Date: 20110812

File: 566-09-5142

Citation: 2011 PSLRB 104

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JUDY A. LETOURNEAU

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as
Letourneau v. National Research Council of Canada

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Pierre Ouellet, Professional Institute of the Public Service of Canada

For the Employer: Joe Grebenc, National Research Council of Canada

Decided on the basis of written submissions
filed April 20, May 18 and June 2 and 10, 2011.

I. Individual grievance referred to adjudication

[1] Judy A. Letourneau ("the grievor") was employed by the National Research Council of Canada (NRC or "the employer") in an IS-01 position, as a communications assistant but was an acting junior communications officer, classified IS-02 at the time of her lay-off. She grieves that her severance package on layoff was calculated on the basis of her substantive IS-01 position rather than on her acting IS-02 position, in contravention of article 33 (Workforce Adjustment Policy) of the collective agreement between the employer and the Professional Institute of the Public Service of Canada ("the union") for the Information Services (IS) Group bargaining unit; expiry date June 20, 2011 ("the collective agreement").

[2] The employer and the union agreed that this grievance should be dealt with through written submissions and on a timetable that they agreed to rather than by way of a hearing.

II. Summary of the evidence

[3] The parties provided an agreed statement of facts, which reads as follows:

> 1. *Judy Létourneau was employed at the IS 1 substantive classification with the National Research Council (NRC). She worked at the Canada Institute for Scientific and Technical Information (CISTI) until her lay-off on August 31, 2010. She had been employed in the Public Service since June 23, 1975.*
>
> 2. *Ms. Létourneau agreed to an Internal Assignment Agreement . . . at an acting IS 2 group and level beginning September 1, 2008 and ending on March 31, 2010. The agreement confirms that upon termination of the assignment, Ms. Létourneau would resume her duties in the IS 1 group and level held by her before the assignment. On December 15, 2009, Ms. Létourneau was advised that the IS 2 position was being maintained during the transition and that she would continue to occupy the position until August 31, 2010.*
>
> 3. *Ms. Létourneau is a member of the Professional Institute of the Public Service of Canada (PIPSC) and is covered by the collective agreement for the Information Services (IS) Group between NRC and PIPSC that expires on June 20, 2011.*

4. *Article 33.01 of the Information Services collective agreement between NRC and the Professional Institute of the Public Service of Canada having an expiry date of June 20, 2011 provides:*

   "The NRC Workforce Adjustment Policy shall form part of this collective agreement and shall be reviewed and negotiated by the signatories to the Policy in accordance with the terms and conditions described in the Policy."

5. *Ms. Létourneau was laid off in accordance with the NRC Work Force Adjustment Policy which "applies to all continuing employees".*

6. *Section 3.6.2.14 of the NRC Work Force Adjustment Policy contained in the NRC Human Resources Manual provides:*

   "This NRC policy is deemed to be part of all collective agreements between the parties and employees are afforded ready access to it."

7. *Paragraph 3.6.16.1 of the NRC Work Force Adjustment Policy provides that:*

   "An employee shall receive severance pay on lay-off as per the applicable collective agreement or compensation plan (for un-represented employees)."

8. *Article 26 of this Information Services (IS) collective agreement between NRC and the Professional Institute of the Public Service of Canada provides for severance pay in the case of lay-off as follows:*

   ARTICLE 26 – SEVERANCE PAY

   26.01 *For the purpose of determining the amount of severance pay to which an employee is entitled under this Article his/her years of continuous service shall be reduced by any period of continuous service in respect of which he/she was granted severance pay, retiring leave, rehabilitation leave or a cash gratuity in lieu thereof by the Public Service, a federal crown corporation, the Canadian Armed Forces or the Royal Canadian Mounted Police. Under no circumstances shall the maximum severance pay provided under Article 26 be pyramided.*

   26.02 Layoff

   In the event that the Council decides that lay-off of one or more employees is necessary, the parties agree to consult jointly prior to the implementation of lay-off procedures.

> ***26.03*** *An employee who has one (1) year or more of continuous service and who is laid off is entitled to be paid severance pay as soon as possible following the time of lay-off.*
>
> ***26.04*** *Subject to clause 26.01, in the case of an employee who is laid off for the first time, the amount of severance pay shall be two (2) weeks' pay for the first and one (1) week's pay for each succeeding complete year of continuous service and in the case of a partial year of continuous service, one (1) week's pay multiplied by the number of days of continuous service divided by 365.*
>
> ***26.05*** *Subject to clause 26.01, in the case of an employee who is laid off for a second or subsequent time, the amount of severance pay shall be one (1) week's pay for each completed year of continuous service and in the case of a partial year of continuous service, one (1) week's pay multiplied by the number of days of continuous service divided by 365, less any period in respect of which he/she was granted severance pay under 26.04 above.*

9. *Clause 26.11 of this IS collective agreement provides:*

   > ***26.11*** *The weekly rate of pay referred to in the above clauses shall be the weekly rate of pay to which the employee is entitled for his/her classification on the date of the termination of his/her employment.*

10. *In correspondence dated July 6, 2010, Ms. Létourneau was advised that her substantive position at the IS 1 group and level was identified as surplus to requirements.*

11. *Ms. Létourneau was laid off on August 31, 2010 and received severance pay based on the weekly rate of pay of her substantive IS 1 classification group and level.*

12. *Ms. Létourneau submitted a grievance dated September 10, 2010 stating:*

    > *"I grieve the National Research Council's decision to base my Work Force Adjustment severance package on my substantive position of IS-1 and not on the position of IS-2 that I have occupied continuously on an acting basis for the past two (2) years."*

13. *The corrective action requested by Ms. Létourneau was:*

    > *"I request that the Work Force Adjustment severance package I am entitled to be based on the Acting IS-2*

position I have been performing for the past two (2) years and not on my substantive IS-1 position. To be made whole in all respects."

14. *Ms. Létourneau's grievance was denied at the first level of the grievance procedure. In the first level grievance reply dated October 21, 2010, it was noted that in accordance with NRC's Human Resources Manual (Section 5.3.13.10.2), and unless the collective agreement provided otherwise, the rate of pay that applies in payments such as severance pay is the employee's substantive rate of pay.*

"Section 5.3.13.10.2 provides:

5.3.13.10

Payments and Recoveries

5.3.13.10.1

For employees and unrepresented employees, refer to 13.10.2.

5.3.13.10.2

Unless the relevant collective agreement or compensation plan specifies otherwise, the rate of pay at which NRC will make payments to or recoveries from an employee shall be the following:

a. the rate of pay shall be the rate in the employee's substantive level that the employee is earning or would be earning but for an acting assignment for:

- *severance pay;*
- *cash out of vacation leave;*
- *recovery of vacation or sick leave granted in excess of credits (on termination);*
- *lump sum in lieu of notice;*
- *out-placement; and*
- *maternity allowance.*

b. the rate of pay shall be the rate at which the employee was paid when the employee worked overtime for:

- *the pay out of compensatory leave credits (based on the principle of first accrued-first used).”*

15. *The grievance was also denied at the second and final level where it was indicated that the NRC human resources policy and procedures clearly identified the employee’s substantive classification level as the basis for the calculation of work force adjustment benefits.*

16. *The grievance was transmitted to the second and final level on October 26, 2010.*

17. *The final level grievance response was provided on January 18, 2011 and the matter was referred to adjudication on February 18, 2011.*

. . .

III. Summary of the submissions

A. For the grievor

[4] The union stated that the grievor had been performing the functions of an IS-04 for at least four years before her layoff and that there had been discussions between the employer and the grievor about reviewing the job description and classification of her substantive position. Despite the discussions, nothing was done to reclassify her before her termination.

[5] The union argued that the employer assigned the grievor tasks above her classification level and that it was well aware that she was performing at a level higher than her substantive IS-01 position. The grievor was encouraged to seek a classification review by her supervisors. Because she believed that her desire for a higher classification was supported by her supervisors, she did not file a job content or classification grievance.

[6] Although the grievor actively sought to have her position reclassified through discussions with the employer, she was advised in 2008 or 2009 that because of an imminent workforce adjustment, her position could not be reclassified. However, she was given an acting assignment at the IS-02 level on September 1, 2008.

[7] The union argued that had the employer acted expeditiously on the grievor’s request for reclassification and had the grievor actually been reclassified, she would have received her severance benefits as the IS-02 level rather than the IS-01 level.

[8] The union acknowledged that the collective agreement is silent about severance benefits in the case of acting assignments and that the employer's policy on the terms and conditions of employment stipulates how severance benefits should be calculated for acting assignments. Based on those documents the union conceded that the grievor had no claims to severance benefits calculated on the basis of her acting position.

[9] However, the union argued that the grievor's acting assignment is proof that the employer recognized that she was performing duties at a higher level than her substantive IS-01 position and that it should have been recognized in the calculation of her severance benefits. The union submitted that the express recognition of the work performed by the grievor amounted to a certificate of appointment to the IS-02 levels. The union cited *Parent v. Treasury Board (Revenue Canada – Taxation)*, PSSRB File No. 166-02-27675 (19970714).

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

[10] The employer submitted that the only question to be determined in this matter is the appropriate rate of pay to use for the calculation of the grievor's severance pay. The collective agreement, the *Workforce Adjustment Policy* and the employer's terms and conditions of employment all support the position that the rate of pay of the grievor's substantive IS-01 position is the appropriate rate to use for the calculation of her severance benefits.

[11] The employer observed that there was no dispute that the grievor's substantive position at the time of her layoff on August 31, 2010, was an IS-01 position and that she was paid severance benefits calculated using her substantive position as the base, as provided by the collective agreement and section 5.3.13.10.2 of the employer's Human Resources Manual, which sets out terms and conditions of employment.

[12] The employer contended that its standard practice and policy was to calculate severance benefits based on employees' substantive positions unless the applicable collective agreement provided otherwise. In this instance, the collective agreement did not provide otherwise. The employer noted the union's concession that nothing in the collective agreement would support the suggestion that severance benefits should be based on anything other than an employee's substantive position.

[13] The employer argued that an adjudicator must interpret the language of the collective agreement based on its plain meaning, as the intentions of the parties to the collective agreement can be found in the plain meaning of the language that they used. Interpreting the language in any other fashion might result in an amendment to the collective agreement, which an adjudicator cannot make. The collective agreement in this case is very clear.

[14] The employer also argued that a provision like severance pay, which confers a financial benefit, requires a clear expression of intent. Had the parties to the collective agreement intended to base the calculation of severance pay on a different rate, clear and express language was necessary. As an example, the employer pointed to the collective agreement of another of its bargaining units, which expressly provides that severance pay is to be calculated using a different rate of pay than that of the substantive position. That language is not found in the collective agreement covering the grievor.

[15] The employer suggested that the union was actually trying to change the nature of the grievance by claiming that the employer should have recognized the grievor's assumption of duties outside her IS-01 job description through a reclassification. The grievance before me is not a classification grievance, a job content grievance or an acting pay grievance, so the union's arguments about the grievor's assumption of duties outside her job description are not relevant. The grievor acted in an IS-02 position as a temporary assignment. There was no issue of appointment and no documentation that could be interpreted as appointing her to the acting position on anything other than a temporary basis. Therefore, *Parent* does not apply.

C. Union's rebuttal

[16] The union reiterated that, based on the collective agreement and the employer's terms and conditions of employment, the grievor understood that she had no claim to severance pay based on the IS-02 acting position. However, the grievor's claim was based on her belief that the employer should have acted in a timely fashion to recognize that she performed duties at the IS-02 level and above for a number of years. Although the grievor did not file a classification or job description grievance, the employer was certainly aware that her classification was an issue of concern to her. The grievor should not have been penalized because the employer failed to act on her classification issues in a timely fashion.

IV. Reasons

[17] This grievance concerns the rate of pay used to calculate the severance benefits paid to the grievor on her layoff. The union alleged that the employer should have calculated the benefits based on the rate of pay of the acting position that she held immediately before her layoff, rather than on her substantive position. At the time of her layoff on August 31, 2010, she had been acting since September 1, 2008, as a junior communications officer, classified IS-02. Her substantive position was as a communications assistant, classified IS-01. For ease of reference, her grievance reads as follows:

> *I grieve the National Research Council's decision to base my Workforce Adjustment severance package on my substantive position of IS-1 and not on the position of IS-2 that I have occupied continuously on an acting basis for the past two (2) years.*

[18] Although the grievance did not identify the relevant article of the collective agreement, the reference to adjudication clarified that the grievor believes that article 33 (Workforce Adjustment Policy) was violated. Article 33 provides as follows:

> ***Article 33 – Workforce Adjustment Policy***
>
> ***33.01*** *The NRC Workforce Adjustment Policy shall form part of this collective agreement and shall be reviewed and negotiated by the signatories to the Policy in accordance with the terms and conditions described in the Policy.*

[19] The *Workforce Adjustment Policy,* described in article 33 of the collective agreement, sets out the roles and responsibilities and terms and conditions governing workforce reductions, surplus employees and layoffs at the NRC. Among other things, it sets out the benefits to be paid to employees on layoff. Section 3.6.13.1 of the *Workforce Adjustment Policy* provides as follows:

> ***3.6.13.1*** *An employee who is identified as surplus is entitled to receive lay-off benefits which include:*
>
> - *a notice period of 20 weeks plus one week for every year of continuous service or portion thereof;*
> - *an outplacement benefit equivalent to 8 weeks' pay or $8,000 whichever is greater;*

- *severance pay on lay-off as per the applicable collective agreement or compensation plan (for un-represented employees).*

The maximum total benefits to which a surplus employee is entitled under this policy shall be an amount not exceeding the equivalent of 70 weeks of pay. In cases where a surplus employee has opted to receive the $8,000.00 versus the 8 weeks' pay as an outplacement benefit, the $8,000.00 will be deemed to represent 8 weeks' pay for the purpose of determining the maximum 70 weeks of pay entitlement.

[20] The collective agreement provides for severance benefits on layoff. The clauses relevant to the calculation of severance pay provide as follows:

. . .

ARTICLE 26 – SEVERANCE PAY

26.01 *For the purpose of determining the amount of severance pay to which an employee is entitled under this Article his/her years of continuous service shall be reduced by any period of continuous service in respect of which he/she was granted severance pay, retiring leave, rehabilitation leave or a cash gratuity in lieu thereof by the Public Service, a federal crown corporation, the Canadian Armed Forces or the Royal Canadian Mounted Police. Under no circumstances shall the maximum severance pay provided under Article 26 be pyramided.*

. . .

26.04 *Subject to clause 26.01, in the case of an employee who is laid off for the first time, the amount of severance pay shall be two (2) weeks' pay for the first and one (1) week's pay for each succeeding complete year of continuous service and in the case of a partial year of continuous service, one (1) week's pay multiplied by the number of days of continuous service divided by 365.*

26.05 *Subject to clause 26.01, in the case of an employee who is laid off for a second or subsequent time, the amount of severance pay shall be one (1) week's pay for each completed year of continuous service and in the case of a partial year of continuous service, one (1) week's pay multiplied by the number of days of continuous service divided by 365, less any period in*

> *respect of which he/she was granted severance pay under 26.04 above.*
>
> . . .
>
> ***26.11*** *The weekly rate of pay referred to in the above clauses shall be the weekly rate of pay to which the employee is entitled for his/her classification on the date of the termination . . . .*
>
> . . .

[21] The issue in this matter appears to be relatively straightforward. What is the correct rate of pay on which to calculate the grievor's severance benefits? Both the *Workforce Adjustment Policy* and article 26 (Severance Pay) of the collective agreement refer to a "weeks' pay" as the base unit for calculation. The issue, then, is whether a "weeks' pay" is based on the rate of pay of the grievor's substantive position or her acting position.

[22] The *Workforce Adjustment Policy* does not define a "weeks' pay" but the collective agreement does. Clause 2.01(u) of the collective agreement defines "weekly rate of pay" as ". . . an employee's annual rate of pay divided by 52.176 . . . ." Clause 26.11, which specifically defines "weekly rate of pay" in the context of severance pay, states that it shall be the ". . . weekly rate of pay to which the employee is entitled for his/her classification on the date of the termination . . . ." However, clause 26.11 does not specify that the classification on termination is the classification of the employee's substantive position. In addition, provisions on pay (clause 13.02) and acting pay (clause 14.01) provide that employees are entitled to be paid at the rate of pay for the classification to which they are appointed and that, when employees act in a higher-rated classification, they are entitled to be paid the rate for that classification as if they had been appointed to the position for the period of the acting appointment. In my view, it is at least open to argue that, when the collective agreement refers to "classification" in clause 26.11, it means the classification for the position that the employee actually occupies at the time of termination.

[23] Other provisions of the collective agreement that deal with payouts on termination are quite specific about the rate of pay to be used to calculate the pay-out. Unfortunately, there is no internal consistency that would assist me in determining what the parties to the collective agreement intended when they used the phrase "a weeks' pay" in the severance pay provisions. For example, the provisions on the

carry-over of vacation leave (clause 17.06) provide that vacation leave credits in excess of the allowable carry-over amount will be ". . . compensated monetarily at the end of the fiscal year at the employee's daily rate of pay as calculated from the employee's substantive position [emphasis added]." However, the collective agreement also provides that unused leave at the time of an employee's termination (clause 17.09) shall be compensated based on the ". . . number of days of earned but unused vacation leave by the daily rate of pay applicable to the employee immediately prior to the termination of his/her employment [emphasis added]."

[24] I have no hesitation finding that the language used in article 26 (Severance Pay) of the collective agreement to determine the base for calculating severance pay is ambiguous. Under other circumstances, an ambiguity such as this could be resolved by examining extrinsic evidence like bargaining history or past practice. However, in this case the parties have agreed that the employer's policy on terms and conditions of employment, which is a unilateral employer policy, correctly provides that the base rate for the calculation of severance pay in article 26 is the rate of pay of an employee's substantive position. The union has agreed that, based on the language of employer's terms and conditions of employment policy and the collective agreement, the grievor has no claim to severance benefits at the IS-02 level. I think that it is worth repeating the union's submission on this point:

. . .

> *It is indeed the position of the grievor and her representative that the appropriate Work Force Adjustment severance benefits received by Ms. Letourneau in September 2010 should have been based on the rate of pay of the grievor's acting position and not on her substantive IS-1 position, this notwithstanding the provisions stipulated in the IS collective agreement and the NRC's Terms and Conditions of Employment . . . . the grievor and her representative have confirmed that, based on the above mentioned documents, the grievor has no claims on any possible IS-2 severance benefits. . . .*

. . .

[25] Given the union's position, I must find that any ambiguity in the language of the collective agreement on severance pay is resolved by its agreement that severance pay benefits were intended to be paid based on the rate of pay of an employee's substantive position.

[26] Having agreed that the collective agreement does not give rise to the benefit that the grievor claims, it is not clear to me on what basis the union believes that the grievor would be entitled to severance pay benefits at the level of her acting position. Although I understand that the grievor and the union believe that her position should have been reclassified and that the employer dragged its feet, the grievance is not a classification grievance and in any case, I do not have jurisdiction over a classification grievance. The employer recognized that the grievor performed at a higher level than the classification of her substantive position and awarded her acting pay. There is no dispute about that fact. But, as has been made clear, severance benefits under the collective agreement are not based on the rate of pay of an employee's acting position.

[27] The union cited *Parent*, suggesting that it stands for the proposition that the express recognition of work performed at a higher level than an employee's substantive position amounts to a certificate of appointment and that, as a result, severance benefits should be based on the rate of pay of the acting position. But the collective agreement language in *Parent* was different, as it stipulated that severance pay would be based on the weekly rate of pay for the position described in the employee's certificate of appointment. The issue in *Parent* was whether the letter of appointment for an acting assignment of under four months constituted a certificate of appointment. That is not the issue in this case, and as a result, *Parent* does not assist.

[28] My jurisdiction in the case of an individual grievance is limited by subsection 209(1) of the *Public Service Labour Relations Act.* Jurisdiction in this case arises only because this is an individual grievance alleging a violation of article 33 (Workforce Adjustment Policy) of the collective agreement with respect to the grievor. Given the union's statement that, based on the collective agreement, the grievor has no claim to severance benefits based on the rate of pay of her acting position, the grievance must be dismissed.

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

(The Order appears on the next page)

V. Order

[30] The grievance is dismissed.

August 12, 2011.

Kate Rogers,
adjudicator