Date: 20120813

Files: 567-02-68 to 71

Citation: 2012 PSLRB 84

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board
(Department of Human Resources and Skills Development)

In the matter of group grievances referred to adjudication

REASONS FOR DECISION

Before: Joseph W. Potter, adjudicator

For the Bargaining Agent: Amarkai Laryea, Public Service Alliance of Canada

For the Employer: Sean Kelly, counsel

Heard at Ottawa, Ontario,
June 28, 2012.

I. Group grievance referred to adjudication

[1] These group grievances were filed in 2009 by the Public Service Alliance of Canada ("the bargaining agent") on behalf of employees situated in Toronto, Hamilton, Edmonton and Vancouver and employed by the Department of Human Resources and Skills Development ("the employer") in several call centres. All the grievances essentially read the same and state as follows:

> *We grieve management's refusal to abide by a healthy 80% occupancy rate (as per the employer's own words and recommendations as well as call centre experts) per half hour interval during our work day in the call centre. As a result, the employer has not made reasonable provisions for my occupational health and safety, which is in violation of Article 22 of the collective agreement.*

[2] The grievors, whose names are on file with the Public Service Labour Relations Board ("the Board"), sought an order from the adjudicator containing five elements, which in essence are the following:

1. Maintain a healthy occupancy rate of 80%.
2. Hire more staff to reduce occupancy.
3. Provide occupancy training to all staff.
4. Provide all employees with the occupancy rates on a weekly basis.
5. Compensate employees by reimbursing sick leave using a formula specified in the grievance.

[3] Note that occupancy rate refers to ". . . the percentage of time that agents handle calls versus the time spent waiting for calls . . . ," as stated in the first-level reply to the Toronto group grievance.

[4] The matter was to be heard in Ottawa on June 28 and 29, 2012.

[5] On May 23, 2012, counsel for the employer sent a letter to the Board stating that ". . . we intend to raise an objection to the jurisdiction of an adjudicator to consider these matters. . . ." The employer requested a pre-hearing conference to discuss the objection and other preliminary matters.

[6] A pre-hearing conference was held on June 15, 2012, during which the parties agreed that the hearing would deal only with the employer's preliminary objection, and

not with the merits of the grievances. Depending upon the decision, the matter would then either be set down for a hearing or would end.

[7] This decision deals with the employer's jurisdictional objection.

II. Summary of the arguments

A. For the employer

[8] Counsel for the employer presented written representations with respect to the jurisdictional issue. A copy is on file with the Board.

[9] The employer's jurisdictional argument was twofold. First, it submitted the following:

> . . . *article 22 of the collective agreement cannot be used as the basis for a group grievance, as this article does not confer any substantive right to individual grievors that can be grieved pursuant to subsection 215(1) of the* Public Service Labour Relations Act. . . .

[10] The employer's second argument was the following:

> . . . *there are administrative procedures for redress to deal with these group grievances under the* Canada Labour Code *(the "*CLC*") and/or the* Government Employees Compensation Act *(the "*GECA*"). Accordingly, an adjudicator must decline jurisdiction over these group grievances pursuant to subsection 215(4) of the* PSLRA*, section 12 of the* GECA *and section 9 of the* Crown Liability and Proceedings Act *(the "*CLPA*")*. . . .

[11] The employees grieved violations of article 22 of the applicable collective agreement (Tab 1 in the bargaining agent's book of authorities) ("the collective agreement"). It reads as follows:

> *22.01 The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Alliance, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.*

[12] The case law is clear that article 22 of the collective agreement does not confer any rights to individual employees, which would be required for it to fall within the

parameters of subsection 215(1) of the *Public Service Labour Relations Act* (*PSLRA*), which reads as follows:

> ***215.****(1) The bargaining agent for a bargaining unit may present to the employer a group grievance on behalf of employees in the bargaining unit who feel aggrieved by the interpretation or application, common in respect of those employees, of a provision of a collective agreement or an arbitral award.*

[13] Article 22 of the collective agreement is a consultation clause under which the employer and the Public Service Alliance of Canada ("the bargaining agent") agreed to consult on matters affecting occupational health and safety. The employer's obligation is to the bargaining agent, not to the individual employees (see *Parsons et al. v. Treasury Board (National Defence)*, 2004 PSSRB 160, at para 38; *Spacek v. Canada Revenue Agency*, 2006 PSLRB 104, at paras 25, 36 and 40; *Kolski v. Treasury Board (Agriculture Canada)*, PSSRB File Nos. 166-2-25899, 25900 and 26020 (19941206); and *Breault v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-2-24186 (19940428).

[14] Article 22 of the collective agreement must be read as a whole. When that is done, it creates an obligation on the employer with respect to the bargaining agent and not to individual employees.

[15] With respect to the second portion of the employer's jurisdictional argument, Part II of the *Canada Labour Code,* R.S.C. 1985, c. L-2 (*CLC*), is an "administrative procedure for redress" to deal with group grievances such as these. Therefore, no adjudicator has jurisdiction to consider them, pursuant to subsection 215(4) of the *PSLRA*.

[16] When subsection 215(4) of the *PSLRA* applies, the administrative procedure becomes the exclusive process, and an adjudicator must decline jurisdiction (see *Brown v. Canada (Attorney General)*, 2011 FC 1205, at para 28).

[17] The Federal Court of Appeal has clearly stated that, if another administrative procedure for redress is available to a grievor, it must be used, as long as it provides a real remedy. The process in question does not need to provide a remedy that is equivalent, identical or better, as long as it deals meaningfully and effectively with the substance of the employee's grievance (see *Canada (Attorney General) v. Boutilier*,

[2000] 3 F.C. 27 (C.A.); leave to appeal refused in [2000] S.C.C.A. No. 12; and *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354 (C.A.); leave to appeal refused in [1995] S.C.C.A. No. 444).

[18] Part II of the *CLC* sets out clear obligations for employers to protect their employees with respect to occupational health and safety. The Federal Court of Appeal has recognized that a health and safety complaint alleging that a workplace is stressful clearly falls within the scope of Part II of the *CLC* (see *Canada (Royal Canadian Mounted Police*) v. *Prentice*, 2005 FCA 395).

[19] In these grievances, the grievors claim that the workplace occupancy rate causes them a gradual onset of stress.

[20] The decision in *Galarneau et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 70, dealt with much the same issue, but the adjudicator in that case accepted jurisdiction. Clearly, that decision was wrong.

[21] These group grievances fall within the scope of the *Government Employees Compensation Act*, R.S.C. 1985, c. G.-5 (*GECA).* Therefore, an adjudicator is without jurisdiction to consider them, pursuant to section 12 of the *GECA*, section 9 of the *Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50,* and subsection 215(4) of the *PSLRA*.

[22] Section 12 of the *GECA* prohibits any claim (including a grievance) against the employer for a workplace accident. The case law is clear that an allegation that gradual onset of stress resulted from the workplace falls within the scope of the *GECA*.

B. <u>For the bargaining agent</u>

[23] The bargaining agent's representative presented written representations with respect to the jurisdictional issue. A copy is on file with the Board.

[24] The Board has jurisdiction to hear this issue. The matter at issue in the grievances can be grieved under clause 18.27 of the collective agreement and subsection 208(1) of the *PSLRA*, which states as follows:

> **208.**(1) *Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*

> (a) *by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> (b) *as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[25] Under subsection 208(2) of the *PSLRA*, as follows, an employee cannot file an individual grievance if an administrative procedure for redress is provided by another Act of Parliament:

> ***208.****(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.

[26] One question in this case is whether an administrative process for redress is provided by another Act of Parliament. As stated as follows in *Galarneau*:

> . . .
>
> *[42] To determine whether another administrative procedure is provided, the adjudicator must identify the purpose of the dispute and determine whether it may reasonably and effectively be dealt with under the administrative procedure. The adjudicator must consider the essence of the grievors' allegations to determine the purpose of the grievance. The limitation on filing a grievance will apply if the administrative procedure can deal with the main issues raised by the grievance and not with secondary or accessory issues. If an administrative procedure exists, the recourse and remedies available under the grievance process and under the administrative procedure do not have to be identical, but the administrative procedure must provide the grievor with a real and beneficial remedy.*
>
> . . .

[27] To answer that question, it is necessary to determine the essence of the grievance as noted as follows by the bargaining agent in its submissions:

> . . .

> *The purpose of the grievances relates to health and safety concerns as it applies to occupancy rates in a call centre work environment. Occupancy is the total amount of time an agent is taking a call or doing after work call compared to the time they are plugged in and waiting for a call. For example, if over a 30 minute interval 27 minutes are spent doing work, then 27/30 would be a 90% occupancy rate for the 30 minute interval.*
>
> *The grievances in this case state that a healthy rate of occupancy is 80% and that the employer has been refusing to abide by this rate which has resulted in the failure of the employer to provide reasonable provisions for their occupational health and safety. They are requesting the employer to maintain the 80% occupancy rate. They are also requesting that the employer hire more staff and also provide training for all staff. Finally, they are requesting damages for exposure to an unhealthy work environment. The damages, in this case, have been expressed in terms of reimbursement of sick day time.*
>
> *It is the union's submission that the essence of the grievance must be determined by examining the grievance as a whole, meaning also looking at the corrective action requested. As will be examined below, the administrative redress provided in the statutes invoked by the employer have a different purpose than that of the grievances and offer remedies that differ from those sought in the grievances filed.*

. . .

[28] The purpose of the *GECA* is to compensate employees who have suffered an employment accident or industrial disease. These grievors did not claim that they suffered an employment accident or that they became disabled due to an industrial disease, and they do not seek the payment of the compensation provided in the *GECA*. Therefore, the *GECA* does not apply to the grievors.

[29] Part II of the *CLC* deals with occupational health and safety prevention. Two principal mechanisms are provided to employees under the *CLC*, which are the right to refuse work if there is a danger, and the right to make a complaint.

[30] The grievors did not refuse to work and did not claim that they wished to exercise a right to refuse to work under section 128 of the *CLC*. The bargaining agent stated the following:

. . .

Under the Code*, employees have a right to make a complaint and this complaint must be investigated under s. 127.1. The complaint may be referred to the health and safety officer under certain circumstances listed in subsection 127.1(8). The health and safety officer has a number of powers under section 145. Decisions rendered by the health and safety officer may be appealed to an appeals officer under section 145.1 of the* Code*.*

The union agrees that a health and safety officer would have jurisdiction to investigate to determine whether the grievors are being exposed to an unhealthy work environment and whether this violates the employer's duty under section 124 of the Code*. However, the issue is whether this procedure offers real and beneficial redress to the grievors.*

It is the union's position that the procedure under the Code *could lead to an order forcing the employer to abide by the 80% occupancy rate in order to eliminate the exposure to an unhealthy work environment. However, it could not lead to the awarding of damages as requested in the grievances.*

As stated in Galarneau *[2009 PSLRB 70], the grievors' claim for damages cannot be considered accessory or secondary elements of the grievances.*

> [59] . . . The grievors seek two remedies: one having a prospective perspective, which is the elimination of the second-hand smoke for the future, and the other involving compensation for harm allegedly already suffered. I do not see on what basis less importance or value can be attributed to the claim for damages or on what basis it could be deemed a secondary element.
>
> [60] To conclude in this case that the complaint mechanism constitutes an administrative procedure for redress within the meaning of subsection 208(2) of the Act would amount to depriving the grievors of the right to claim damages if it is established that the employer violated the collective agreement. I believe that such an interpretation of subsection 208(2) of the Act would unduly limit the right of the grievors to have their allegations heard.
>
> *[. . .]*

Given this, the union submits that the Code *does not provide a redress measure as complete and beneficial as the grievances because it does not cover a key component of the redress sought by the grievors, being damages. The union further submits that the* Code *does not offer redress that is sufficiently comprehensive to be deemed real and beneficial*

for the grievors, therefore the grievors have rightly filed their individual grievances under subsection 208(1) of the PSLRA *and the grievances have been referred correctly under subsection 209(1) of the* PSLRA.

. . .

Article 22 of the applicable collective agreement clearly confers substantive rights and individual rights and the violation of this article may be used as the basis for grievances. The article reads as follows:

> The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Alliance, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.

The first sentence of article 22 clearly creates for the employer a substantive duty to each of its employees. I quote from Galarneau *[PSLRB 2009 PSLRB 70]:*

> [66] In my opinion, the first sentence of clause 18.01 of the collective agreement clearly creates for the employer a substantive duty to each of its employees: the employer shall make reasonable provisions for the occupational safety and health of employees. Although the duty is expressed in general terms, it is in my view a no less substantive commitment, the scope of which extends to each of the employer's employees. In the second sentence of the clause, the parties set out the means by which they agree to ensure that the duty in the first sentence is met. To enable the employer to meet its duty to make reasonable provisions to protect the health and safety of its employees, the parties commit to consult and to work together to carry out the necessary procedures. I do not see on what basis this second element of the clause should eclipse the employer's duty, and the corollary right of employees, provided in the clause's first sentence.
>
> [67] Indeed, I believe that the main purpose of clause 18.01 of the collective agreement is found in the employer's duty, which is stated in the clause's first sentence, while the second sentence provides for the mechanisms to ensure that the duty is met. The mechanisms, created in the form of respective undertakings by the employer and the bargaining agent, are not exclusive and do not have the effect of

> reducing the substantive nature of the duty clearly established in the clause's first sentence. Furthermore, I see nothing that would prevent the parties from setting out in a single clause both a duty for the employer to its employees and mutual obligations for the employer and the bargaining agent. With all due respect, it is my position that concluding that clause 18.01 does not confer individual rights on employees constitutes an overly restrictive interpretation that voids the meaning of the clause's first sentence.

The case of Gaignard v. Canada (Attorney General) *[2003 Canlii 40299] dealt with the exact collective agreement wording we are dealing with in this particular case. In that case, the Ontario court of appeal [sic] declined jurisdiction because they believed that an adjudicator under the PSSRB would be able to address such matters. As stated in the decision:*

> [23] The facts raise a complaint by individuals who are acknowledged to be covered by the collective agreement. Their complaint is against their employer and its executive team and concerns the way the workplace was run by management. The facts centre on an alleged covert operation to stop contraband entering Kingston Penitentiary which employed methods that the appellants say poisoned their work environment and caused them physical and emotional harm. These allegations clearly engage the employer's obligation in Article 18 of the collective agreement to make reasonable provisions for the occupational safety and health of the employees.
>
> [24] The same reasoning makes it equally clear that the ambit of Article18 extends to the facts which the appellants say underpin this dispute. The employer's obligation under the collective agreement to maintain a safe workplace is directly implicated by the covert operation and its consequences for the appellants as described in the statement of claim.
>
> [25] If this dispute were arbitrated and a breach of the collective agreement were established, the remedy at arbitration would undoubtedly include compensation to injured employees who grieved. That would remedy the wrong in very much the same way as would an award of damages in a court action. There would be no deprivation of ultimate remedy.
>
> [26] Finally, looked at holistically, it seems to me that this is precisely the kind of dispute that the parties intended to be finally resolved by arbitration when

> they agreed to Article 18. The facts involve a workplace dispute between union members and management. The collective agreement sets out an obligation that fits the problem with some precision, and arbitration can provide an effective remedy. In these circumstances, the essential character of the dispute entails that the principle of exclusive jurisdiction apply. The court thus has no power to entertain an action based on this dispute.

Some years later, the Federal Court, without actually ruling on the issue, had an opportunity to weigh in on an almost identical clause in the case Galarneau v. Canada (Attorney General) *[2005 FC 39]. In that decision, the Court referred to the* Gaignard *case and held:*

> [35] However, the language of clause 18.01 and of the provisions examined in these cases is very similar to that in section 124 of the Canada Labour Code, imposing a general obligation on employers in respect of each of their employees, and reading as follows:
>
> 124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
>
> [. . .]
>
> [38] So although it is quite probable that the interpretation adopted by the Ontario Court of Appeal will be followed, particularly in light of the language of section 124 of the Canada Labour Code and the large and liberal interpretation that is generally given to collective agreements, the Court cannot conclude that the plaintiff's position has no chance of success.

If article 22 does not confer substantive rights and individual rights, then the grievors would not have an administrative procedure that provides real and beneficial remedy to the concerns raised in their grievance. This could not have been the intention of the parties when negotiating the collective agreement and could not have been the intention of the legislators when drafting s. 208(2) of the PSLRA.

. . .

[Emphasis in the original]

III. Reasons

[31] I will begin my analysis by addressing the "other administrative procedure for

redress" argument. Subsection 215(4) of the *PSLRA* states as follows:

> ***215.****(4) A bargaining agent may not present a group grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act*.*

[32] The employer stated that the provisions of Part II of the *CLC* apply and that they are an administrative procedure for redress to deal with these group grievances. As a consequence, the employer stated that an adjudicator is without jurisdiction to consider these group grievances.

[33] The bargaining agent agreed that the *CLC* would apply and that an order could be issued forcing the employer to abide by the 80% occupancy rate, but it could not lead to the awarding of damages. As a result, the bargaining agent stated that the *CLC* does not provide a redress measure as complete and beneficial as would the grievance process because it does not cover damages.

[34] The facts of this case show that it is not in dispute that Part II of the *CLC* can be applied to the grievors. One might think that that would decide the matter and that subsection 215(4) of the *PSLRA* would therefore bar the filing of these grievances. However, the bargaining agent stated that the *CLC* does not provide for the possibility of damages under Part II; therefore, any redress cannot be deemed real and beneficial to the grievors.

[35] The Federal Court of Appeal wrote in *Boutilier*, at para 23, as follows:

> *In summary, the principle set out in Byers Transport governs these cases. It is consistent with the wording and purpose of the statute, with Cooper, and with virtually all of the jurisprudence of this Court. The dispute resolution system in federal labour matters is, therefore, not as simple as one would like it to be. If another administrative procedure for redress is available to a grievor, that process must be used, as long as it is a "real" remedy. It need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance." Possible delay in securing redress administratively itself is not significant, unless perhaps it is so pronounced that it can be said that no real remedy is available to the grievor at all. Differences in the administrative remedy, even if it is a "lesser remedy," do not change it into a non-remedy.*

[36] If the *CLC* deals ". . . meaningfully and effectively with the substance of the

employee's grievance . . . ," then the conclusion must be reached that ". . . another administrative procedure for redress . . ." exists that would oust my jurisdiction.

[37] The bargaining agent stated that, under the *CLC*, a health and safety officer could investigate the matter, which ". . . could lead to an order forcing the employer to abide by the 80% occupancy rate in order to eliminate the exposure to an unhealthy work environment." It therefore acknowledged that the process provided for under the CLC provisions does provide some kind of remedy, but argued that the remedy provided was not sufficient as it did not provide for damages.

[38] It is my view that the *CLC* process does in fact provide a mechanism that could deal "meaningfully and effectively with the substance of the employees grievances".

[39] The bargaining agent stated that the grievors' claim for damages cannot be considered an accessory or secondary element of the grievances and quoted *Galarneau* in support.

[40] Although that might have been the case in *Galarneau*, I do not believe the same can be said in this case.

[41] As the bargaining agent submitted, ". . . in order to determine whether another administrative procedure is provided, we need to determine the essence of the grievance. . . ." The bargaining agent submitted that the essence of a grievance must be determined by examining the grievance as a whole, which means also considering the requested corrective action. I agree with that proposition.

[42] Each grievance's requested corrective action contains five parts.

[43] First, the grievors requested that ". . . management immediately ensure that a healthy occupancy rate of 80% is consistently adhered to. . . ."

[44] I note that that is the first requested corrective action. I think it reasonable to conclude that it has a high degree of importance to the grievors, since it ties directly to the grievance statement and is at the top of the list of requested corrective actions.

[45] The bargaining agent acknowledged that a CLC investigator could address the issue of the occupancy rate, which, as noted above, is the first requested corrective action and of utmost importance to the grievors.

[46] Second, the grievors requested ". . . that management hire more staff to reduce occupancy. . . ." An adjudicator would have no jurisdiction to order the employer to hire more staff (for example, see *Brown v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 127, at para 13).

[47] Third, the grievors requested that all staff receive occupancy training.

[48] Fourth, the grievors requested that all staff be provided with their occupancy rates.

[49] Finally, the grievors requested that management provide compensation in the form of sick-time reimbursement.

[50] Four out of the five items refer specifically to the occupancy rate, an issue that the complaint procedure under the *CLC* can address. I have no difficulty in concluding that, in this case, "the essence of the grievance," as the bargaining agent put it, relates to the 80% occupancy rate and not to damages.

[51] Therefore, I have no difficulty concluding that, in this case, following *Boutilier*, the *CLC* is "another administrative procedure for redress," which can deal ". . . meaningfully and effectively with the substance of the [employees'] grievance[s]. . . ," and I have no jurisdiction to hear the grievances.

[52] Having reached that conclusion, there is no need for me to deal with the employer's other arguments.

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

(The Order appears on the next page)

IV. Order

[54] The employer's objection to my jurisdiction is allowed.

[55] I order the files closed.

August 13, 2012.

Joseph W. Potter,
adjudicator