the second part of the decision is concerned, I am of the opinion that the referee acted in excess of his jurisdiction in granting "interest and additional compensation," "non-pecuniary damages" and "exemplary damages." Such compensation is not only not provided for in subsections 251.1(1) and 251.12(4) of the Code, provisions that define the jurisdiction of the inspector and the referee, respectively, but it is not even claimed in the complaints of the employees in question. . . .*

. . .

[56] In *Pommerleau v. Autocar Connaisseur Inc.*, [2000] F.C.J. No. 907 (QL), that decision was appealed to the Federal Court of Appeal. Justice Desjardins wrote as follows:

> *[1] . . .We concur in the conclusions arrived at by Pinard J., … except regarding interest, which in our opinion is incidental to the amounts which are owed the respondents pursuant to the judgment of Pinard J.*
>
> *[2] The appeal will be dismissed with costs.*
>
> *[3] The cross-appeal will be allowed without costs for the sole purpose of awarding the respondents' interest.*

. . .

[57] Thus the Federal Court of Appeal recognizes that complainants employed by a federal undertaking in the private sector have the right to interest on claimed overtime

and holiday pay. Similarly, entitlement to interest applies to the grievor's claim for pay in this case.

[58] Counsel for the employer submitted that, in writing paragraph 226(1)(*i*) of the new *Act*, the legislator intended to give adjudicators new jurisdiction with respect to interest. That is not supported by the evidence. As well, the decisions cited above indicate that adjudicators do have this jurisdiction, even though it is not specifically set out in the former *Act*. In this regard, paragraph 226(1)(*i*) of the new *Act* may well express the legislator's intent to put an end to the debate in the case law by specifying in the new *Act*, based on the unanimous court decisions, that adjudicators have the jurisdiction to award interest in grievances involving dismissal, downgrading, suspension or financial penalties. Since this grievance must be settled based on the rights and obligations set out in the former *Act*, I need not pursue further the issue of the legislator's possible intent in drafting the new *Act*.

[59] According to the decisions cited above, interest does not constitute damages awarded to the party that suffers harm because of the employer's wrongful action; rather, interest results from the principle that the party suffering harm is entitled to full and complete compensation for the harm caused by the employer. No recent judgments countering these decisions were adduced. I therefore conclude that these judgments represent a unanimous trend by the courts over the past decade. Consequently, I must apply them to this case.

C. Calculation of interest

[60] In this case, the grievor has demonstrated that the employer's error in calculating his pay at the time of his acting appointment on January 5, 1993 resulted in a loss of pay of $6393.01. A pay adjustment of $6393.01 was paid to him on March 13, 2002.

[61] Also according to the grievor, that situation resulted in a loss of interest on that amount. He has estimated the total amount of this interest at $7514.49, representing an annual compound interest rate of 9.50% on the corrected amount of pay for each year from 1993 to 2002 (Exhibit F-2, Appendix 2). This interest rate corresponds to the one that the grievor was receiving on savings at that time.

[62] The evidence has established the amounts of lost pay resulting from the employer's error are $1621.16 for 1993 and $1590.62 for each of 1994, 1995 and 1996

(Exhibit F-2, Appendix 2). Starting in 1997 the grievor no longer suffered lost pay, since by that time his pay was at the top of the pay scale (Exhibit F-2, Appendix 1).

[63] In *Morgan*, a majority of Federal Court of Appeal judges determined that the compensation period begins at the time of the wrongful action. If this reasoning is applied to this case, the employer's error occurred on January 5, 1993, at the time of the grievor's acting appointment to a materiel management officer position at the PG-02 group and level, when the revision of his pay should have been made. The pay period is to continue throughout the time the grievor lost pay, which would be until 1996. I cannot grant the grievor the interest he claims for the period from 1997 to 2002 or up to the date of this decision.

[64] Thus the amounts of lost pay on which interest is payable are as follows:

1993: $1621.16

1994: $1621.16 + $1590.62 = $3211.78

1995: $3211.78 + $1590.62 = $4802.40

1996: $4802.40 + $1590.62 = $6393.02

[65] According to the following principle set out in *Morgan*, the grievor's calculation of compound interest does not apply to this case:

. . .

> *As to whether it was right for the tribunals to award compound interest, the answer must be arrived at taking the same approach. Compound interest is warranted if, but only if, it can be deduced from the evidence or the circumstances of the case that it was required to cover the loss. I quickly agree with my colleague that that was certainly not the case here.*

. . .

[66] In this case, it has not been established to me that awarding compound interest is necessary to compensate for the loss suffered. Accordingly, simple, not compound, interest will be awarded; in other words, no interest on the interest accumulated during the period concerned will be awarded.

[67] With respect to the interest rate, in *Morgan* the Federal Court of Appeal decided that the interest rate that applies to lost investment income is the Canada Savings Bond rate for each year concerned.

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

(The Order appears on the next page)

VI. Order

[69] The employer's objection based on sections 91 and 92 of the former *Act* is dismissed.

[70] The grievance is allowed in part.

[71] I order the employer to pay to the grievor interest in cash at the Canada Savings Bond rate, for each of the years concerned, on the following amounts:

- the interest rate applicable for 1993 on the amount of $1621.16;
- the interest rate applicable for 1994 on the amount of $3211.78;
- the interest rate applicable for 1995 on the amount of $4802.40; and
- the interest rate applicable for 1996 on the amount of $6393.02.

June 28, 2007.

P.S.L.R.B. Translation

Léo-Paul Guindon,
adjudicator