Date: 20131024

File: 566-02-5022

Citation: 2013 PSLRB 130

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

JEAN-GUILLAUME DUFOUR

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Catherine Quintal, UCCO-SACC-CSN

For the Employer: Martin Desmeules, counsel

Heard at Québec, Quebec,
May 14 and 15, 2013.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] On July 29, 2010, Jean-Guillaume Dufour ("the grievor") filed a grievance against the Correctional Service of Canada ("the employer"), claiming that it violated the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN, which expired on May 31, 2010 ("the collective agreement").

[2] The grievor has been a CX-01 correctional officer at the Donnacona Institution in Donnacona, Quebec, since February 2000. His grievance is worded as follows: "[translation] I am filing a grievance under articles 37 (No Discrimination) and 30.04 (Parental Allowance) of the CX collective agreement." As corrective action, the grievor requested that he be paid in full the amount owed him under clause 30.04.

[3] The grievor's bargaining agent referred the grievance to adjudication on January 5, 2011. In the notice of reference, article 37 and clause 30.04 of the collective agreement were once again identified as the provisions of the collective agreement forming the subject of the grievance. Article 37 of the collective agreement addresses the elimination of discrimination, while clause 30.04 covers a maternity allowance that an employee granted maternity leave without pay could receive.

[4] At the hearing, the grievor specified in his opening statement that clause 30.04 was not the subject of his grievance but instead clause 30.07, which provides a parental allowance that an employee granted parental leave without pay could receive. According to the grievor, the reference to clause 30.04 in both his grievance and the referral to adjudication was nothing more than a typographical error.

[5] In its opening statement, the employer raised a preliminary objection to jurisdiction, indicating that I did not have jurisdiction to rule on the matter because the grievor had raised the issue of clause 30.07 for the first time at adjudication rather than in the initial grievance; see *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192.

[6] In rebuttal, the grievor indicated that it was clear from the documentation that he had filed with his grievance and in the employer's response as part of the grievance process that his grievance was in fact founded on the parental allowance and not on the maternity allowance, to which the grievor acknowledged having no right.

[7] I indicated to both parties that I would hear all the evidence and their arguments on both the preliminary objection to jurisdiction and on the merits of the grievance and that I would take everything under consideration.

II. Summary of the evidence

[8] At the hearing, the grievor testified and called an additional witness, Yanne Garneau, a union representative. The employer called no witnesses.

[9] The grievor indicated that his de-facto spouse, who is also a correctional officer at the Donnacona Institution, gave birth to their first child on August 28, 2009, and that he informed his employer at that time that he would take parental leave without pay for a period of five weeks, i.e., from September 1 to October 5, 2009. He added that the employer approved the leave in question, in accordance with clause 30.06 of the collective agreement, which the employer did not dispute.

[10] The grievor then contacted a compensation advisor of the employer to better understand the benefits and allowances to which he was entitled during the leave. The advisor explained that the grievor might have been entitled to a parental allowance, i.e., a pay supplement representing the difference between 93% of his weekly rate of pay and the parental or paternity benefits that he would receive under the Québec Parental Insurance Plan (QPIP) but that the employer would pay a maximum of 52 weeks of benefits for an employee couple. The grievor was also told that since his spouse was already receiving a parental allowance and that she planned to collect 52 weeks of parental and maternity benefits, he was not eligible for the parental allowance stipulated in clause 30.07 of the collective agreement and was entitled only to the QPIP paternity benefits, which represented 70% of his weekly pay. A detailed letter from the employer's compensation advisor, dated September 2, 2009, was adduced in evidence, and it confirmed the facts that the grievor presented.

[11] According to the grievor, the fact that his de-facto spouse was also a federal employee made him ineligible for the 23% supplement stipulated in clause 30.07 of the collective agreement, i.e., the difference between 93% and 70%, as opposed to all his colleagues, whose spouses are not federal employees. According to the grievor, that represented a shortfall of about $1765 (gross) for the 5-week period in question, which he deemed discriminatory.

[12] In July 2010, the grievor met with his union representative, Mr. Garneau, to discuss the employer's position on his right to a parental allowance and the possibility of filing a grievance. Mr. Garneau indicated in his testimony that he advised the grievor to file a grievance and that he contacted the president of the local to ask him to draft and file a grievance for the grievor. According to Mr. Garneau, the idea was never to base the grievor's grievance on clause 30.04 of the collective agreement, because the intent was always to challenge the employer's decision to deny the grievor a parental allowance to cover the difference between 93% of his weekly pay and the QPIP paternity benefits he received. According to Mr. Garneau, the reference to clause 30.04 in both the grievance and the notice of reference to adjudication was a typographical error.

[13] In cross-examination, the grievor confirmed that he did not draft the grievance in question and that he never intended to refer to clause 30.04 of the collective agreement or to claim a maternity allowance. According to him, it was clear both in his grievance and at the first-level grievance process meeting that the subject of his grievance was his right to the parental allowance stipulated in clause 30.07 of the collective agreement.

[14] The grievor stated that he went alone to the first-level grievance process meeting on September 18, 2010, and that his manager confirmed to him at that time that if two spouses worked for the employer, only one of them at a time could receive the parental allowance, up to the stipulated maximum. Following the meeting, the employer rendered a decision. That decision (Exhibit S-4) reads as follows:

> [Translation]
>
> *. . . Currently, only one of the two employees can benefit from the parental plan of 93% of salary.*
>
> *ARGUMENT FROM THE GRIEVOR AND/OR THE UNION:*
>
> *At the first level:*
>
> *The grievor argued that he is the victim of discrimination; only one of the two employees can receive the "93%" during the parental leave because both work for the CSC.*

[15] The grievor was not present at the second-level grievance process meeting because Mr. Garneau attended alone and presented the grievor's position to the director of the Donnacona Institution. According to Mr. Garneau, it was clear that the issue was the grievor's right to a parental allowance for a five-week period, and he never mentioned clause 30.04 of the collective agreement or the grievor's right to a maternity allowance. The employer adduced no evidence to the contrary. After the second meeting, the employer rendered a decision, which reads as follows:

> [Translation]
>
> . . .
>
> *This follows from the transmittal of your grievance to the second level and is about the fact that under the allowances paid during leave for the birth of a child, clause 30.04 (Maternity Allowance) in no way refers to the rates granted in the event that both employees work for the CSC. Currently, only one of the two employees can benefit from the parental plan of 93% of salary.*
>
> *Your grievance was heard on November 3, 2010, in the presence of your union representative, Mr. Yanne Garneau, and me. Since I received no new facts after the hearing of your grievance that would allow modifying the decision you received at the first level, I uphold this decision for the same reasons cited in your first-level response.*
>
> *Given the preceding, your grievance is denied.*
>
> . . .

[16] Mr. Garneau confirmed that he received the decision from the second level of the grievance process. He noted that the grievance had been denied and immediately sent the decision to those responsible for representation at the third and final level. In cross-examination, he did not remember seeing references to clause 30.04 and the maternity allowance in the decision.

[17] Mr. Garneau did not take part in the third and final level of the grievance process and did not remember receiving a copy of the final decision that the employer rendered after the referral to adjudication. Nor did the grievor take part in a final-level meeting, if one was held, but he confirmed receiving the decision from the third and final level of the grievance process, which stated the following:

> [Translation]

. . .

> *This is in response to your grievance filed on July 29, 2010, in which you claimed to be the victim of discrimination within the meaning of article 37 of the collective agreement for correctional officers (CX). As a corrective measure, you asked that the employer pay you all sums owing that are stipulated in paragraph 30.04.*
>
> *I considered all the information contained in your file before rendering this decision.*
>
> *Paragraph 30.04 of the CX collective agreement refers to the allowance provided for maternity leave without pay. Paragraph 30.03 of the collective agreement clearly defines that maternity leave applies only to "*the employee who becomes pregnant.*" Accordingly, maternity leave cannot be granted to you, whether in part or in whole, given the provisions of the collective agreement, because only pregnant women have the right to it. For your information, I would like to refer you to paragraph 30.06 (parental leave), to which you are entitled. Paragraph 30.07 addresses the allowance to that effect, and the leave can be shared between the father and mother of the newborn.*
>
> *Consequently, I inform you that your grievance and the requested corrective measure are unfounded and, accordingly, are denied.*

. . .

[18] In cross-examination, the grievor confirmed that following the birth of their first child, his spouse received a combined total of 52 weeks of parental and maternity benefits from the employer and, by that very fact, received 93% of her weekly rate of pay for the 52 weeks in question. He also admitted to never consulting his union's website to learn its position on pregnancy-related leave, i.e., maternity and parental leave. Although the website in question indicates that the father can receive parental leave covered by the QPIP for a maximum of 5 weeks at 70% of his salary without affecting the mother's parental leave, nothing on the site suggests that a father receiving the paternity benefits in question can receive the parental allowance stipulated in clause 30.07 of the collective agreement if his spouse has already received the maximum weeks of parental allowance stipulated by the collective agreement.

III. Summary of the arguments

A. For the grievor

1. *Burchill*: change to the nature of a grievance

[19] The grievor maintained that his reference to clause 30.04 of the collective agreement in both the grievance and the notice of reference to adjudication was nothing more than a typographical error. In his opinion, what matters is his reference to "parental allowance" in the grievance's wording.

[20] The grievor maintained that the evidence showed that the representations he made at the first level of the grievance process and those made by Mr. Garneau at the second level actually addressed his eligibility for the parental allowance stipulated in clause 30.07, not his eligibility to the maternity allowance stipulated in clause 30.04.

[21] According to the grievor, the evidence also showed that the allowance he sought, and the allowance addressed in a detailed response from the employer on September 2, 2009, was in fact the parental allowance stipulated in clause 30.07 of the collective agreement.

[22] The grievor argued that the employer could not have claimed surprise at having to address his eligibility to the parental allowance or to clause 30.07 of the collective agreement at adjudication, as the issue had always been at the heart of the debate between the parties, and the employer knew the exact nature of his complaints throughout the grievance process. So, according to the grievor, this issue was not raised for the first time at adjudication, which means that the principles set out in *Burchill* do not apply in this case.

[23] The grievor urged me to interpret the grievance liberally and to find that no new issue was raised at adjudication, that the grievance was admissible and that I had jurisdiction to consider its merits.

[24] As for the issue of my jurisdiction, the grievor cited *Juba v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 71; *Mississauga Hydro-Electric Commission v. I.B.E.W., Loc. 636* (1992), 28 L.A.C. (4th) 177; and *Toronto (City) v. C.U.P.E., Loc. 79* (2002), 113 L.A.C. (4th) 151.

2. Merits of the grievance

[25] The grievor maintained that he met the requirements of clause 30.07 of the collective agreement at the time of his parental leave without pay and that the employer's refusal to pay him the parental allowance stipulated in that clause was a violation of the collective agreement.

[26] The grievor maintained that clauses 30.06(a) and 30.07(a) of the collective agreement entitled him to parental leave without pay and the associated parental allowance and that those clauses stipulate no exceptions in cases of a grievor's spouse also claiming the same benefits. The clauses in question read as follows:

> ***30.06 Parental Leave Without Pay***
>
> *(a) Where an employee has or will have the actual care and custody of a new-born child (including the new-born child of a common-law partner), the employee shall, upon request, be granted parental leave without pay for a single period of up to thirty-seven (37) consecutive weeks in the fifty-two (52) week period beginning on the day on which the child is born or the day on which the child comes into the employee's care.*
>
> . . .
>
> ***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), providing he or she:*
>
> *(i) has completed six (6) months of continuous employment before the commencement of parental leave without pay,*
>
> *(ii) provides the Employer with proof that he or she has applied for and is in receipt of parental, paternity or adoption benefits under the Employment Insurance or the Québec Parental Insurance Plan in respect of insurable employment with the Employer,*
>
> *and*
>
> *(iii) has signed an agreement with the Employer stating that:*

> *(A) the employee will return to work on the expiry date of his/her parental leave without pay, unless the return to work date is modified by the approval of another form of leave;*
>
> *(B) following his or her return to work, as described in section (A), the employee will work for a period equal to the period the employee was in receipt of the parental allowance, in addition to the period of time referred to in section 30.04(a)(iii)(B), if applicable;*
>
> . . .

[27] The grievor also maintained that when he applied for the parental allowance, he met all the criteria stipulated in clause 30.07(a) of the collective agreement.

[28] According to the grievor, no provision of the collective agreement can be interpreted to prevent an employee couple from claiming more than 52 weeks of benefits associated with the birth of a child because the benefits provided in the collective agreement cover employees individually, despite their marital status or their spouses' workplaces. He asserted that no exception is made for employee couples in the collective agreement with respect to the right to the parental allowance, despite the language used in clause 30.07(k), which stipulates the following:

> *(k) The maximum combined maternity and parental allowances payable under this collective agreement shall not exceed fifty-two (52) weeks for each combined maternity and parental leave without pay.*

[29] The grievor also maintained that even had such an exception been agreed to in the collective agreement, it would not be legally enforceable, given that it would be discriminatory. In his opinion, neither his marital status nor his family status should limit his right to that benefit. He added that the parties subject to a collective agreement cannot contract out of the protections guaranteed by the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). On that point, he referred me to *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, and *N.A.P.E. v. NL (Green Bay Health Care Centre),* [1996] 2 S.C.R. 3.

[30] According to the grievor, the fact that his spouse, also a federal employee, received 52 weeks of benefits associated with the birth of their child should not have

limited in any way his right to the parental allowance stipulated in clause 30.07 of the collective agreement. He maintained that he should have been entitled to the full amount of benefits stipulated by the collective agreement despite his family status and that the employer discriminated against him by treating him differently from employees whose spouses are not federal employees. According to the grievor, the fact that the employer disadvantaged him as an employee based on his marital and family status constituted a discriminatory practice, in violation of section 7 of the *CHRA*. He invited me to compare his personal situation to that of employees covered by the collective agreement whose spouses are not federal employees.

[31] The grievor emphasized that he did not wish to invalidate clause 30.07 of the collective agreement but instead the employer's interpretation of it, along with its practice of limiting employee couples to 52 weeks of benefits for the birth of a child. He also indicated that he was seeking a declaratory order forbidding the employer from continuing to engage in that practice.

[32] Finally, the grievor asked to be paid the parental allowance to which he was entitled, which he estimated at $1765.80, and $1000 for pain and suffering.

B. For the employer

1. *Burchill*: change to the nature of a grievance

[33] According to the employer, the documents adduced in evidence speak for themselves and clearly show that in fact the subject of the grievance was clause 30.04 of the collective agreement, which addresses the maternity allowance. The employer maintained that the administrative decisions it made at all three levels of the grievance process addressed the grievor's eligibility to the maternity allowance stipulated in that clause.

[34] The employer also reminded me that the grievor's referral to adjudication in no way referred to the parental allowance and that the only references in that referral were to article 37 and clause 30.04 of the collective agreement.

[35] The employer also referred me to certain sections of *Juba* and maintained that the grievor's right to a parental allowance was a new issue that the employer had not yet examined as part of the grievance process.

[36] At the very least, the employer asked for a statement from me to the effect that the nature of the grievor's grievance was not clear.

2. Merits of the grievance

[37] The employer asserted that even had the grievance been about the parental allowance stipulated in clause 30.07 of the collective agreement, that clause would have to be read and interpreted within the appropriate context and jointly with clauses 30.03, 30.04 and 30.06, which stipulate the following:

> ***30.03 Maternity Leave Without Pay***
>
> *(a) An employee who becomes pregnant shall, upon request, be granted maternity leave without pay for a period beginning before, on or after the termination date of pregnancy and ending not later than eighteen (18) weeks after the termination date of pregnancy.*
>
> *(b) Notwithstanding paragraph (a):*
>
> *(i) where the employee has not yet proceeded on maternity leave without pay and her newborn child is hospitalized,*
>
> *or*
>
> *(ii) where the employee has proceeded on maternity leave without pay and then returns to work for all or part of the period during which her newborn child is hospitalized,*
>
> *the period of maternity leave without pay defined in paragraph (a) may be extended beyond the date falling eighteen (18) weeks after the date of termination of pregnancy by a period equal to that portion of the period of the child's hospitalization during which the employee was not on maternity leave, to a maximum of eighteen (18) weeks.*
>
> *(c) The extension described in paragraph (b) shall end not later than fifty-two (52) weeks after the termination date of pregnancy.*
>
> *(d) The Employer may require an employee to submit a medical certificate certifying pregnancy.*
>
> *(e) An employee who has not commenced maternity leave without pay may elect to:*

(i) use earned vacation and compensatory leave credits up to and beyond the date that her pregnancy terminates;

(ii) use her sick leave credits up to and beyond the date that her pregnancy terminates, subject to the provisions set out in Article 31 Sick Leave With Pay. For purposes of this subparagraph, the terms "illness" or "injury" used in Article 31 Sick Leave With Pay, shall include medical disability related to pregnancy.

(f) An employee shall inform the Employer in writing of her plans for taking leave with and without pay to cover her absence from work due to the pregnancy at least four (4) weeks in advance of the initial date of continuous leave of absence during which termination of pregnancy is expected to occur unless there is a valid reason why the notice cannot be given.

(g) Leave granted under this clause shall be counted for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave. Time spent on such leave shall be counted for pay increment purposes.

****

30.04 Maternity Allowance

(a) An employee who has been granted maternity leave without pay shall be paid a maternity allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraph (c) to (i), provided that she:

(i) has completed six (6) months of continuous employment before the commencement of her maternity leave without pay,

(ii) provides the Employer with proof that she has applied for and is in receipt of maternity benefits under the Employment Insurance or the Québec Parental Insurance Plan in respect of insurable employment with the Employer,

and

(iii) has signed an agreement with the Employer stating that:

(A) she will return to work on the expiry date of her maternity leave without pay unless the return to work date is modified by the approval of another form of leave;

(B) following her return to work, as described in section (A), she will work for a period equal to the period she was in receipt of maternity allowance;

(C) should she fail to return to work in accordance with section (A), or should she return to work but fail to work for the total period specified in section (B), for reasons other than death, lay-off, early termination due to lack of work or discontinuance of a function of a specified period of employment that would have been sufficient to meet the obligations specified in section (B), or having become disabled as defined in the Public Service Superannuation Act, *she will be indebted to the Employer for an amount determined as follows:*

$$\text{(allowance received)} \times \frac{\text{(remaining period to be worked following her return to work)}}{\text{[total period to be worked as specified in (B)]}}$$

however, an employee whose specified period of employment expired and who is rehired in any portion of the Core Public Administration as specified in the Public Service Labour Relations Act *within a period of ninety (90) days or less is not indebted for the amount if her new period of employment is sufficient to meet the obligations specified in section (B).*

(b) For the purpose of sections (a)(iii)(B), and (C), periods of leave with pay shall count as time worked. Periods of leave without pay during the employee's return to work will not be counted as time worked but shall interrupt the period referred to in section (a)(iii)(B), without activating the recovery provisions described in section (a)(iii) C).

(c) Maternity allowance payments made in accordance with the SUB Plan will consist of the following:

(i) where an employee is subject to a waiting period of two (2) weeks before receiving Employment Insurance maternity benefits, ninety-three per cent (93%) of her weekly rate of pay for each week of the waiting period, less any other monies earned during this period,

(ii) for each week that the employee receives a maternity benefit under the Employment Insurance or the Québec Parental Insurance Plan, she is eligible to receive the difference between ninety-three per cent (93%) of her weekly rate of pay and the maternity benefit, less any other monies earned during this period which may result in a decrease in her maternity benefit to which she would have been eligible if no extra monies had been earned during this period.

(d) At the employee's request, the payment referred to in subparagraph 30.04(c)(i) will be estimated and advanced to the employee. Adjustments will be made once the employee provides proof of receipt of Employment Insurance or Québec Parental Insurance Plan maternity benefits.

(e) The maternity allowance to which an employee is entitled is limited to that provided in paragraph (c) and an employee will not be reimbursed for any amount that she may be required to repay pursuant to the Employment Insurance Act *or the* Parental Insurance Act *in Québec.*

(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 leave without pay;

(ii) for an employee who has been employed on a part-time or on a combined full-time and part-time basis during the six (6) month period preceding the commencement of maternity leave, the rate obtained by multiplying the weekly rate of pay in subparagraph (i) by the fraction obtained by dividing the employee's straight time earnings by the straight time

earnings the employee would have earned working full-time during such period.

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

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

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

(j) Maternity allowance payments made under the SUB Plan will neither reduce nor increase an employee's deferred remuneration or severance pay.

. . .

30.06 Parental Leave Without Pay

(a) Where an employee has or will have the actual care and custody of a new-born child (including the new-born child of a common-law partner), the employee shall, upon request, be granted parental leave without pay for a single period of up to thirty-seven (37) consecutive weeks in the fifty-two (52) week period beginning on the day on which the child is born or the day on which the child comes into the employee's care.

(b) Where an employee commences legal proceedings under the laws of a province to adopt a child or obtains an order under the laws of a province for the adoption of a child, the employee shall, upon request, be granted parental leave without pay for a single period of up to thirty-seven (37) consecutive weeks in the fifty-two week (52) period beginning on the day on which the child comes into the employee's care.

(c) Notwithstanding paragraphs (a) and (b) above, at the request of an employee and at the discretion of the Employer, the leave referred to in the paragraphs (a) and (b) above may be taken in two periods.

(d) Notwithstanding paragraphs (a) and (b):

> *(i) where the employee's child is hospitalized within the period defined in the above paragraphs, and the employee has not yet proceeded on parental leave without pay,*
>
> *or*
>
> *(ii) where the employee has proceeded on parental leave without pay and then returns to work for all or part of the period during which his or her child is hospitalized,*
>
> *the period of parental leave without pay specified in the original leave request may be extended by a period equal to that portion of the period of the child's hospitalization during which the employee was not on parental leave. However, the extension shall end not later than one hundred and four (104) weeks after the day on which the child comes into the employee's care.*
>
> *(e) An employee who intends to request parental leave without pay shall notify the Employer at least four (4) weeks in advance of the commencement date of such leave.*
>
> *(f) The Employer may:*
>
> *(i) defer the commencement of parental leave without pay at the request of the employee;*
>
> *(ii) grant the employee parental leave without pay with less than four (4) weeks' notice;*
>
> *(iii) require an employee to submit a birth certificate or proof of adoption of the child.*
>
> *(g) Leave granted under this clause shall count for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave. Time spent on such leave shall count for pay increment purposes.*
>
> . . .

According to the employer, those clauses all have a common trigger: an adoption order or the birth of a child. Without either trigger, no benefits stipulated in those clauses, including clause 30.07, can be claimed or granted.

[38] The employer maintained that clause 30.07(k) of the collective agreement limits any combined maternity and parental allowances to a maximum of 52 weeks. Accordingly, an employee couple claiming, for example, three different benefits under

clauses 30.04 and 30.07 of the collective agreement, a maternity allowance for the mother, a parental allowance for the mother and a parental allowance for the father, cannot claim and receive more than 52 weeks of combined allowances following the birth of their child.

[39] I think it is appropriate at this point to once again quote clause 30.07(k) of the collective agreement, which stipulates the following:

> *(k) The maximum combined maternity and parental allowances payable under this collective agreement shall not exceed fifty-two (52) weeks for each combined maternity and parental leave without pay.*

[40] According to the employer, neither its refusal to grant the parental allowance to the grievor under the circumstances nor its interpretation of clause 30.07(k) of the collective agreement or its way of applying that clause constituted a discriminatory practice, in violation of section 7 of the *CHRA*.

[41] The employer maintained that contrary to the facts that apply in *Winnipeg School Division No. 1* and *N.A.P.E.*, the issue in this case is not that a person's right was taken away but instead how the applicability criteria was applied to fringe benefits negotiated by the employer and the grievor's bargaining agent.

[42] The employer refuted the grievor's argument that the comparator group in this case consists of all employees covered by the collective agreement whose spouses are not federal employees. Instead, it invited me to compare the grievor's personal situation to that of male employees covered by the collective agreement whose spouses gave birth to or adopted a child. According to the employer, all male employees whose spouses have given birth to or adopted a child are treated the same way, i.e., they have to meet the criteria set out in clause 30.07 of the collective agreement, including the maximum number of weeks stipulated in clause 30.07(k), to be eligible for the parental allowance in question. Those who meet these criteria are eligible, and those who do not are not. In the employer's opinion, the fact that it did not allow the grievor to receive more benefits than those available to other employees in his comparator group or any other employee covered by the collective agreement was not discriminatory.

[43] Finally, the employer maintained that the grievor adduced no evidence to support any pain and suffering.

IV. Reasons

A. *Burchill*: change to the nature of a grievance

[44] I fully agree with the employer's position that the exact nature of the grievance, as described by the grievor in his written process, could be confusing. However, the fact remains that I am certain that the actual subject of the grievance, from the moment the grievance was filed, was the grievor's right to the parental allowance stipulated in clause 30.07 of the collective agreement and that it was brought to the employer's attention at the first level of the grievance process.

[45] The grievance form clearly indicates that the grievor claimed a parental allowance. Those are the exact words he used. Furthermore, the "grievance rationale" prepared by the grievor's manager after the first-level grievance process meeting of September 18, 2010, also indicates that the argument presented by the manager at the meeting in fact addressed an application for parental leave and the associated parental allowance.

[46] Furthermore, a review of the grievor's personnel record would easily have revealed that he requested parental leave without pay, which the employer approved in accordance with clause 30.06 of the collective agreement, for the period from September 1, 2009, to October 5, 2009. It goes without saying that an employee must first be granted parental leave without pay before becoming eligible for the parental allowance stipulated in clause 30.07.

[47] It seems somewhat odd to me to claim that the employer was dealing strictly with an application for maternity allowance. As the grievor and Mr. Garneau testified, the arguments presented at the first- and second-level meetings addressed the grievor's right to a parental allowance, not his right to a maternity allowance. The employer adduced no evidence to the contrary on those meetings. In addition, although the employer's final-level response mentioned the grievor's non-eligibility for the maternity allowance and the fact that he could not avail himself of such an allowance, which is reserved for pregnant women, the parties were unable to confirm whether arguments were presented as part of that final procedure or whether in fact a meeting had actually been held.

[48] Accordingly, it is clear to me that the employer was informed of the nature of the grievor's complaints throughout the grievance process, that the grievor did not try

to introduce or to put forward a new application or position at the adjudication of his grievance, and that, accordingly, the grievance is admissible. Therefore, I find that I have jurisdiction to adjudicate this grievance on its merits.

B. Merits of the grievance

[49] In my opinion, clauses 30.03, 30.04, 30.06 and 30.07 of the collective agreement should be read and interpreted as a whole. A priori, only a female employee who becomes pregnant can be granted the maternity leave without pay stipulated in clause 30.03 and the maternity allowance stipulated in clause 30.04. Those clauses stipulate a maximum of 18 weeks of maternity allowance.

[50] The birth of or the adoption of a child can also entitle an employee to benefits stipulated in clauses 30.06 and 30.07, i.e., parental leave without pay and the parental allowance, but only if the employee meets the criteria set out in clause 30.07 of the collective agreement. One criterion is that the employee must, a priori, receive parental, paternity or adoption benefits either from the federal employment insurance system or from the QPIP, a system open only to residents of the province of Quebec. The benefits of the federal employment insurance system can be shared between the child's two parents for a period not exceeding 35 weeks. Clause 30.07 of the collective agreement stipulates a maximum of 37 weeks of parental allowance. That means that a male employee whose spouse receives the maximum parental benefits stipulated by the federal employment insurance system or the QPIP, whether or not the spouse is a federal employee, cannot meet that requirement of clause 30.07 since he will not have received those parental benefits from either of the two systems. That is so in this case because in fact the grievor's spouse received the maximum parental benefits granted by those systems and, accordingly, the grievor could not show the employer that he had applied for and received those benefits from either the federal or the provincial system.

[51] However, the paternity benefits stipulated by the QPIP are exclusive to the biological father and cannot be shared between the two parents. Does that mean that an employee living in the province of Quebec who applies for and receives the paternity benefits stipulated by the QPIP is automatically eligible for the parental allowance stipulated in clause 30.07 of the collective agreement, despite that his spouse received the maximum number of weeks of maternity and parental benefits? In my opinion, the answer to that question is no. Clause 30.07(k) of the collective

agreement clearly states that the maximum payable for combined maternity and parental allowances cannot exceed 52 weeks for each of the combined periods of maternity and parental leave without pay. That restriction refers to the combined benefits stipulated in clauses 30.04 and 30.07 of the collective agreement, not to any one employee. Several factors can make the number of weeks claimed by employees covered by the collective agreement exceed 52 weeks. For example, adding the maximum number of weeks stipulated in clause 30.04 (18 weeks) to the maximum stipulated in clause 30.07 (37 weeks) gives 55 weeks. However, no matter how the allowances stipulated in those clauses are combined or who claims them, the benefits payable as maternity or parental allowances cannot exceed 52 weeks. In this case, had the grievor's spouse chosen to claim a combined allowance totalling 47 weeks, the grievor could have received the parental allowance he claimed as he would have met all the requirements of clause 30.07, having received the paternity benefits covered by the QPIP, without exceeding the 52 weeks stipulated in clause 30.07(k).

[52] No matter what the benefit paid under the QPIP is called, the allowance payable under the collective agreement is a parental allowance subject to a maximum, as stipulated in clause 30.07(k). The fact that the grievor received paternity benefits, making him eligible for a parental allowance, does not mean that he could receive that allowance, particularly if the maximum stipulated in clause 30.07(k) was already reached.

[53] Although I concluded that the clauses in question should be interpreted as a whole, I agree with the grievor that the benefits stipulated by the collective agreement cover individual employees. However, that does not necessarily mean that "caps" cannot be set on applications for benefits. For example, the National Joint Council Relocation Directive stipulates that only one spouse can submit a request as the primary applicant and that applications from both employees are not permitted.

[54] I also acknowledge the grievor's argument that parties cannot contract out of the protections afforded under the *CHRA*. However, that assumes that that Act was violated.

[55] Although neither counsel cited it, this case is very similar to a recent decision of the Federal Court of Appeal, *Martin v. Canada (Attorney General)*, 2013 FCA 15. In that case, the parents of twins both applied for 35 weeks of parental benefits under the *Employment Insurance Act* (*EIA*), stating that a denial of those benefits violated

subsection 15(1) of the *Charter*. Among other things, the Court found that the distinction made in the *EIA* between "parents" and the "parents of twins" did not create a disadvantage by perpetuating prejudice or by stereotyping. I also note that the Supreme Court of Canada recently denied a request for an appeal of that case.

[56] Although this case was argued under subsection 7(1) of the *CHRA*, I feel that the decision rendered in *Martin* applies to this case. As stipulated by the *Charter*, a case presented under subsection 7(1) of the *CHRA* must also prove that the negative impact was the result of stereotyping, of the perpetuation of a historical disadvantage or of an analogous ground. No such argument was presented, and I do not see any historical disadvantage or stereotyping in this case. I see no prejudice or vulnerability with respect to public employees married to other public employees.

[57] Furthermore, if the grievor's position were adopted, federal spouses living in the province of Quebec would receive more benefits than those working elsewhere in Canada, which is neither a fair nor a desirable outcome.

[58] In conclusion, I share the employer's point of view that the matter at issue is not taking away a person's right or discrimination on prohibited grounds but instead applying the admissibility criteria to the fringe benefits negotiated by the employer and the grievor's bargaining agent and that are now governed by a collective agreement. The birth of a child can lead to a combination of applications for benefits from employees covered by the collective agreement, and the parties who negotiated the collective agreement agreed to set the maximum number of weeks payable for such a combination at 52. Neither clause 30.07 nor the employer's interpretation of it in this case violates the right to equality or contravenes the *CHRA*.

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

(The Order appears on the next page)

V. Order

[60] The grievance is dismissed.

[61] I order the file closed.

October 24, 2013.

PSLRB Translation

Stephan J. Bertrand,
adjudicator