Date: 20091210

File: 166-34-34573

Citation: 2009 PSLRB 163

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

SUZANNE LEPAGE

Grievor

and

CANADA REVENUE AGENCY

Employer

EXPEDITED ADJUDICATION DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Guylaine Bourbeau, Grievance and Adjudication Officer, Public Service Alliance of Canada

For the Employer: Sylvie Désilets, Senior Advisor, Human Resources Branch, Canada Revenue Agency

Note: The parties have agreed to deal with the grievance by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.

Heard at Ottawa, Ontario,
December 3, 2009.
(PSLRB Translation)

[1] When she filed her grievance, Suzanne Lepage ("the grievor") was an employee of the Canada Revenue Agency ("the employer"). She held a position classified PM-02 (acting).

[2] The grievor's grievance, filed on August 8, 2002, was worded as follows:

> [Translation]
>
> *By letter dated May 31, 2002 that was emailed to the team leader on or about June 17, 2002 and that the employee read on July 23, 2002 when she returned from vacation, the employer notified the employee that a total of 337.28 vacation hours had to be recovered, corresponding to a gross amount of $5937.51 to reimburse.*
>
> *We are challenging the employer's request because it is unfounded for the following reasons.*
>
> *The employer did not submit any documents, timesheets or calculations in support of its request.*
>
> *The request seems based on estimates, and it is unfounded.*
>
> *The error that gave rise to the alleged excess vacation credits resulted from an error by the employer going back more than 10 years, for which the employee was always in good faith and for which she never made any representations or provided any incorrect documents that led to the employer's error. Therefore, the employer must be responsible for its actions and the consequences of its decisions like any respectable and responsible person or organization worthy of its name.*
>
> *The employer's claim is also abusive and causes undue hardship to an employee whose record is spotless. The situation results from the employer's inertia, and the employer cannot legitimately go so far back in time when limitation dates are found in most statutes, including those applied by the employer. That is contrary to the principles of natural justice.*
>
> *In addition, there is no legal or statutory basis for the employer's claim. The collective agreement governing the employee's employment contract contains no clause permitting the recovery of leave that would have been credited by error and used by the employee.*
>
> *As well, the employer cannot rely on subsection 155(3) of the Financial Administration Act, which reads as follows:*

> *(3) The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made.*
>
> *That subsection allows the recovery of salary, wages, pay or pay and allowances that have been overpaid to an employee when the employee has been unjustly enriched because of the overpayment.*
>
> *In this case, excess vacation was credited to an employee who is still working for the Agency.*
>
> *Unlike the situation contemplated by subsection 155(3), the employee was not personally enriched because of the employer's error. She allegedly received more vacation days than she would have been entitled to receive had it not been for the employer's error.*
>
> *However, the employee did not receive additional sums of money and, without the employer's error, she would have worked rather than taking days of leave that were legitimate at the time, and she would ultimately have received the same salary. Since the outcome involves no monetary benefit for the employee, the employer cannot demand any type of compensation from her for the errors that it made.*
>
> *We reserve the right to submit additional arguments at a later date.*
>
> *The employer has no right to require an employee to retroactively take leave without pay.*

[3] The grievor requested the following corrective action:

> [Translation]
>
> . . .
>
> *The employee requests that the employer cancel the entire claim, that it waive any other claim arising out of corrective measures resulting from the request of May 31, 2002 and that it take no recovery action before the final disposition of this grievance. The employee also requests any other corrective action that may be reasonable in the circumstances.*
>
> . . .
>
> *We request that we not be prejudiced as a result of this*

grievance.

[4] The parties agreed to deal with the grievance by way of expedited adjudication.

[5] The collective agreement in force when the grievance was filed was the agreement between the Canada Customs and Revenue Agency and the Public Service Alliance of Canada for the Program Delivery and Administrative Services Group (expiry date: October 31, 2007; "the collective agreement").

[6] 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*").

[7] This grievance is one of 12 dealing essentially with the same issue. The parties submitted an agreed statement of facts for all the grievances. That statement is worded in part as follows:

[Translation]

. . .

The collective agreement in force when the grievances were filed was the agreement signed on March 22, 2002 by the Canada Customs and Revenue Agency and the Public Service Alliance of Canada; expiry date October 31, 2003.

1. In 2001, the compensation section of the CRA (Headquarters) asked local pay offices to review the status of all employees. It was part of a "clean up process to ensure data integrity."

2. Local pay offices were asked to verify whether employees had had breaks in service or had received severance pay. Payroll had found some irregularities in the accumulation of vacation credits by certain employees (for those employees, who had received severance pay or had had a break in service, vacation credits should in theory have gone back to the same level as a newly hired person, namely, zero).

3. Payroll discovered that some employees had kept their vacation credits even though they had received severance

pay or had had a break in service. Therefore, it began recovering the overpaid vacation credits.

4. The errors occurred between 1981 and 1991, but the CRA did not learn of them until 2001-2002 during the national CAS audit process.

5. The Quebec regional pay office sent all affected employees a letter dated May 31, 2002 or June 6, 2002 informing them of the situation and the amounts to be recovered. The letter gave the employees the following two options:

1- Subtract the excess hours from the vacation credits in their current banks;
2- Recover the excess hours from their pay.

6. See the enclosed table (Appendix 1), which provides details on each complainant.

7. The complainants filed grievances challenging the employer's decision to recover the vacation credits granted in the past, since the employer had made the error.

8. As corrective action, the complainants request that the employer accept the consequences of its error, that it reimburse them the hours that it has recovered and that they not be prejudiced as a result of these grievances.

9. The complainants filed their grievances within the required time, except for Mr. Pierre Parazelli.

10. The grievances were dismissed at the final level on April 30, 2004 for the Lachapelle et al. group and on March 21, 2006 for the Bolduc et al. group.

. . .

II. Ms. Lepage's case

[8] Ms. Lepage was notified by the employer on May 31, 2002 that it would be recovering an overpayment of annual leave credits. The letter read as follows:

[Translation]

Canada Customs and Revenue Agency

May 31, 2002

Memo to employee: Lepage, Suzanne

PRI: . . .

Subject: Change to the continuous/discontinuous service date

Madam:

We have recently finished verifying employee files with respect to the date for determining annual leave credits, which we call the "continuous/discontinuous service date."

Since an error was previously made in calculating your continuous/discontinuous service date, that date therefore changed as follows:

- *Initial determination date: 01-01-77*
- *Revised determination date: 05-04-88*

That revised date now appears in the CAS.

As well, you will understand that changing this date affects the vacation credits that you accumulated in the past. A total of 337.280 hours must be recovered to put your file in order.

We ask that you consider the two recovery options set out below, that you choose one of them and that you return to us a copy of this letter so that we may proceed based on your choice.

1. Subtract the excess hours from the current balance of your vacation credits, if you have enough of them.
2. Recover the excess hours from your regular pay.

N.B.: Option 2: the overpaid hours correspond to a gross amount of $5937.51.

We are sorry for any inconvenience this may cause you.

If you need further information, do not hesitate to contact the undersigned at 514-283-1404.

Please give a copy of this letter to the person who codes the timesheets.

France Malo
Compensation and Benefits Advisor
Montreal Region

. . .

To be completed and returned to your advisor

> *I choose option _____*
>
> *If option 2 is chosen, state whether you prefer that the recovery be of the full amount of _____ or that it be spread over more than one pay period at the rate of 10% of your gross wages _____.*
>
> _____
> *Employee's signature Date*

[9] The letter of May 31, 2002 was not accompanied by any other information about how the amount to be recovered had been calculated. According to Appendix 1 of the agreed statement of facts, Ms. Lepage reimbursed the employer out of her severance pay and wrote two additional cheques dated January 3, 2007.

III. Summary of the bargaining agent's arguments

[10] The bargaining agent submitted that the employer made an error in each file, including the grievor's, at the time of a break in service. When the grievor returned to work, the employer gave her a document showing the balance of her credits. In the years that followed, the employer updated her on her bank of leave credits each year. It also approved her leave requests each year.

[11] In 2002, the employer changed its payroll system and became aware of an error in calculating the leave bank. The employer then wrote to the grievor, claiming reimbursement of the excess leave that it had granted her.

[12] The bargaining agent argued that the *Financial Administration Act* (*FAA*) provides that the Receiver General may recover any overpayments as follows:

. . .

> ***155.****(3) The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made.*

. . .

[13] The bargaining agent submitted that, under that provision, the employer is not

required to recover amounts owed to it and that it may exercise its discretion not to recover them. The bargaining agent noted that, as follows, article 54 of the collective agreement specifically provides for the exercise of that discretion:

> *Article 54*
>
> ***LEAVE WITH OR WITHOUT PAY FOR OTHER REASONS***
>
> *54.01 At its discretion, the Employer may grant:*
>
> . . .
>
> *(b) leave with or without pay for purposes other than those specified in this Agreement.*
>
> . . .

[14] The bargaining agent noted that the collective agreement contains no provision authorizing the recovery of annual leave.

[15] The bargaining agent pointed out that the circumstances of this grievance are such that the grievor was not unjustly enriched. She made no misrepresentations. She accepted the calculations covering 14 years that her employer gave to her. During that time, the employer accepted her leave requests without considering whether she was entitled to leave.

[16] In support of its position that the employer must exercise its discretion when recovery causes hardship to the employee, the bargaining agent cited *Pearce v. Treasury Board (Department of National Defence),* PSSRB File No. 166-02-7016 (19800123) (error in calculating leave found by employer after leave taken). In support of its position that the grievor ought not to suffer a retroactive financial penalty for having accepted the employer's representations in good faith, the bargaining agent cited *Adamson v. Treasury Board (Canada Employment and Immigration Commission)*, PSSRB File No. 166-02-16207 (19880211) (payment of acting pay premium to employee not entitled to it). In support of its position that it would be unreasonable for the employer to recover an amount paid by error even though the employees received documents to the contrary, the bargaining agent cited *Conlon et al. v. Treasury Board (Public Works and Government Services Canada),* PSSRB File Nos. 166-02-25629 to 25631 (19970604) (recovery of pay because of unjustified promotion).

[17] The bargaining agent asked me to allow the grievance because the grievor acted in good faith when she took leave.

IV. Summary of the employer's arguments

[18] The employer submitted that, throughout the grievance process, the grievor did not complain about the amount to be recovered. The employer argued that the grievor disputing the amount claimed from her is a change to the grievance's wording, which *Burchill v. Attorney General of Canada,* [1981] 1 F.C. 109 (C.A.), clearly rejected.

[19] The employer submitted that the recovered amount resulted from an administrative error and that it is entitled to recover that amount under subsection 155(3) of the *FAA*. Basing itself on *Conlon*, the employer submitted that the word "may" also includes the discretion to recover a sum of money.

[20] The employer stated that it went ahead with recovery as soon as it realized its error. As examples of cases in which the adjudicator dismissed grievances challenging the recovery of overpayments, the employer cited the following decisions: *Ellement v. Treasury Board (Public Works and Government Services Canada),* PSSRB File No. 166-02-27688 (19970611) (error as to pay increment date), *Anderson et al. v. Treasury Board (Indian and Northern Affairs Canada),* 2002 PSSRB 29 (annual pay increment contrary to collective agreement), *Bolton v. Treasury Board (Indian and Northern Affairs Canada),* 2003 PSSRB 39 (salary overpayment over several years), and *Veilleux et al. v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 152 (excessive hours of leave for designated paid holidays).

[21] The employer submitted that the principle of estoppel applies to this case because the grievor did not establish that she changed her situation significantly because of the error. Finally, the employer was very flexible by proposing more than one option for remitting the amount owed.

[22] The employer requested that the grievance be dismissed.

V. Reasons

[23] The grievor is challenging, based on an unreasonable delay, the employer's decision to retroactively claim an overpayment resulting from leave credited to her

leave bank in 1988.

[24] The employer maintains that the principle of estoppel applies to this case. According to that principle, a party that receives a salary overpayment may challenge the decision to recover the overpayment if the party can establish detrimental reliance on the error. In *Canada (Attorney General) v. Molbak,* [1996] F.C.J. No. 892 (T.D.) (QL), the Federal Court of Appeal held that an adjudicator under the former *Act* had jurisdiction to hear a grievance and apply that principle.

[25] The cases cited by the employer in support of its position differ from this case on the facts in two important respects. *Ellement*, *Anderson* and *Bolton* involved errors relating to salary. The case law is unanimous that recovery is possible with such errors because, basically, they create unjust enrichment. In *Veilleux*, the error was found the following year.

[26] In this case, the error went back 14 years (1988 to 2002). The employer did not deny that the bank of leave credits was updated annually or that it approved each leave request. Therefore, I consider it reasonable to think that the employer was able to verify the balance each time it updated the bank. The fact that an administrative error was found in connection with the change to the payroll system does not relieve the employer of its duty of care in managing its employees' files.

[27] Both the *FAA* and clause 54.01(b) of the collective agreement allow the employer to exercise its discretion. The *FAA* allows the employer to decide whether to recover an amount. That provision is not restrictive in any way. Clause 54.01(b) provides that the employer may grant leave with pay for purposes other than those specified in the collective agreement. Each mechanism allowed the employer to exercise its discretion based on the specific situation.

[28] In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee Relations' Union* (1999), 84 L.A.C. (4th) 252, the arbitrator held that a six-year delay in recovering an amount owed to the employer as a result of an overpayment of benefits to which the employee was not entitled was unreasonable and even unjust. In this case, the 14-year delay was all the more unreasonable because it put the grievor in the position of not being able to dispute the claim since she had not kept adequate proof. As in *Pearce*, the grievor did

not have the choice of not taking the days of leave or giving up the salary.

[29] Because of the scope of the employer's discretion and its delay in asserting its claim, I find that the employer exercised its discretion to recover the overpayment in an unreasonable manner.

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

(The Order appears on the next page)

VI. Order

[31] The grievance is allowed.

December 10, 2009.

PSLRB Translation

Michele A. Pineau,
adjudicator