Date: 20080717

File: 566-02-907

Citation: 2008 PSLRB 56

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CLÉMENT DELAGE

Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

Indexed as
Delage v. Treasury Board (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: France Saint-Laurent, counsel

For the Employer: Jennifer Champagne, counsel

Decided on the basis of written submissions
filed June 12 and 27 and July 4, 2008.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] On February 27, 2006, Clément Delage ("the grievor") filed a grievance against the Department of Fisheries and Oceans ("the employer") alleging a failure to comply with clause 18.07 of the collective agreement between the International Brotherhood of Electrical Workers, Local 2228, and the Treasury Board for the Electronics Group, which expired on August 31, 2001 ("the collective agreement").

[2] The employer issued its reply at the final level of the grievance procedure on February 5, 2007, and the bargaining agent referred the grievance to adjudication on February 19, 2007.

[3] The grievance reads as follows:

> [Translation]
>
> *DETAILS OF GRIEVANCE*
>
> *In 2005, Coast Guard EL-04s were reclassified to the EL-5 level retroactively starting January 7, 2002. On that date, January 7, 2002, I was on authorized parental leave in accordance with the established rules. The parental leave ended on July 22, 2002. My retroactive payment issued on 11-10-2005 covers the period from July 22, 2002 to November 2005. The Compensation Department of the Coast Guard refuses to include the period of my parental leave in the retroactivity calculation, i.e., January 7, 2002 to July 22, 2002, in contravention of clause 18.07 (c) (vii) of the IBEW Local 2228 collective agreement, page 33, which reads as follows: "Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly." The emails containing Compensation's reply are attached.*
>
> *CORRECTIVE ACTION REQUESTED*
>
> *That the retroactive payment be revised to include the period from January 7, 2002 to July 22, 2002, when I was on parental leave. Correction at the EL-5 level for that period.*

[4] On May 26, 2008, the parties agreed on a joint statement of facts regarding the grievance. The hearing was to take place from June 4 to 6, 2008. On May 29, 2008, the parties asked the Public Service Labour Relations Board ("the Board") to postpone the

hearing because the employer had informed the grievor's representative that it intended to object to the presentation of a human rights argument at the hearing.

[5] On May 28, 2008, the grievor's representative had given notice that, in accordance with subsection 210(1) of the *Public Service Labour Relations Act*, she intended to raise an issue involving the interpretation or application of the *Canadian Human Rights Act*. On June 23, 2008, the Canadian Human Rights Commission informed the Board that it did not intend to make submissions in this case.

[6] The parties suggested that the Board determine the issue of the objection based on written submissions, and the Board accepted that suggestion. This decision deals with the employer's objection to the admissibility of a human rights argument in this case.

II. Summary of the employer's argument

[7] I reproduce below the gist of the argument submitted by the employer's representative:

> [Translation]
>
> . . .
>
> *The employer wishes to raise a preliminary objection to this argument. The employer submits that the new issue about the interpretation or application of the* Canadian Human Rights Act *changes the nature of the grievance. The union cannot change the nature of the grievance at this point since the argument was not made during the grievance procedure.*
>
> . . .
>
> *The grievor filed a grievance dated February 27, 2006, asking for a review of his parental allowance following his reclassification from the EL-4 level to the EL-5 level. The grievance was dismissed at the final level on February 5, 2007. The grievance, as written, makes no reference to the* Canadian Human Rights Act. . . .
>
> . . .
>
> *The employer processed the grievance as it was worded, and the reply at the final level does not make any reference to the* Canadian Human Rights Act. *This argument was first raised by counsel for the complainant while preparing for the adjudication.*

. . .

> *The argument now raised under section 3 of the* Canadian Human Rights Act *was not presented at all levels of the grievance procedure and cannot now be the subject of a referral to adjudication. Allowing such an argument at this stage of the proceedings would undermine the integrity of the grievance and adjudication process. The reasoning followed in* Parry Sound *does not apply in this context and cannot justify reconsidering the principle in* Burchill *and the many decisions that followed it.*
>
> . . .
>
> *Accordingly, the employer submits that the nature of the grievance cannot be changed following the internal grievance settlement procedure. Only the initial grievance, as worded at the time of the internal grievance procedure, may be referred to adjudication.*

. . .

[8] The employer's representative filed the following decisions to support her argument: *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109; *Schofield v. Canada (Attorney General)*, 2004 F.C.J. No. 784 (QL); *Attorney General of Canada v. Shneidman*, 2006 FC 381; *Shneidman v. Attorney General of Canada,* 2007 FCA 192; *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5; and *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (QL).

III. Summary of the grievor's argument

[9] I reproduce below the gist of the argument submitted by the grievor's representative:

> [Translation]
>
> . . .
>
> *The bargaining agent side readily admits that the argument based on discrimination was never raised during the grievance procedure.*
>
> *However, this factor does not have the impact claimed by the employer side.*
>
> *As worded, the grievance properly described the dispute from the outset: the refusal by the Department of Fisheries and Oceans Canada [sic] to pay Mr. Clément Delage the retroactive amount with respect to the parental allowance he*

> *received throughout the period from January 7, 2002 to July 22, 2002, when he was on parental leave. . . .*
>
> . . .
>
> *We remind the Board that the initial arguments based on the very wording of the provisions of the collective agreement remain: clause 18.07 (a) (vii) of the collective agreement should be interpreted in the manner suggested by the bargaining agent side; the concept of "pay revision" specifically applies to Mr. Delage's situation when he was reclassified following the classification review of the EL positions.*
>
> *We also submit an additional argument that, in deciding Mr. Delage's grievance, no provision of the collective agreement should be interpreted or applied so as to have a discriminatory effect.*
>
> . . .
>
> *Mr. Delage's grievance is and remains unchanged: the refusal by the employer to pay him a retroactive amount with respect to the parental allowance he received. An additional legal argument, even an alternative one, based on the* Canadian Human Rights Act*, cannot amount to the addition of a* "new grievance" *or a* "different grievance."
>
> . . .
>
> *Accordingly, the employer side cannot validly argue that human rights do not apply or that they cannot be raised because they were not asserted at any of the levels of the grievance procedure. The assertion that the Board's jurisdiction with respect to the* Canadian Human Rights Act *can only be exercised if the grievance initially raised this issue cannot be supported.*
>
> . . .

[10] The grievor's representative filed the following decisions to support her argument: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324,* [2003] 2 S.C.R. 157; *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929; *Rinaldi*; and *Bell Canada v. Communications and Electrical Workers of Canada*, [1990] R.J.Q. 2808.

IV. Reasons

[11] The issue raised by the employer's preliminary objection is not whether I should uphold an argument based on human rights in this case. Rather, it is to determine whether such an argument is admissible because it was not raised by the grievor when he submitted his grievance at the various levels of the internal grievance procedure.

[12] Although this decision is not intended to examine the grievance on the merits, the relevant clauses of the collective agreement must be reviewed to better understand the scope of the parties' submissions on the admissibility of the human rights argument.

> ***ARTICLE 18***
>
> ***OTHER LEAVE WITH OR WITHOUT PAY***
>
> . . .
>
> ***18.07 Parental Allowance***
>
> . . .
>
> *c) Parental Allowance payments made in accordance with the SUB Plan will consist of the following*:
>
> *(i)*
>
> *(A) Where an employee is subject to a waiting period of two (2) weeks before receiving Employment Insurance parental benefits, ninety-three per cent (93%) of his/her weekly rate of pay for each week of the waiting period, less any other monies earned during this period.*
>
> *(B) For each week in respect of which the employee receives EI parental benefits pursuant to section 23 of the* Employment Insurance Act, *the difference between the gross amount of the Employment Insurance parental benefits he or she is initially eligible to receive and ninety-three per cent (93%) of his or her weekly rate of pay, less any other monies earned during this period which may result in a decrease in Employment Insurance benefits to which*

> *he or she would have been eligible if no extra monies had been earned during this period.*
>
> . . .
>
> *(iii) The parental allowance to which an employee is entitled is limited to that provided in (i) and an employee will not be reimbursed for any amount that he or she is required to repay pursuant to the* EI Act.
>
> *(iv) The weekly rate of pay referred to in sub-clause 18.07(c)(i) shall be:*
>
> *(A) for a full-time employee, the employee's weekly rate of pay on the day immediately preceding the commencement of maternity or parental leave without pay;*
>
> . . .
>
> *(v) The weekly rate of pay referred to in sub-clause (iv) shall be the rate to which the employee is entitled for the substantive level to which she or he is appointed.*
>
> . . .
>
> *(vii) Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.*
>
> . . .

[13] The grievor alleges in his grievance that the employer failed to comply with clause 18.07(c)(vii) of the collective agreement by refusing to include the period of parental leave in the calculation of the retroactive amount paid to him following the reclassification of his position. He asks that the employer correct this situation by revising the retroactive payment.

[14] The grievor's failure to present a human rights argument at the various levels of the grievance process and the fact that he only did so at the adjudication stage does not change the nature of the grievance. The details of the grievance and the corrective action requested remain exactly the same.

[15] Whether or not the grievor presents a discrimination argument based on family status does not change what is at issue. In fact, the grievance is based on the interpretation of clause 18.07(c)(vii) of the collective agreement. According to the documents on file, the issue in the grievance is whether the expression "pay revision" includes a reclassification like the one that occurred in this case. A number of arguments can be advanced to consider the reclassification as a pay revision. The opposite can also be argued. The parties are free to present arguments at adjudication that were not presented during the internal grievance process.

[16] The rule established in *Burchill* is irrelevant to resolving the employer's objection. In *Burchill*, the Court states that a grievance presented at adjudication cannot differ from the one presented in the internal grievance procedure. The complaint to be considered by the adjudicator must be stated in the grievance. In this case, the grievance referred to adjudication is identical to the one filed internally. In addition, the complaint is clearly stated in the grievance.

[17] In *Schofield*, the Court confirmed that the adjudicator had correctly decided that he was without jurisdiction to hear an issue relating to a demotion where the grievance dealt with the employer's decision to recall the employee from an assignment in Düsseldorf. The initial details of the grievance were changed, and the adjudicator had no jurisdiction to deal with the new issue that had been raised because he was limited to the initial details of the grievance. In this case, the initial details of the grievance remain unchanged.

[18] In *Shneidman*, the employee challenged the termination of her employment, asserting in the grievance that the decision was unjustified, unreasonable and excessive. At adjudication, she also argued that there had been a failure to comply with the collective agreement because the disciplinary procedure it set out had not been respected. The Court determined that the adjudicator lacked jurisdiction to dispose of the allegations of non-compliance with the collective agreement because they had not been raised at the final level of the grievance procedure. In this case, the failure to comply with the collective agreement was brought to the employer's attention in the wording of the grievance.

[19] In *Rinaldi*, the Court points out that the wording of a grievance is important because the allegations made in it have the effect of "attributing jurisdiction." The Court also states that it is primarily in light of the wording of the grievance that the

Court must determine whether the allegation made at adjudication so altered the original grievance as to change its nature and make it a new grievance. In this case, the grievor did not present any argument in his grievance to support his position. He simply alleged that the employer had not respected clause 18.07(c)(vii) of the collective agreement. The human rights argument does not change the nature of his allegation.

[20] In *Lee*, the adjudicator, commenting on the principle established in *Burchill,* notes that, in a grievance, the employer is entitled to know what it is being accused of so that it may properly address the issues raised. In this case, the employer was aware of what it was being accused of when the grievance was filed. The wording of the grievor's grievance was clear.

[21] In summary, the presentation of a human rights argument at adjudication, even where the argument was not presented to the employer within the internal grievance procedure, does not in any way constitute a change in the grievance as it is understood in *Burchill* and in the other decisions filed by the employer.

[22] In the grievance filed at the first level of the grievance procedure and later referred to adjudication, the grievor clearly set out what he was accusing the employer of having done, along with the corrective action requested. Those factors are not affected by accepting a human rights argument.

[23] In view of the foregoing, I do not think that it will be helpful to revisit the other decisions submitted by the grievor's representative, despite the interesting principles that they contain.

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

(The Order appears on the next page)

V. Order

[25] The preliminary objection is dismissed.

[26] The Board will contact the parties to agree on a hearing date to hear the case on the merits and to render a decision on the grievance.

July 17, 2008.

PSLRB Translation

Renaud Paquet,
adjudicator