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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CHRISTIAN DAUPHINAIS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Dauphinais v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Ariane Pelletier, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Anne-Marie Duquette, counsel

Decided on the basis of written submissions
filed June 2, 15 and 23, 2011.
(PSLRB Translation)

I. Individual grievances referred to adjudication

[1] On April 27 and 30, 2007, Christian Dauphinais ("the grievor") filed two grievances, alleging that the Correctional Service of Canada ("the employer") did not comply with clauses 30.07(h) and (i) of the collective agreement between the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN and the Treasury Board, which expired on May 31, 2010 ("the collective agreement"). When the grievances were filed, Mr. Dauphinais' substantive position was classified at the CX-01 group and level. At that time, he was acting in a position classified at the CX-02 group and level.

[2] The employer hired Mr. Dauphinais on July 5, 2002 for a position at the CX-01 group and level. On November 15, 2002, Mr. Dauphinais was granted an acting appointment for a position at the CX-02 group and level. Except for six months in 2006-2007, he acted in a position at the CX-02 group and level until his indeterminate appointment as a CX-02 in April 2009. The parties submitted documents certifying the following acting appointment dates for Mr. Dauphinais: April 28 to September 30, 2006; April 3 to October 1, 2007; October 2, 2007, to February 1, 2008; and February 2 to June 30, 2008. No document was submitted for before April 2006 or after June 2008.

[3] On April 22, 2005, Mr. Dauphinais made a first request for parental leave while acting in a position at the CX-02 group and level. The parental leave, which lasted 35 weeks, began July 19, 2005 and ended March 19, 2006. On November 15, 2005, the salary that Mr. Dauphinais would have received had he been working was increased by one increment on the CX-02 salary scale, and his parental allowance was increased proportionately. The employer admitted to renewing and extending Mr. Dauphinais' acting appointment during his parental leave.

[4] On May 26, 2006, Mr. Dauphinais made a second request for parental leave while still acting in a position at the CX-02 group and level. That parental leave, which lasted 37 weeks, began July 18, 2006 and ended April 2, 2007. On June 26, 2006, the collective agreement came into force. It adjusted the salary scales. Mr. Dauphinais' annual salary was adjusted accordingly. Mr. Dauphinais contends that, on November 15, 2006, his salary should have increased by one increment of the CX-02 salary scale and that his parental allowance should have been adjusted proportionately, which according to him did not occur. The submissions demonstrate that his acting

appointment ended September 30, 2006 and that it was renewed only on April 3, 2007. Other submitted documents attest to the salary and allowance that Mr. Dauphinais received during his second parental leave.

[5] On April 3, 2007, when Mr. Dauphinais returned from his parental leave, the employer established his salary at the CX-02 salary level at which he would have been paid had it been his first day of work in the CX-02 position. Mr. Dauphinais disagreed with that decision. The employer justified its decision on the acting appointment ending during the parental leave. On that point, the employer wrote as follows in its response at the final level of the grievance process:

> [Translation]
>
> . . .
>
> *Paragraph 49.07 of your collective agreement stipulates that, when an employee is required to fulfill the duties of a higher level, he or she shall receive acting pay as of the date on which the employee begins to fulfill those duties, as though he or she were appointed to that higher level.*
>
> *According to the amassed information, a break in service occurred between the two acting periods that you performed, since management ended your acting assignment for the duration of your parental leave. Given the break in service for the CX-02 acting appointment during your parental leave, the salary for the new acting appointment as of April 3, 2007, had to be recalculated; you were no longer entitled to the pay increment because you began a new acting period.*
>
> . . .

[6] In his grievance of April 27, 2007, Mr. Dauphinais alleges that the employer unfairly refused the pay increment of November 2006. In his grievance of April 30, 2007, he alleges that there were no grounds "[translation] for a cut in increment" for the CX-02 acting position because, when he left on parental leave, he held a position at the CX-02 group and level and, when he returned from leave, he still held a CX-02 position. In both grievances, he refers to clauses 30.07(h) and (i) of the collective agreement. Mr. Dauphinais requests that the employer retroactively pay the salary differences in question.

[7] These two grievances involve, among other things, the interpretation of the following collective agreement provisions:

. . .

30.07 Parental Allowance

(a) An employee who has been granted parental leave without pay, shall be paid a parental allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs (c) to (i) . . . .

. . .

(f) The weekly rate of pay referred to in paragraph (c) shall be:

> *(i) 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;*

. . .

(g) The weekly rate of pay referred to in paragraph (f) shall be the rate to which the employee is entitled for the substantive level to which she or he is appointed.

(h) Notwithstanding paragraph (g), and subject to subparagraph (f)(ii), if on the day immediately preceding the commencement of parental leave without pay an employee is performing an acting assignment for at least four (4) months, the weekly rate shall be the rate, the employee was being paid on that day.

(i) Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.

. . .

***APPENDIX "A"*

. . .

I. Pay Increment (applicable to all employees)

(a) Every twelve (12) month period, on the anniversary of his or her hiring date, the employee shall advance to the next increment.

(b) For the purpose of administering Pay Increment Note I(a), the pay increment date for an employee, appointed on or

> *after March 20, 1980, to a position in the bargaining unit upon promotion, demotion or from outside the Public Service, shall be the anniversary date of such appointment. The anniversary date for an employee who was appointed to a position in the bargaining unit prior to March 20, 1980, shall be the date on which the employee received his or her last pay increment.*
>
> . . .

II. Summary of the arguments

A. For Mr. Dauphinais

[8] Mr. Dauphinais alleges that his salary should have increased by one increment on November 15, 2006 while he was on parental leave, that there was no break in service for his appointment to the CX-02 group and level in 2006-2007, and that he should have received all subsequent pay increments.

[9] During the first parental leave, on November 15, the anniversary of Mr. Dauphinais' acting appointment, the employer raised his salary by one increment of the CX-02 scale. On his return from leave, he continued to progress on the CX-02 scale. During the second parental leave, the employer refused to grant him a pay increment on November 15, even though Mr. Dauphinais held an acting appointment when he left on leave. However, the collective agreement is clear that salary scale progression occurs on the anniversary of appointment, that is, on November 15. Thus, the employer had no reason to not grant Mr. Dauphinais a pay increment on November 15, 2006.

[10] The employer attempted to effect indirectly what it could not effect directly by claiming that a break in service occurred during Mr. Dauphinais' acting appointment. In fact, the employer unilaterally imposed a break in service solely because Mr. Dauphinais was on parental leave. No break in service actually occurred, and the employer declared the false break in service to breach the provisions of the collective agreement. Despite Mr. Dauphinais not performing the duties of his job, the contractual relationship between him and the employer was not interrupted. Indeed, it should be noted that Mr. Dauphinais acted continuously from 2002 to 2009. Concluding that a break in service occurred would make it impossible for a correctional officer to fully exercise a right granted under the collective agreement.

B. For the employer

[11] On May 1, 2006, the employer offered Mr. Dauphinais an acting appointment from April 28 to September 30, 2006. The appointment ended on October 1, 2006, and Mr. Dauphinais received a new acting appointment on April 3, 2007, when he returned from parental leave. Therefore, the appointment that ended on September 30, 2006 was not extended.

[12] In accordance with the collective agreement, the employer calculated the compensation to pay to Mr. Dauphinais based on his acting salary at the CX-02 level for the entirety of his leave, even though the CX-02 appointment ended on September 30, 2006. When he returned from leave, the employer indeed remunerated Mr. Dauphinais at one level lower than that of the CX-02 salary scale he received before going on leave, since a break in service occurred.

[13] However, the employer submits that Mr. Dauphinais was mistakenly granted a pay increment on November 15, 2006 to which he was not entitled because the acting appointment ended on September 30, 2006.

[14] The provisions of article 30 of the collective agreement do not apply when determining the salary applicable on return from leave. On that sole basis, the second grievance, filed April 30, 2007, should be dismissed.

[15] Alternatively, the employer submits that the collective agreement was correctly applied when it calculated Mr. Dauphinais' salary on his return from parental leave on April 3, 2007. The employer did not extend Mr. Dauphinais' acting appointment that ended September 30, 2006 because, since he was on leave, he was not available to work. The employer was entitled to make that decision. For salary purposes, as of October 1, 2006, Mr. Dauphinais was back in a CX-01 position. Therefore, it was normal that, as of his new appointment on April 3, 2007, the employer determined his pay level based on him being an employee at the CX-01 group and level at that time.

III. Reasons

[16] In the grievance filed on April 27, 2007, Mr. Dauphinais claims a pay increment applicable on November 15, 2006 and an adjustment to the allowance paid to him. The employer declared that Mr. Dauphinais benefited from that pay increment but that he had not been entitled to it because the acting appointment ended on September 30,

2006. In his rebuttal to the employer's arguments, Mr. Dauphinais did not deny that he received that pay increment. In addition, I carefully examined the parties' written submissions, and I found that Mr. Dauphinais' parental allowance was increased as of the pay period that included November 15, 2006 and that the upward adjustment was maintained for the entire duration of the parental leave.

[17] Therefore, I dismiss the grievance filed on April 27, 2007 because, contrary to Mr. Dauphinais' claims, the employer indeed considered a pay increment on November 15, 2006 when it calculated the parental allowance to pay him. Thus, the employer is not required to reimburse Mr. Dauphinais, as he contends.

[18] In his grievance filed on April 30, 2007, Mr. Dauphinais asks that the employer pay him at the level of the CX-02 salary scale at which he would have been had it not been for the parental leave, rather than at a lower level of that salary scale. The employer pointed out that the determination of Mr. Dauphinais' salary did not fall under the provisions of article 30 of the collective agreement. Although the employer is correct, it is irrelevant, because Mr. Dauphinais' grievance is clear and unequivocal — he challenges the pay level he received on return from his leave on April 3, 2007. I must examine the matter on the merits and determine whether the employer's decision to pay Mr. Dauphinais at that level respected the collective agreement.

[19] The written submissions demonstrate that the employer did not extend Mr. Dauphinais' acting appointment, which ended on September 30, 2006. Regardless of the amount of parental allowance he was paid, Mr. Dauphinais was on leave from a CX-02 position from July 18, 2006 to September 30, 2006 and was on leave from a CX-01 position from October 1, 2006 to April 2, 2007. When he returned from leave on April 3, 2007, the employer reappointed him to a CX-02 position and integrated him at the appropriate level of the CX-02 salary scale. The fact is that a six-month break in service occurred in Mr. Dauphinais' acting appointment. The employer deemed that he was a CX-01 when it appointed him to an acting position at the CX-02 group and level on April 3, 2007 and integrated him on the CX-02 salary scale, which was consistent with the facts as well as with the collective agreement.

[20] The employer based its decision on Mr. Dauphinais not performing the duties of a CX-02 position in October 2006 because he was on leave. On that point, the following provisions of the collective agreement must be examined:

. . .

> ***49.02*** *An employee is entitled to be paid for services rendered at:*
>
> *(a) The pay specified in Appendix "A", for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment;*
>
> . . .
>
> ***49.07***
>
> *When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least eight (8) hours of work, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.*
>
> . . .

[21] The employer did not ask Mr. Dauphinais to perform, as stipulated in clause 49.07 of the collective agreement, CX-02 duties from October 2006 to April 2007. Therefore, it deemed that his salary had to be that of his CX-01-classified position, in accordance with clause 49.02.

[22] Mr. Dauphinais raised the fact that the employer had nonetheless extended his acting appointment during his first parental leave. However, that did not entitle him to the same treatment during the second leave. Subject to clause 49.07 of the collective agreement, the right to appoint an employee on an acting basis falls to the employer. It exercised that right differently for Mr. Dauphinais' two parental leaves.

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

(The Order appears on the next page)

IV. Order

[24] The grievances are dismissed.

July 27, 2011.

PSLRB Translation

Renaud Paquet,
adjudicator