Date: 20091210

File: 166-34-37239

Citation: 2009 PSLRB 167

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

RENÉE ALAIN

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, Renée Alain ("the grievor") was an employee of the Canada Revenue Agency ("the employer"). She held a position classified PM-01.

[2] The grievor's grievance, filed on July 5, 2002, was worded as follows:

> [Translation]
>
> *I contest my employer's decision, set out in its June 6, 2002 letter, to recover the vacation leave credits that it had credited to me in the past. That recovery constitutes unreasonable action against me since the employer made the error.*

[3] The grievor requested the following corrective action:

> [Translation]
>
> *I request that the employer take responsibility for its error, that I not be required to reimburse the 115.625 hours claimed, that the employer restore any hours recovered and that any other action that would be appropriate in the circumstances be taken.*

[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, s. 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. Alain's case

[8] Ms. Alain was notified by the employer on June 6, 2002 that it would be recovering an overpayment of annual leave credits. The letter reads as follows:

> [Translation]
>
> *Canada Customs and Revenue Agency*
>
> *June 6, 2002*
>
> *Ms. Renée Alain*
> *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 the reason you left your former department was "Layoff," since you received five weeks' separation pay for the previous period of employment, i.e., from July 29, 1991 to December 14, 1995 and since you were not re-hired by the public service within one year, that period cannot be taken into account in determining the continuous/discontinuous service date. We took into account the former periods of employment, i.e., 180 days from 22-01-90 to 05-05-89 and 337 days from 22-01-90 to 24-12-90. That calculation changed your continuous/discontinuous service date as follows:*
>
> - *Initial determination date: 01-03-1991*
> - *Revised determination date: 03-12-1996*
>
> *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 115.625 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 will be calculated based on your pay on the date on which you acquired the excess credits, which was $30 907.00.

We are sorry for any inconvenience that this may cause you.

If you need further information, do not hesitate to contact the undersigned at 648-7755.

Lucette Bolduc
Acting Systems and Compensation Training Consultant
Quebec City Region

. . .

To be completed and returned to your advisor

I select 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 June 6, 2002 included information about the recovery calculation. According to Appendix 1 of the agreed statement of facts, Ms. Alain reimbursed the employer by cheque on May 9, 2006.

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 credits 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 six 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 in 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. 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 date of pay increment), *Anderson et al. v. Treasury Board (Indian and Northern Affairs Canada),* 2002 PSLRB 29 (annual pay

increments contrary to collective agreement), *Bolton v. Treasury Board (Indian and Northern Affairs Canada),* 2003 PSLRB 39 (salary overpayment over several years), and *Veilleux et al. v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 152 (excess 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 that error. In addition, the claimed sum was minimal. 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 over several years.

[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] This case involves an error that the employer made after the grievor returned to the federal public service in 1996. 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 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. Similarly, in this case, the delay before recovery was at least six years.

[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