Date: 20131002

File: 569-02-110

Citation: 2013 PSLRB 122

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: Michael Bendel, adjudicator

For the Bargaining Agent: Lionel Saurette, Canadian Association of Professional Employees

For the Employer: Richard E. Fader, counsel

Decided on the basis of written submissions
filed June 6, 14 and 28, 2013.

The grievance

[1] The Canadian Association of Professional Employees ("the Association") has presented a policy grievance challenging the manner in which the Treasury Board ("the employer") has been applying the National Joint Council Work Force Adjustment Directive ("the WFAD") regarding the subject of alternation. The WFAD has been incorporated by reference into the collective agreements between the Association and the employer.

[2] At about the same time that the Association referred the grievance to adjudication, two other bargaining agents, the Public Service Alliance of Canada and the Professional Institute of the Public Service of Canada, referred similar policy grievances challenging the employer's approach to alternation. Those bargaining agents and the employer agreed to consolidate their grievances ("the consolidated case"). The Association considered including the present grievance in the consolidation, but chose not to in view of certain differences between the grievances. However, it stated, at the time it made that decision, that it would follow closely the consolidated case and would not seek to relitigate questions resolved in that case to the extent that they were equally applicable to its own grievance.

[3] The decision in the consolidated case was issued on April 9, 2013 (*Public Service Alliance of Canada and Professional Institute of the Public Service of Canada v. Treasury Board of Canada,* 2013 PSLRB 37). After reviewing that decision, the Association informed the Public Service Labour Relations Board that one issue raised in its own grievance had not been explicitly dealt with in the consolidated case and that it wished to seek a ruling from the adjudicator on that issue. Following a pre-hearing telephone conference, the parties agreed to proceed by way of written submissions on the one outstanding issue.

[4] The outstanding issue was whether, on an alternation, the alternate could choose the option described in paragraph 6.3.1(c)(ii) of the WFAD.

Pertinent provisions of the WFAD

[5] In their submissions, the parties referred to the following provisions of the WFAD:

Objectives

It is the policy of the Treasury Board to maximize employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.

To this end, every indeterminate employee whose services will no longer be required because of a work force adjustment situation and for whom the deputy head knows or can predict employment availability will receive a guarantee of a reasonable job offer within the core public administration. Those employees for whom the deputy head cannot provide the guarantee will have access to transitional employment arrangements (as per Parts VI and VII).

. . .

Definitions

***Alternation** – occurs when an opting employee (not a surplus employee) who wishes to remain in the core public administration exchanges positions with a non-affected employee (the alternate) willing to leave the core public administration with a Transition Support Measure or with an Education Allowance.*

. . .

***Opting employee** – is an indeterminate employee whose services will no longer be required because of a work force adjustment situation and who has not received a guarantee of a reasonable job offer from the deputy head and who has 120 days to consider the options of section 6.3 of this Directive.*

. . .

***Work force adjustment** – is a situation that occurs when a deputy head decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work, the discontinuance of a function, a relocation in which the employee does not wish to relocate or an alternative delivery initiative.*

. . .

6.2.2 An alternation occurs when an opting employee who wishes to remain in the core public administration exchanges positions with a non-affected employee (the alternate) willing to leave the core public administration under the terms of Part VI of this Directive.

. . .

6.2.4 An indeterminate employee wishing to leave the core public administration may express an interest in alternating with an opting employee. Management will decide, however, whether a proposed alternation will result in retaining the skills required to meet the ongoing needs of the position and the core public administration.

6.2.5 An alternation must permanently eliminate a function or a position.

6.2.6 The opting employee moving into the unaffected position must meet the requirements for appointment to the position; for greater clarity, that appointment is subject to all Public Service Commission requirements for the appointment or deployment of an affected employee from his or her surplus position into an unaffected position; this includes language requirements and the determination of applicable equivalencies for staffing purposes. The alternate moving into the opting position must meet the requirements of the position, except if the alternate will not be performing the duties of the position and the alternate will be struck off strength within five days of the alternation.

. . .

6.3.1 Only opting employees who are not in receipt of the guarantee of a reasonable job offer from the deputy head will have access to the choice of options below:

(a)

(i) Twelve-month surplus priority period in which to secure a reasonable job offer. Should a reasonable job offer not be made within a period of twelve months, the employee will be laid off in accordance with the Public Service Employment Act. *Employees who choose or are deemed to have chosen this option are surplus employees.*

(ii) At the request of the employee, this twelve-month surplus priority period shall be extended by the unused portion of the 120-day opting period referred to in subsection 6.1.2 which remains once the employee has selected in writing Option (a).

(iii) When a surplus employee who has chosen, or who is deemed to have chosen, Option (a) offers to resign before the end of the twelve-month surplus priority period, the deputy head may authorize a lump-sum payment equal to the surplus employee's pay for the substantive position for the balance of the surplus period, up to a maximum of six months. The amount of the lump-sum payment for the pay

> *in lieu cannot exceed the maximum of that which he or she would have received had they chosen Option (b), the TSM.*
>
> *(iv) Departments or organizations will make every reasonable effort to market a surplus employee during the employee's surplus period within his or her preferred area of mobility.*
>
> *or*
>
> *(b) TSM is a cash payment, based on the employee's years of service in the public service (see Appendix C) made to an opting employee. Employees choosing this option must resign but will be considered to be laid off for purposes of severance pay.*
>
> *or*
>
> *(c) Education Allowance is a TSM (see Option (b)) plus an amount of not more than $11,000 for reimbursement of receipted expenses of an opting employee for tuition from a learning institution and costs of books and mandatory equipment. Employees choosing Option (c) could either:*
>
> *(i) resign from the core public administration but be considered to be laid off for severance pay purposes on the date of their departure;*
>
> *or*
>
> *(ii) delay their departure date and go on leave without pay for a maximum period of two years, while attending the learning institution. The TSM shall be paid in one or two lump-sum amounts over a maximum two-year period. During this period, employees could continue to be public service benefit plan members and contribute both employer and employee share to the benefits plans and the Public Service Superannuation Plan. At the end of the two-year leave without pay period, unless the employee has found alternate employment in the core public administration, the employee will be laid off in accordance with the* Public Service Employment Act.
>
> *. . .*

[6] Reference was also made to the *Appointment or Deployment of Alternates Regulations*, SOR/2012-83 ("the *Regulations*"), made under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13. Sections 3, 4 and 5 of the *Regulations* read as follows:

> ***3.*** *An alternate must submit an irrevocable resignation from employment in the public service that is accepted by the deputy head and that is to take effect no later than five days after the day on which they are appointed or deployed to the position of the opting employee.*
>
> ***4.*** *An alternate must not perform the duties of the position of the opting employee.*
>
> ***5.*** *An alternate ceases to be an employee in the public service on the day on which the irrevocable resignation takes effect.*

Parties' submissions

[7] The Association argued that an alternate was entitled to choose the option in paragraph 6.3.1(c)(ii) of the WFAD if he or she met all the conditions for the alternation. Those conditions were set out in paragraphs 6.2.4 and 6.2.6. Specifically, this meant that alternates could choose to delay their departure dates and to go on leave without pay for a maximum of two years while attending a learning institution. During that two-year period, they would continue to be members of the public service benefit plan and the Public Service Superannuation Plan.

[8] According to the Association, the alternate who did not meet the requirements of the opting employee's position would not be entitled to benefit from paragraph 6.3.1(c)(ii) of the WFAD, as stated in paragraph 6.2.6, but all other alternates would be entitled to choose the option in paragraph 6.3.1(c)(ii).

[9] The Association maintained that it was clear from the definition of "alternation" and from the language of paragraph 6.2.2 of the WFAD that paragraph 6.3.1(c) fully applied to the alternate.

[10] The *Regulations*, according to the Association, applied to a situation where the alternate did not meet the requirements of the opting employee's position. They provided that the employment of such an alternate had to be terminated by resignation within five days of the alternation. The *Regulations* had no application to an alternate who did meet the requirements of the position and who could therefore choose the option in paragraph 6.3.1(c) of the WFAD.

[11] According to the Association, its interpretation was the only one that would conform with the objectives of the WFAD, which included the maximization of employment opportunities.

[12] In addition to seeking a declaration that alternates could choose option (c)(ii) in paragraph 6.3.1 of the WFAD, the Association requested that the adjudicator do the following:

> (a) declare that the interpretation given in the consolidated case applied (with the necessary changes) to the employees it represented;
>
> (b) allow the parties a fixed period to attempt to resolve their conflicts concerning alternation; and
>
> (c) remain seized to deal with any disputes that the parties were unable to resolve themselves.

[13] The employer replied that not only was the Association's argument inconsistent with the WFAD but it had also been effectively put to rest by the *Regulations*.

[14] The employer observed that paragraph 6.3.1 of the WFAD was directed to "opting employees," not alternates. An alternate was defined in the WFAD as an employee who was ". . . willing to leave the core public administration . . . ," and paragraph 6.2.4 refers to a proposed alternate as an ". . . indeterminate employee wishing to leave the core public administration . . . ." Paragraph 6.2.5 states that "[a]n alternation must permanently eliminate a function or a position." It would be inconsistent with these provisions to hold that an alternate could be on a two-year leave of absence by choosing option (c)(ii) in paragraph 6.3.1.

[15] According to the employer, the *Regulations* made it abundantly clear that an alternate cannot continue to be an employee. The *Regulations* were consistent with the WFAD.

[16] The employer agreed with the remedial order sought by the Association, except for the declaration that alternates could choose option (c)(ii) in paragraph 6.3.1 of the WFAD.

Reasons

[17] The issue on which a decision is sought is whether an alternate can choose option (c)(ii) in paragraph 6.3.1 of the WFAD.

[18] If the Association is right in saying that this option is open to alternates, they would be able, in the words of paragraph 6.3.1(c)(ii) of the WFAD, to ". . . delay their departure date and go on leave without pay for a maximum period of two years, while attending the learning institution." During that period, they could continue to participate in public service benefits and in the Public Service Superannuation Plan.

[19] The employer says that only "opting employees," not alternates, can choose this option since, although it is not expressly denied to alternates, it would be inconsistent with the WFAD as a whole to allow them to continue as employees, even on a two-year leave without pay. It also says that, quite apart from the terms of the WFAD, sections 3, 4 and 5 of the *Regulations* admit of no conclusion other than that the alternate cannot choose option (c)(ii) of paragraph 6.3.1 since they state explicitly that the alternate must submit a resignation, at which point he or she ceases to be an employee.

[20] As I read the WFAD, it does not specifically enumerate the options open to an alternate. Rather, it says that the opting employee "exchanges positions" [sic] with the alternate (definition of "alternation" and paragraph 6.2.2). From this, it could perhaps be deduced that, from the perspective of the WFAD, the alternate stands in the shoes of the opting employee for all purposes and that whatever liabilities and benefits apply to the opting employee by reason of the imminent elimination of his or her position apply equally to the alternate. In other words, the liabilities and benefits of the opting employee could be viewed as attaching to his or her position and as transferring to any other employee moving into that position. That would appear to be the implication arising from the purpose, structure and language of the WFAD. If that is correct, the alternate could choose the option in paragraph 6.3.1(c)(ii).

[21] I am not persuaded that the description in paragraph 6.2.2 of the WFAD of the alternate as a ". . . non-affected employee . . . willing to leave the core public administration under the terms of Part VI of this Directive" necessarily means that the alternate must leave the public service immediately following the alternation. In my view, an employee wishing to leave the core public administration, albeit after a leave

of absence without pay of up to two years, as would happen in the case of an employee choosing option (c)(ii) of paragraph 6.3.1, would still meet the description in paragraph 6.2.2. Similarly, it is not necessarily inconsistent with paragraph 6.2.5, which states that "[a]n alternation must permanently eliminate a function or a position" to hold that the elimination of the function or position could be delayed for two years.

[22] However, it is not necessary for me to express a firm conclusion on these aspects of the interpretation of the WFAD since I agree with the employer's submission that sections 3, 4 and 5 of the *Regulations* make it clear that the alternate cannot remain in employment, even on a leave without pay, for a period of up to two years. These sections provide that an alternate must submit a resignation to take effect not later than five days after the alternation and that he or she ceases to be an employee when the resignation takes effect. Therefore, even if option (c)(ii) of paragraph 6.3.1 of the WFAD were in principle available to the alternate, the *Regulations* make it impossible for him or her to benefit from that option.

[23] I find no basis in the *Regulations* for the Association's argument that they applied only to an alternate who did not meet the requirements of the opting employee's position. The distinction advanced by the Association is not supported by any language in the *Regulations*.

[24] Since there was no mention of this matter in the parties' submissions, I express no opinion on the possible result of the alternate failing to submit a resignation, although required to by section 3 of the *Regulations*.

[25] With this answer to the question submitted to me by the parties, together with the answers given in the consolidated case (which, they have agreed, apply to the collective agreements between them), I trust that they will be able to resolve all or most of their conflicts about alternation. I remain seized of this grievance for a period of 90 days to deal with any disputes within their scope which the parties are unable to resolve themselves.

October 2, 2013.

Michael Bendel,
adjudicator