Date: 20110201

Files: 566-02-3470 et al.
(see attached list)

Citation: 2011 PSLRB 8

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARK TIMSON ET AL.

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Timson et al. v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievors: John Mancini, counsel

For the Employer: Michel Girard, counsel

Decided on the basis of written submissions
filed November 19 and December 16 and 22, 2010.

I. Grievances referred to adjudication

[1] This matter concerns 42 grievances referred to adjudication relating to a correctional officer's (classified CX-2) entitlement to acting pay when acting as an instructor. The relevant clauses of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN ("the union") for the Correctional Services Group bargaining unit ("the 2006 collective agreement"), signed on June 26, 2006, read as follows:

. . .

> ***43.05 Instructor allowance***
>
> *When an employee acts as an instructor, he shall receive an allowance equal to two dollars fifty cents ($2.50) per hour, for each hour or part of an hour.*
>
> . . .
>
> ***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.*
>
> . . .

[2] On October 9, 2009, an adjudicator issued a decision in *Lavigne et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 117, involving an identical issue based on an interpretation of the 2001 collective agreement between the parties. In that decision, the adjudicator decided that, when performing the duties of a national firearms instructor, the grievors substantially performed the duties of a higher classification and were entitled to the difference between the CX-3 rate of pay and the rate at which they had been paid when providing firearms training.

[3] For ease of reference, *Lavigne* may be summarized as follows: The five grievors were correctional officers classified as CX-2. They claimed acting pay for the days they provided firearms training to their co-workers. The employer refused to pay them acting pay on the basis that they did not substantially perform the duties of a higher

classification level when performing training duties. The adjudicator held that being a firearms instructor was a CX-3 duty and that the grievors substantially performed CX-3 duties when they acted as firearms instructors. The grievances were allowed.

[4] In this case, the union argues that the Correctional Service of Canada ("the employer") is attempting to relitigate the *Lavigne* matter and that the grievances should be allowed.

[5] Briefly, the employer has taken the position that the *Lavigne* decision was based on another collective agreement and that its findings are therefore inapplicable to these grievances.

[6] Following a pre-hearing conference on November 10, 2010, the parties were asked to provide written arguments on the applicability of *Lavigne* to the 42 grievances in dispute.

II. Summary of the arguments

A. The union's arguments

[7] The union argues that the employer has denied acting pay to the grievors for the same reasons as in *Lavigne*; that is, when acting as instructors, correctional officers perform only one of several key activities required to qualify for CX-3 acting pay. The adjudicator in *Lavigne* rejected that argument.

[8] The union argues as it did in *Lavigne* that, when a correctional officer acts as an instructor, he or she performs an essential task of the higher-level position and that this task excludes simultaneously performing all the other key tasks on the same day.

[9] The union submits that clause 49.07 of the 2006 collective agreement is identical to clause 50.07 of the 2001 collective agreement. The union also submits that the addition of a clause covering instructor remuneration to the 2006 collective agreement does not negate clause 49.07.

[10] The union further argues that *Lavigne* is clearly a precedent that establishes that performing but one of the key activities of the higher level for at least eight hours entitles a correctional officer to acting pay for that period. The union submits that *Lavigne* is consistent with a fundamental principle in modern arbitral law that the meaning of the collective agreement is sought in its express provisions. As there has

been no fundamental change between the 2001 collective agreement and the 2006 collective agreement with respect to clause 49.07, other than the addition of an instructor allowance in clause 43.05, the reasoning in *Lavigne* applies to these grievances. Consequently, *Lavigne* is highly persuasive, and the employer should not be allowed to litigate anew what has already been decided as final.

B. <u>The employer's arguments</u>

[11] The employer argues that, although these grievances deal with the same subject matter, the findings of the *Lavigne* decision are distinguishable. *Lavigne* concerned the interpretation of the 2001 collective agreement, whereas these grievances involve the 2006 collective agreement. Notably, Brown and Beatty (*Canadian Labour Arbitration*, 4th edition, at section 1:3100) observe that arbitral awards are less authoritative when the prior award was made under a different collective agreement.

[12] There are new provisions in the 2006 collective agreement about an instructor's allowance that do not appear in the 2001 agreement. The comments of the adjudicator in *Lavigne* with respect to this allowance are *obiter* as to how the new provisions of the 2006 collective agreement should apply, since the adjudicator based his decision on the 2001 collective agreement. The adjudicator did add that in any event, the 2006 collective agreement did not amend former clause 50.07 but maintained it intact in clause 49.07. Hence, clause 43.05 granted instructors a new premium and nothing more. The employer argues that the adjudicator could not interpret the 2006 collective agreement since that collective agreement was not before him when he decided *Lavigne*.

[13] The employer submits that, in the context of interpreting the provisions of the same collective agreement, if a second panel has "…the clear conviction that the first award is wrong, it is its duty to determine the case before it on the principles that it believes are applicable" (see Brown and Beatty). In the alternative, the employer argues that the *Lavigne* adjudicator's interpretation of the 2006 collective agreement was flawed.

[14] The employer relies on *Cooper and Wamboldt v. Canada Revenue Agency*, 2009 PSLRB 160, for the interpretation of collective agreements. In that case, the adjudicator stated that interpreting collective agreements is no different from the construction of statutes or private contracts, the object being to ascertain the parties'

intention. Accordingly, the words of a collective agreement must be given their ordinary and plain meaning unless it leads to an absurdity or an inconsistency with other provisions of the collective agreement.

[15] The employer contends that clause 49.07 of the 2006 collective agreement requires that employees claiming acting pay establish that they substantially performed duties at a higher classification level. Even acknowledging that some responsibilities may overlap between CX-2 and CX-3 functions, this does not amount to a CX-2 acting in a higher group and level when providing firearms instruction. The employer submits that the adjudicator in *Lavigne* did not consider the job descriptions and did not analyze the CX-3 job description. Consequently, *Lavigne* was decided without considering all the relevant evidence.

[16] Furthermore, the jurisprudence has inconsistently interpreted the notion of what constitutes a duty "substantially performed." In this case, the correctional officers were not "substantially" performing CX-3 duties when they acted as instructors. Moreover, the 2006 collective agreement contains a new clause that deals specifically with the situation that is the subject matter of the grievances, that is, additional remuneration for employees providing instruction.

C. <u>The union's response</u>

[17] The union responds that, in its reply to the Bentley grievance, as an example, the employer acknowledged that the grievor performed one of the key activities of the higher classification. This key activity included planning and coordinating a training program in an acting capacity (implied for eight hours), and the grievor received the instructor allowance set out in the 2006 collective agreement.

[18] The union underscores that the employer has admitted that the grievors are entitled to the instructor allowance in clause 43.05 of the 2006 collective agreement but that it refuses to apply the acting pay provision of clause 49.07, as it did in *Lavigne*.

[19] The union argues that the application of clause 43.05 of the 2006 collective agreement (instructor allowance) does not exclude the application of clause 49.07 (acting pay). It is not because an employee receives an instructor allowance that he or she is not performing the duties of the higher classification. The union contends that,

if the intention of the parties was to replace the acting pay provision of the collective agreement with an instructor allowance, then clause 50.07 of the 2001 collective agreement would have been deleted and would not have remained as clause 49.07.

[20] The union argues that the employer's arguments were set aside in *Lavigne* and that *Cooper and Wamboldt* has further confirmed that an employee does not have to perform all the duties of the higher classification level to receive acting pay. Even if there is no doctrine of *stare decisis* in labour matters, the union asserts that the Board is being asked to reinterpret a clause in the 2006 collective agreement identical to the one already interpreted in the 2001 collective agreement.

III. Reasons

[21] The issue to be decided is twofold. The first is whether the employer is seeking to again litigate an issue already decided in another adjudication decision. The second is whether there is a basis for reaching a conclusion different from that of the earlier award.

[22] While arbitral authorities are not unanimous about the application of issue estoppel and *res judicata* to the arbitral process, those principles are not rigidly entrenched in the adjudication regime under the *Public Service Labour Relations Act* (*PSLRA*). Nonetheless, the finality of the adjudication process under subsection 233(1) of the *PSLRA*, in my view, suggests an inclination for maintaining the effect of earlier awards but not without considering the legitimate interests of each party.

[23] First, I will address the argument that the grievances before me are different from those in *Lavigne*. In that case, the adjudicator was called upon to determine whether CX-2s providing firearms training substantially performed CX-3 duties in an acting capacity and whether they were entitled to acting pay. These grievances also concern whether CX-2s when providing instruction are acting as CX-3s in the performance of those duties and are entitled to acting pay.

[24] Accordingly, these grievances arise in the same circumstances as those in *Lavigne*: the language of clause 49.07 in the 2006 collective agreement is the same as that of clause 50.07 in the 2001 collective agreement (except for a small change that is not material), the parties accepted the adjudicator's decision as final, and the parties are the same. Other than the fact that these grievances address a wider range of training circumstances and a subsequent collective agreement, the underlying factual

circumstances have not materially changed, and the disputed clause of the collective agreement has not changed.

[25] The argument that the adjudicator in *Lavigne* did not consider or analyze the CX-2 and CX-3 job descriptions is not persuasive. Paragraph 44 of that decision specifically states that the CX-3 national firearms instructor job description was not submitted in evidence. Apparently, in that case, neither party viewed the job description as a determining factor in deciding whether an instructor performed the duties of a CX-3.

[26] I have not been convinced by the argument that clause 43.05 of the 2006 collective agreement, providing for an instructor's allowance, changes the plain and ordinary meaning of clause 49.07. The addition of an instructor's allowance does not lead to an absurdity or inconsistency with other provisions of the collective agreement. The instructor's allowance is listed along with the other allowances, such as those for employees who agree to be emergency response team members, the dog handler's allowance and the responsibility allowance, without the stated intent that any of these allowances replace the provision for acting pay in clause 49.07.

[27] Therefore, it remains for me to address the facts and circumstances of this case in the context of other relevant considerations. This includes the ongoing contractual relationship of the collective bargaining regime and the statutory scheme that regulates the relationship of the parties and the adjudication of their disputes. Therefore, I will turn to considerations relating to the effectiveness of the adjudication process and the fundamental principles of certainty and finality. I note four issues of significance.

[28] First, the underlying dispute has been the subject of five grievances, decided by the *Lavigne* case. Second, the dispute has been adjudicated without judicial review and has already involved considerable resources. Third, *Lavigne* included the consideration, albeit unsuccessfully for the employer, of the very arguments that it sets out in this case. To not give significant weight to an existing adjudicative determination of these very issues would be inconsistent with the adjudication design of the *PSLRA*. Fourth, and as noted earlier in this decision, the legislative regime provides that an adjudicator's decisions are final and binding.

[29] I have not been convinced that the award in *Lavigne* is wrong, nor do the changes in the 2006 collective agreement lead me to reach a different conclusion. *Lavigne* decided the general principle that a CX-2 acting as an instructor for at least one working day substantially performs the duties of a higher classification and is entitled to the CX-3 rate of pay for that day. The only change in the 2006 collective agreement is that the expression "at least eight hours of work" in clause 49.07 has replaced the expression "at least one working day" that was in clause 50.07. It was not argued by either party that this was a material change. Accordingly, insofar as a CX-2 acts as an instructor for at least eight hours – the equivalent of a working day – he or she is entitled to be paid at the rate of the higher classification. Otherwise, the instructor allowance provided in clause 43.05 is apparently the hourly allowance payable for periods of less than eight hours.

[30] Taking all those factors into consideration, I conclude that, in the circumstances of this case, the need for finality and certainty in the grievance adjudication process outweighs the general interest of having each of the 42 grievances adjudicated on their merits.

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

(The Order appears on the next page)

IV. Order

[32] The grievances are allowed.

February 1, 2011.

Michele A. Pineau,
Vice-Chairperson