

Date: 20131024

File: 566-02-5068

Citation: 2013 PSLRB 131



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

LINE LEBEAU

Grievor

and

**TREASURY BOARD
(Statistics Canada)**

Employer

Indexed as

Lebeau v. Treasury Board (Statistics Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

For the Grievor: Bertrand Myre, Canadian Association of Professional Employees

For the Employer: Anne-Marie Duquette, counsel

Heard at Ottawa, Ontario,
May 13 and 14, 2013.
Written submissions filed June 6 and 28 and July 4, 2013.
(PSLRB Translation)

Individual grievance referred to adjudication and summary of the evidence

[1] Line Lebeau (“the grievor”) works at Statistics Canada. She filed an individual grievance on November 9, 2010, which reads as follows:

[Translation]

With this, I contest my employer’s decision requiring me to pay an additional premium to be able to reserve my parking spot. I have a parking spot due to my minor disability, on compassionate grounds. I feel that Statistics Canada’s decision to make me pay double the monthly rate due to my disability is discriminatory and is a direct violation of the Canadian Human Rights Act as well as clause 16.01 of the collective agreement between the Treasury Board and the Canadian Association of Professional Employees.

Corrective measures sought

I request that my employer cease this discriminatory practice and reimburse me the \$100 per month in additional charges. I further request financial compensation for the harm caused by this decision.

I reserve the right to add other appropriate corrective measures during the grievance process.

[2] The grievor is a member of the bargaining unit for the Economics and Social Science Services Group, to which the collective agreement between the Treasury Board and the Canadian Association of Professional Employees signed on March 11, 2009 (“the collective agreement”) applied when the grievance was filed. Clause 16.01 of the collective agreement states as follows:

16.01 *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Association, marital status or a conviction for which a pardon has been granted.*

[3] The grievance is about the amount the grievor, who has a physical disability, had to pay to park at her workplace. The relevant facts are not disputed.

[4] The grievor has Raynaud’s disease (or syndrome), a chronic blood circulation disorder affecting the extremities. When exposed to cold, even at temperatures that are

not very low, the fingers and toes, and sometimes other extremities, suddenly turn white and become cold, unresponsive and numb; the patient may then feel a sharp pain in the affected body parts. In 2005, when she first requested a parking spot reserved for persons with disabilities, the grievor informed Statistics Canada that she suffered from a physical disability, but did not specify it. Her physician signed the request to confirm the degree of her disability. He wrote as follows:

[Translation]

When she is exposed to cold, even on a bus, the patient experiences severe pain and has difficulty walking.

[5] The grievor has been working at Tunney's Pasture in Ottawa since 2001, a vast complex of many buildings and parking lots located along the Ottawa River. For some time, she took a bus to work from her home in Aylmer, Quebec, but her ears often hurt because of the temperature on the bus, even in the summer. In addition, she was particularly sensitive to winds blowing from the river when she had to cross the parking lots at Tunney's Pasture. After her disease was diagnosed in 2005, the grievor purchased a car to commute to work.

[6] According to Statistics Canada's parking policy in effect in 2005, three categories of parking permits were available for employees: general parking, executive parking and "medical/accessible" parking. If employees wished to obtain a medical/accessible parking permit, entitling them to reserved spots close to their offices, they had to have their physicians complete a form confirming that their health condition met the established criteria, such as the inability to use traditional city buses and to walk a distance of 175 metres.

[7] Based on the grievor's request for a medical/accessible parking permit, supported by a medical certificate, Statistics Canada granted her a permit in 2005. Employees holding such permits paid the same parking fees as other employees.

[8] Statistics Canada changed its parking policy in 2010 and transferred the administration of its parking to a private company on November 1, 2010.

[9] Statistics Canada informed employees who "[translation] had a minor disability and had a parking spot on compassionate grounds" that it would continue to reserve parking spots for them. However, it stated as follows: "[translation] new administrative

procedures require charging an additional premium now to allow you to reserve a spot.” With that additional premium, the monthly cost of parking increased from \$100 to \$200. A few days after announcing the new policy, Statistics Canada explained that employees who had disability parking permits issued by their provinces would continue to pay the \$100 monthly fee.

[10] The grievor did not have a provincial permit. She was one of the employees with a “minor disability” under the new policy. Statistics Canada gave her and the other employees in that category the option of using general parking at \$100 per month instead of keeping their reserved spots. The implementation of the new policy was postponed until December 1, 2010, to enable them to make other arrangements, if necessary.

[11] Due to the distance she had to walk outside in any temperature, the grievor felt that she could not do without a reserved spot. She tried to find an alternative but was unsuccessful. Even though the extra cost was substantial for her, she concluded that she had no choice. Thus, she decided to keep the reserved spot and to file a grievance to contest the additional premium.

[12] The grievor testified that the increase caused her financial stress. That was on top of the financial pressure she was already under because of her divorce and because she had begun her career at the advanced age of 41, her ex-husband had passed away, she had decided to allow her adult son to live with her and she had recently bought a condominium. She explained that her financial situation was already precarious before the parking fees were increased.

[13] In addition to the financial impact of the increase, the grievor had a strong impression that Statistics Canada’s decision meant that it did not consider her as valuable as other employees. She felt humiliated. Her self-esteem was affected. She suffered from insomnia and depression because of the situation.

[14] The grievor added that she found the third-level reply to her grievance insensitive and incomprehensible. The employer indicated in the reply that “[translation] [p]aying the administrative costs of all employees in your situation would cost \$650 000 each year” to Statistics Canada, which it could not do “[translation] without taking money from surveys or existing programs.” According to the grievor, the employer tried to blame her for program cuts and job losses because of her

request that it end its discriminatory practice. Furthermore, she stated that the \$650 000 mentioned in the reply was incomprehensible and inconceivable.

[15] Peter Morrison, Assistant Chief Statistician, explained during his testimony that the parking policy that Statistics Canada adopted in 2010 followed a decision by Public Works and Government Services Canada (PWGSC) to privatize parking across the federal government. The PWGSC decided that the monthly price for the grievor and for other employees in the same category would increase to \$200. Mr. Morrison discussed it with the PWGSC's deputy minister but did not manage to change the latter's decision. According to Mr. Morrison, the PWGSC justified the increase by citing the need to monitor permit holders and to keep their information up to date. He added that Statistics Canada had doubts about the merits of certain medical/accessible parking permits for employees who did not have a provincial permit and about the interpretations of their medical certificates.

[16] Mr. Morrison explained that Statistics Canada had to pay the PWGSC an additional monthly premium of \$100 for each reserved parking spot. Because of budget cuts, those costs could not be absorbed.

[17] Mr. Morrison, who replied to the grievance at the third level on behalf of the employer, did not recall the basis used to estimate that it would cost Statistics Canada \$650 000 each year to cover the additional premium for all employees in the same situation as the grievor.

[18] In November 2012, after the grievance had been filed, Statistics Canada decided to offer the grievor and the other employees in the same category reserved parking spots at the same price as general parking as of December 1, 2012. According to Mr. Morrison, since demand for reserved parking spots had dropped, Statistics Canada was able to subsidize parking for those employees. Following the policy change, Statistics Canada decided to reimburse the grievor \$2460 for the additional premium she had to pay, which she received in April 2013. Mr. Morrison could not explain why the grievor received her reimbursement only in April 2013.

Statutory provisions

[19] The parties cited the following provisions of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (*PSLRA*):

226. (1) An adjudicator may, in relation to any matter referred to adjudication,

...

(h) give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the Canadian Human Rights Act;

(i) award interest in the case of grievances involving termination, demotion, suspension or financial penalty at a rate and for a period that the adjudicator considers appropriate

...

[20] The parties also referred to the following provisions of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*):

...

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

...

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

...

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

...

Summary of the arguments

[21] The grievor pointed out that the increase in the price for her reserved parking spot was a discriminatory practice. She was disadvantaged or deprived due to her medical condition. In addition, it could be argued that she required accommodation because she had a disability, namely, Raynaud's disease. By requiring her to pay double what general parking permit holders paid, the employer was guilty of discrimination, which contravened the *CHRA* and clause 16.01 of the collective agreement. In other words, the required accommodation, a reduction to the grievor's parking fees, did not constitute undue hardship. The grievor cited the Supreme Court of Canada decisions *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, and *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566.

[22] The grievor pointed out that she was not reimbursed the additional premium until April 2013, five months after the policy change, despite numerous reminders. According to her, it was indicative of a carefree and reckless attitude on the part of Statistics Canada.

[23] The grievor pointed out that under paragraph 226(1)(h) of the *PSLRA*, the adjudicator can make an order under paragraph 53(2)(e) of the *CHRA* for damages for pain and suffering. The grievor allegedly suffered profound physiological and psychological repercussions that could be attributed to Statistics Canada's discrimination against her. Mr. Morrison's insensitive remarks in his grievance reply allegedly added to the harm that she suffered. Therefore, the adjudicator should order a payment of \$15 000 to the grievor for pain and suffering. The grievor cited *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15, and *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 110, in support of her claim. According to the grievor, at the very least, Statistics Canada should have informed itself about her medical condition before denying her grievance.

[24] Additionally, the adjudicator should award the grievor \$20 000 in special compensation, as set out under subsection 53(3) of the *CHRA*, since Statistics Canada

acted willfully and recklessly, in addition to interest on the amount reimbursed in April 2013.

[25] The employer responded that Statistics Canada's parking policy was not discriminatory. In addition, it pointed out that the \$2460 payment in April 2013 was an adequate remedy. Nothing in this case justifies compensation for pain and suffering or special compensation under subsection 53(3) of the *CHRA*, any more than paying interest.

[26] According to the employer, for the adjudicator to find that discrimination occurred, the grievor had to prove a link between her membership in a protected group and detrimental impact, as ruled by Justice Abella in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para 48. The grievor's medical disability was not a factor in Statistics Canada's decision or in the detrimental impact of the decision. Therefore, the adjudicator should find that no discrimination occurred against the grievor.

[27] The employer pointed out that even if discrimination occurred, the reimbursement of \$2460 in parking fees was a suitable remedy. The evidence adduced did not justify compensation for pain and suffering. In particular, the evidence did not establish that the grievor lost her enjoyment of life because of Statistics Canada's actions. If she suffered financial stress from the additional premium, it is because her financial situation was already precarious, for which the employer cannot be held accountable. As for her feelings of humiliation and loss of self-esteem, the grievor's testimony focused mainly on her reaction to the third-level grievance reply, a reaction that was unreasonable and unfounded. Furthermore, the grievor adduced no evidence aside from her testimony that she had suffered a lack of confidence or self-esteem, stress, etc., because of the parking fee increase. The case law she cited, namely, *Cyr, Lloyd* and *Stringer*, differs quite clearly from this case, as far as Statistics Canada's actions are concerned.

[28] As for the special compensation that the grievor claimed under subsection 53(3) of the *CHRA*, the employer argued that the adjudicator cannot award such compensation unless Statistics Canada's conduct was willful or reckless, which the evidence failed to show. The employer cited *Canada (Attorney General) v. Robitaille*, 2011 FC 1218.

[29] Finally, the employer argued that the adjudicator did not have jurisdiction to order interest in this case, as the Federal Court of Appeal explained in *Nantel v. Canada (Attorney General)*, 2008 FCA 351, in which it based its decision on paragraph 226(1)(i) of the *PSLRA*.

[30] In addition to the case law mentioned earlier, the employer referred to *Simpsons-Sears; Peel Law Association v. Pieters*, 2013 ONCA 396; *Moore v. British Columbia (Education)*, 2012 SCC 61; *Canada (Attorney General) v. Tipple*, 2011 FC 762 (appeal allowed in part in 2012 FCA 158); *Robitaille; Grierson-Heffernan v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 30; *Currie v. Deputy Head (Department of Fisheries and Oceans)*, 2010 PSLRB 10; *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (QL) (C.A.); *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Burles v. City Cabs (1993) Ltd. (No.1)*, 2008 NWTHRAP 10 (CanLII); *Burles v. City Cabs (1993) Ltd. (No.2)*, 2009 NWTHRAP 1 (CanLII); and *Lavoie v. Canada (Treasury Board of Canada)*, 2008 CHRT 27.

[31] The grievor responded that her testimony as to how her financial situation was affected by the additional premium was solid and direct evidence that the adjudicator should accept. According to her, the amount claimed for pain and suffering is comparable to the ruling made in *Burles v. City Cabs (1993) Ltd. (No.1)*, 2008 NWTHRAP 10 (CanLII), which demonstrates the reasonableness of the request. Finally, the grievor pointed out that the adjudicator was authorized to order the payment of interest since, under paragraph 226(1)(g) of the *PSLRA*, he has the same powers in this matter as the Canadian Human Rights Tribunal, which includes the authority to award interest under subsection 53(4) of the *CHRA*.

Reasons

[32] Under section 7 of the *CHRA*, it is a discriminatory practice “. . . in the course of employment, to differentiate adversely in relation to an employee”

[33] I have doubts about the discriminatory nature of Statistics Canada’s parking policy for two reasons. I have raised doubts rather than officially decide these matters because the parties hardly addressed them in their arguments.

[34] First, I note that Statistics Canada increased the price of reserved parking spots only for employees with disabilities who were without a provincial permit. Therefore, it can be concluded that it chose to use the same definition as the provinces to

categorize persons with disabilities for the purposes of priority parking and to defer to the decisions of the provinces in specific cases. Under such circumstances, to criticize Statistics Canada's decision is equivalent to criticizing the provincial rules on priority parking. It seems perfectly reasonable to me to decide to adopt provincial criteria and administration rather than establishing its own criteria. How can Statistics Canada be criticized for making the same such distinction as provincial authorities? Regardless, its decision cannot be called arbitrary.

[35] Second, the grievor did not indicate during her testimony whether she had applied for a provincial permit. Given Statistics Canada's decision to defer to the provincial rules, it seems to me that the simplest and most direct recourse for the grievor would have been to obtain a permit. That is far easier and more direct than entering into a lengthy dispute with Statistics Canada, filing a grievance and referring it to adjudication. Although no evidence about it was adduced, it would appear that a provincial permit can be obtained by filling out a form and mailing it, along with a letter from a physician. I have raised that issue because the new Statistics Canada parking policy can be viewed not as a discriminatory practice but instead as an invitation for the grievor and other individuals in the same category to obtain a provincial permit as a condition for keeping a reserved spot for the older price. Requiring employees to complete a form to avoid a monthly premium of \$100 is not a discriminatory practice.

[36] I will set those doubts aside.

[37] The main dispute between the parties is about compensation for pain and suffering and the special compensation requested by the grievor.

[38] Even if Statistics Canada violated the collective agreement and the *CHRA* by imposing an additional premium on the grievor as a condition for keeping her reserved spot (which I doubt), it is impossible to conclude that she would be entitled to moral damages. In *Canada (Attorney General) v. Tipple*, 2011 FC 762 (appeal allowed on other matters in 2012 FCA 158), the Federal Court expressed the opinion that an adjudicator should not award compensation for psychological injury in the absence of evidence of such an injury, preferably provided by a health professional. Furthermore, the evidence should indicate that the injury is significant and long lasting. Justice Zinn wrote as follows at paragraph 60 of that decision:

[60] . . . *Second, there was no evidence offered by Mr. Tipple other than his own evidence that he experienced a lack of confidence, hurt feelings, low self esteem [sic], humiliation, stress, anxiety and a feeling of betrayal. Specifically, there was no evidence that Mr. Tipple was required to obtain medical treatment or was provided with a psychological diagnosis that was premised on the employer's conduct in the manner of termination, other than the mere fact of the termination of his employment. Third, unlike the facts in Zesta Engineering, there is nothing in the decision to suggest that the psychological injury to Mr. Tipple was "significant, long lasting, and ongoing." . . .*

[39] In her testimony, the grievor described how she felt because of Statistics Canada's discriminatory practice but did not state that she had to consult a health professional about it. She filed no evidence of that pain and suffering other than her testimony. Nor did she mention that she continues to experience it.

[40] Still to be dealt with is the claim for special compensation under subsection 53(3) of the *CHRA*. Before awarding such compensation, the adjudicator must find ". . . that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly."

[41] I cannot conclude that the grievor is entitled to such compensation. Even if the new policy did not comply with the *CHRA*, which I highly doubt, Statistics Canada did not act recklessly or unreasonably, in my view, by deciding to defer to the provincial rules on priority parking. It did not make its decision maliciously or without considering the consequences for employees.

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

(The Order appears on the next page)

Order

[43] The grievance is denied.

October 24, 2013.

PSLRB Translation

**Michael Bendel,
adjudicator**