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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Canadian Association of Professional Employees v. Treasury Board

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Bargaining Agent: Jean Ouellette, Canadian Association of Professional Employees

For the Employer: Stéphan Bertrand, counsel

Heard at Ottawa, Ontario,
September 9, 2010.

I. Policy grievance referred to adjudication

[1] On July 14, 2009, the Canadian Association of Professional Employees (CAPE or "the bargaining agent") filed a policy grievance with the Treasury Board (TB or "the employer") about the interpretation or application of clause 27.07 of the collective agreement between the TB and the CAPE for the Economic and Social Science Services Group, with an expiry date of June 21, 2011.

[2] The grievance reads as follows:

> [Translation]
>
> . . .
>
> *Under the terms of clause 27.07 of the EC collective agreement, the Association, on its behalf and on behalf of its members, is filing a grievance about the Employer's repeated refusal, as confirmed in the recent letter of June 29, 2009, to negotiate with the Association the pay rates of the new EC classification standard, which took effect on June 22, 2009, and the rules affecting the pay of employees on their movement to the new EC levels.*

[3] The CAPE requests the following corrective action:

> [Translation]
>
> . . .
>
> *A statement that the Employer is required to negotiate in good faith the rates of pay and rules affecting the EC conversion.*

[A second remedy was withdrawn by the CAPE at the grievance hearing. Therefore, I will not refer to it again.]

[4] The TB dismissed the grievance on October 19, 2009. It was then referred to adjudication.

II. Uncontested facts

[5] The parties to this dispute negotiated a collective agreement that took effect on March 11, 2009, with an expiry date of June 21, 2011. The collective agreement was signed after a notice to bargain had been given in spring 2007, followed by an initial exchange of proposals, two subsequent exchanges and a number of meetings. By July 2008, all non-monetary issues had been resolved. However, the question of the

conversion from the ES and SI classifications to the new single EC classification had not been resolved.

[6] In June 2008, the employer sent the employees affected by the new classification standard advance notice that it would come into force on June 22, 2009. On that point, the CAPE presented a proposal in May 2008 that referred to certain elements of the classification standard but that did not include a pay proposal. In May and July 2008, the CAPE provided the employer with an economic comparison of the group's situation to that of the federal public service as a whole and an economic comparison of the group's situation to the market outside the federal public service. In response to those comparisons, the employer indicated in early July 2008 that it could not make a pay offer before September 2008.

[7] On November 18, 2008, the TB submitted its pay offer and indicated that it was not negotiable. The CAPE was informed at the same time that the federal government intended to table in the coming days a bill to restrict its employment expenditures but that the specific provisions were not yet known (see the *Expenditure Restraint Act*, enacted by section 393 of chapter 2 of the *Statutes of Canada*, 2009, in force on assent March 12, 2009; "the *Act*"). Following the final offer, the CAPE signed an agreement in principle, which the bargaining unit members ratified.

[8] On June 17, 2009, Claude Danik wrote as follows to Carl Trottier, Senior Director, Compensation Management, TB, stating that the TB had an obligation to negotiate with the CAPE the rates of pay for the new levels arising from the implementation of the EC standard if it were implemented during the term of the current collective agreement:

. . .

> *Dear Mr. Trottier:*
>
> *Pursuant to Article 27.07 of the EC Collective Agreement, Treasury Board Secretariat has an obligation to negotiate with the Association "rates of pay and the rules affecting the pay of employees on their movement to the new levels" if during the term of this Agreement, a new classification standard is implemented.*
>
> *While we have been given notice that the conversion implementation date is June 22nd 2009, we have yet to have*

> *been approached by Treasury Board Secretariat to negotiate rates of pay and rules affecting pay as per EC-27.07.*
>
> *Given the requirement under the article, we would like to meet forthwith with you to negotiate new rates of pay and the rules for the EC classification conversion. We understand that negotiations can carry on for some time. Therefore, the rates and rules agreed to would by necessity have to date back to June 22nd, 2009.*
>
> *Please advise when you are available. We are prepared to meet with you at your earliest convenience.*

[9] On June 22, 2009, the new EC classification standard took effect.

[10] On June 29, 2009, Mr. Trottier declined the offer to meet with the CAPE since, in his words, as follows, the negotiation of the rates of pay applying to the new EC classification standard had already taken place during the last round of bargaining:

> . . .
>
> *Dear Mr. Danik:*
>
> *I write in response to your letter dated June 17, 2009 concerning the application of Article 27.07 of the collective agreement which deals with the obligation to negotiate rates of pay and rules affecting the pay of employees when a new classification standard is implemented.*
>
> *The Employer's position is that such negotiations have already occurred. On November 18, 20008 the Employer submitted its "final offer" to the Bargaining Agent. The offer included base salary rates of conversion, the establishment of June 22, 2009 as the date of conversion and renewal of all existing pay administration language in the collective agreement including that pertaining to salary protection. These were agreed to as per the collective agreement signed on March 11, 2009 and are being implemented.*
>
> *In view of the above, the Employer is of the view that the requirements of Article 27.07 have been satisfied . . . .*

III. Testimony of Claude Danik

[11] Mr. Danik, the CAPE's spokesperson at the bargaining table, testified that the bargaining agents were consulted between 1998 and 2002 on a unified classification standard. Mr. Danik was part of one of the committees. The employer then changed its approach and decided on a standard for each professional group. The CAPE was consulted about seven versions of the EC classification standard.

[12] According to Mr. Danik, clause 27.07 of the collective agreement implies that, when there is a conversion from one classification to another during the term of the collective agreement, the parties must meet to ensure that the pay rates after the conversion are appropriate and reflective of the labour market. In the case of the EC conversion, no study was made of the corresponding labour market. Mr. Danik testified that the CAPE is responsible for the integrity of the collective agreement and its application and, consequently, it does not share the employer's opinion that the pay scale for the EC classification was negotiated during the last bargaining round. Mr. Danik stated that, although in his opinion the *Act* restricts any new form of compensation, it still allows bargaining during the restricted period. Since the collective agreement is in effect from March 11, 2009 to June 21, 2011, the pay rates negotiated during the term of collective agreement would apply after the restrictions are lifted, specifically, as of April 1, 2011. This means that, by invoking clause 27.07, the CAPE can negotiate an agreement on the pay scale for the EC classification but that the agreement will not apply until after April 1, 2011.

[13] In cross-examination, Mr. Danik admitted that the affected employees were informed of the conversion to the new classification standard one year in advance and that the collective agreement anticipated a conversion. The members of the bargaining unit had been expecting a reclassification for a very long time. The CAPE bargaining committee was aware of the effective date when it signed the memorandum of agreement and when the memorandum of agreement was ratified by the bargaining unit members. In the ratification document provided to the bargaining unit members, the CAPE did not mention its intention to renegotiate the pay scale of the EC classification once the agreement was signed. Mr. Danik also admitted that the CAPE would not have agreed to a conversion to the EC classification on a date before the collective agreement was signed because, if so, the CAPE would not have been able to exercise its recourse under clause 27.07.

[14] According to Mr. Danik, the pay scale could not have been renegotiated until after the collective agreement came into force. Mr. Danik acknowledged that he had not mentioned to the employer during collective bargaining that the CAPE planned to ask to renegotiate the pay scale for the EC classification after the collective agreement took effect. However, according to Mr. Danik, the classification standard, like the effective date, is not negotiable, and thus, the only option for the bargaining agent was to renegotiate the pay scale when a new classification standard came into force.

[15] Mr. Danik argued that the CAPE did not "sign a blank cheque" and that the employer had an obligation to return to the bargaining table once the EC classification was in force. The current collective agreement applies only to the ES and SI classifications.

IV. Testimony of Guy Lauzé

[16] Guy Lauzé, the employer's spokesperson at the bargaining table, testified that, in response to the CAPE's proposal in June, the employer had to make its own offer on the monetary clauses in September 2008. However, in September 2008, he still did not have a mandate to make that offer. He told Mr. Danik that the CAPE could expect to receive the same pay offer as the other bargaining tables and that the EC classification pay scale would have the same number of levels as the current ES and SI classifications. On November 18, 2008, the employer tabled its monetary offer, which contained, among other things, a specific pay scale for the conversion of the ES and SI classifications to the new EC classification.

[17] The level increments, for the ES and SI classifications and for the EC classification, were negotiated to apply on June 22 of each year of the collective agreement to coincide with the already planned conversion date to the new EC classification and to simplify pay adjustments.

[18] According to Mr. Lauzé, the CAPE's acceptance of the employer's pay offer, which encompassed the new EC classification standard, represented a negotiated agreement of the new pay scale in light of the conversion that was to take place on June 22, 2009.

V. Summary of the arguments

A. For the CAPE

[19] The CAPE argues that clause 27.07 of the collective agreement speaks for itself and that, as the adjudicator, I have a duty to apply it as negotiated. The CAPE objects to my use of extrinsic evidence to interpret a clause that is not ambiguous.

[20] Further, pursuant to clause 53.02 of the collective agreement, the obligations of the collective agreement become effective only on the date on which it is signed. Consequently, the employer could not fulfill its obligations to negotiate a new pay

scale for the EC classification until after March 11, 2009. Clause 27.07 does not apply retroactively. The final offer of November 11, 2008 was not negotiable and was tabled during the previous agreement. Therefore, bargaining should have taken place in good faith when the new classification standard was implemented.

[21] Furthermore, the passage of the *Act* did not prohibit negotiating a new pay scale for the EC classification even though it could not apply before April 1, 2011.

[22] In support of its position, the CAPE cites the following decisions: *Berry v. Treasury Board (Canada Post)*, PSSRB File No. 166-02-11263 (19820303); *Melançon et al. v. Treasury Board (Department of Industry, Department of Health and Canadian International Development Agency)*, 2010 PSLRB 20; *Hall et al. and Association of Canadian Financial Officers v. Treasury Board*, 2010 PSLRB 19; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *Pelzner v. Coseco Insurance Co.* [2000] O.F.S.C.I.D. No. 81 (QL); *Sheridan*, 1993 LNONOSC 21; and *Lefebvre v. Treasury Board (Solicitor General Canada),* PSSRB File Nos. 166-02-16101 and 16490 (19871023).

[23] The CAPE asks that I allow the grievance.

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

[24] The employer argues that clause 27.07 of the collective agreement would be relevant had it made an unanticipated reclassification during the term of the collective agreement. Regardless of how brief the bargaining may have been, the pay scale for the EC classification was the subject of an agreement that covered not only the pay rates but also the effective date.

[25] The employer claims that it acted in good faith when it proposed a pay scale and an effective date for the conversion to the new EC classification standard. In contrast, the CAPE did not reveal to the employer or to its members the stunt that it planned to pull after signing the collective agreement. The employer submits that, even though Mr. Lauzé did not have a mandate in September 2008, nevertheless, he gave the employer's anticipated position on pay rates. He further stated that the conversion from one classification to another would involve eight levels, as in the existing two classifications. That position was confirmed in the final offer that followed. Nothing changed between the date of advance notice of the classification conversion in June 2008 and the final offer in November 2008.

[26] The employer's offer, which included the pay scale for the new EC classification as of June 22, 2009, was accepted and ratified. The conversion to the new classification was not something new but was the result of several years of consultation. The employer points out that, had the CAPE been unsatisfied with the employer's final offer, it could have rejected it, and it could have gone to an arbitration board for a settlement.

[27] In addition, "Appendix A" of the collective agreement contains detailed notes about pay and pay increment administration and about the conversion method to increments under the new classification. Clause 27.07 does not apply in this case.

[28] The employer asks that I dismiss the grievance.

VI. Reasons

[29] The clause of the collective agreement that is the focus of this dispute is worded as follows:

> *27.07 If, during the term of this Agreement, a new classification standard for a group is established and implemented by the Employer, the Employer shall, before applying rates of pay to new levels resulting from the application of the standard, negotiate with the Association the rates of pay and the rules affecting the pay of employees on their movement to the new levels.*

[30] The question at issue is whether the employer failed in its obligation to negotiate in good faith the pay rates of employees transferred to the new EC classification, as set out in clause 27.07 of the collective agreement.

[31] When interpreting a clause of a collective agreement, it is necessary to consider not only the words of that clause but also the collective agreement as a whole and the intention of the parties when it was signed. As an adjudicator, I must also be guided by the purpose of the clause at issue and the consistency of my interpretation.

[32] The facts that led to the filing of the grievance are not contested. The parties negotiated a collective agreement that includes a pay scale for the new EC classification. That pay scale was proposed by the employer as part of its final offer, and the CAPE accepted it. Still in dispute are the intentions of each party when each entered into the agreement. The CAPE claims that the pay scale for the EC classification was not final when the collective agreement was signed because the

employer could not fulfill its obligation to negotiate that scale before signing the collective agreement. The employer argues that signing a collective agreement that included the pay scale for the EC classification constituted an acceptance of the pay scale for the EC classification and that it concluded the negotiations.

[33] For the following reasons, it is my opinion that clause 27.07 of the collective agreement does not apply to the situation grieved by the CAPE.

[34] The detailed notes in "Appendix A" of the collective agreement leave no doubt as to the compensation that was to apply when the EC classification came into force:

. . .

> *5. EC Conversion*
>
> *(a) Effective June 22, 2009, prior to any revision that occurs on that date, an employee shall be paid in the "X" line corresponding to the classification of his or her substantive position under the EC standard, at the rate of pay that is closest to but not less than the employee's former rate of pay on June 21, 2009.*
>
> *(b) Should there be no such rate the employee's salary shall be protected at the rate of pay received on June 21, 2009. Such rate shall be revised by one decimal five per cent (1.5 %) effective June 22, 2009 and by one decimal five per cent (1.5 %) effective June 22, 2010.*
>
> *6. Except as provided in clause 27.03, an employee being paid in the EC levels 1 to 8 scale of rates **shall**, on the relevant effective dates of adjustments to rates of pay, be paid in the (C) and (D) scales of rates shown immediately below the employee's former rate of pay.*
>
> . . .
>
> [Emphasis added]

[35] The use of the word "shall" in the clause allows no ambiguity. An employee affected by a conversion to the new EC classification shall be paid at the rates of pay in the new C and D rate scales as of June 22, 2009. Those C and D rate scales are found in "Appendix A" of the collective agreement. I do not understand the CAPE's argument that the new scales must be subject to new bargaining.

[36] The CAPE's communication to its members on its website at the time of the ratification vote was very clear: it was a vote for a collective agreement that included

the EC classification. The pay scale in "Appendix A" for the EC group was part of the ratification package.

[37] The choice of words in the communication and the ratification package as well as the letter to Mr. Trottier contradict the position put forward by the CAPE that there was a lack of negotiation or that it was unaware of the consequences of the finality of the employer's offer.

[38] The CAPE's interpretation of clause 27.07 of the collective agreement distorts its wording. The clause stipulates that the employer shall negotiate rates of pay if a new classification standard is implemented during the term of the agreement. I must consider not only the words of that clause but also the collective agreement as a whole and the intention of the parties when it was signed. A comparison of the French and English versions of clause 27.07 provides a new perspective of the parties' intention.

[39] The French version of the collective agreement states that the employer shall negotiate the rates of pay and rules affecting pay of employees if " . . . *au cours de la présente convention, il est établi à l'égard de ce groupe une nouvelle norme de classification qui est mise en oeuvre par l'Employeur . . . .*" The English version states that " . . . if, during the term of this Agreement, a new classification standard for a group is established and implemented by the Employer . . . ."

[40] The use of the words "*établi*" in French and "established" in English suggests that a new classification would have to be created and implemented during the term of the present collective agreement. The evidence shows that the employer gave advance notice to affected employees and to the bargaining agent before the signing of the collective agreement. Consequently, the new classification standard was not established during the term of the collective agreement as evidenced by the new pay scales and the administrative notes in "Appendix A" of the agreement.

[41] Circumstances in which the employer clearly indicated to the bargaining agent during collective bargaining its intention to apply a new classification standard and made the effort to propose a new pay scale, which was accepted by the bargaining agent, cannot be considered a "new classification standard" established during the term of the collective agreement within the meaning of clause 27.07.

[42] Clause 27.07 of the collective agreement would support the CAPE's position only had the employer proceeded to create a reclassification during the period of collective bargaining. Even though there were few exchanges of positions on the pay clauses, the explicit terms of the agreement show that the parties expressly provided for a pay scale for the EC classification, which was to apply as of June 22, 2009.

[43] The CAPE did not convince me that the employer could not fulfill its obligation to negotiate a new pay scale for the EC classification until after the signing of the agreement on March 11, 2009. Although the employer presented its November 11, 2008 offer as not negotiable, it did not remove the CAPE's option at that time to refuse to sign the memorandum of understanding or to proceed to arbitration. If the CAPE's strategy was to accept the employer's final offer, with the intention of reopening the collective agreement after the implementation of the new classification, it had an obligation to communicate that strategy clearly to the employer, which would have had an opportunity at that point to adjust its own approach.

[44] In conclusion, clause 27.07 of the collective agreement does not apply to the CAPE's grievance. The collective agreement is clear on the intention of the parties to establish the pay rates for the EC classification as of June 22, 2009, and the wording used in the notes of "Appendix A" of the collective agreement is unequivocal.

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

(The Order appears on the next page)

VII. Order

[46] The grievance is dismissed.

September 27, 2010.

Michele A. Pineau,
adjudicator