

Date: 20131204

Files: 566-02-4645 to 4648

Citation: 2013 PSLRB 156



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

KAREN GRIERSON-HEFFERNAN

Grievor

and

**DEPUTY HEAD
(Canada Border Services Agency)**

Employer

Indexed as
Grierson-Heffernan v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR REMEDIAL ORDER

Before: Augustus Richardson, adjudicator

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Heard by teleconference,
held on October 25, 2013.

REASONS FOR DECISION

Introduction

[1] On March 25, 2013, I rendered a decision in this matter; see 2013 PSLRB 30. For reasons set out in that decision, I made the following declaration and order:

- a. *the grievor [Karen Grierson-Heffernan] is declared to have been an indeterminate employee within the jurisdiction of the deputy head of the CBSA [Canada Border Services Agency] as of June 15, 2007;*
- b. *... the grievor's termination on August 28, 2007 was a breach of the CBSA's powers under the collective agreement and is set aside;*
- c. *... the CBSA should have designated ... the grievor as an indeterminate employee within the North West New Brunswick Division of the CBSA effective June 15, 2007;*
- ...
- f. *I will remain seized of the matter for 90 days to permit the parties time to agree to and to implement the steps necessary to give effect to this order. ...*

[2] A number of teleconferences were held with representatives for the parties to deal with the remedial portion of the decision. At least one had to be adjourned to a later date because the grievor's representative had not conveyed the employer's offer to the grievor in time for her to consider it. However, as it turned out, the parties were eventually able to agree to solutions to some but not all of the issues arising out of the order. They were able to agree that:

- a. the grievor would take up a position as a CR-03-level cashier in St. Stephen, New Brunswick, at the Ferry Point crossing, on November 12, 2013;
- b. the grievor was to be considered as having been on leave without pay from June 15, 2007 (when she would have become indeterminate had she not been the subject of gender-based discrimination), to November 12, 2013;
- c. the employer would contribute both its and the grievor's shares of pension payments for the period from June 15, 2007, to March 25, 2013 (the date of my decision), calculated at an AS-01 level rate of pay; and

- d. the employer and the grievor were each responsible for their respective shares of pension payments for the period from March 25, 2013, to November 12, 2013, calculated at a CR-03 level.

[3] However, they were not able to agree on whether the grievor was entitled to retroactive pay for the period from March 25, 2013 (the date my decision was released) to November 12, 2013 (the commencement date of the grievor's new job with the employer). A teleconference was held on October 25, 2013, during which submissions were made on behalf of the grievor and the employer.

[4] The union's representative submitted that the grievor should receive retroactive pay because (as detailed in the original decision) it was the employer's discriminatory practice that had resulted in the grievor losing her job when she did on August 28, 2007. She should not suffer a loss as a result. He also submitted that the employer had unreasonably delayed in identifying a suitable job that it could offer her to remedy its original default. The grievor ought not to be prejudiced by that delay, and should be awarded retroactive pay. Not to do so, he submitted, would be to reward the employer for its delay.

[5] The employer's representative submitted that the grievor should not be awarded retroactive pay. She submitted that it was a basic principle that there is no entitlement to pay in the absence of work for that pay. She also submitted that the employer had not acted in a dilatory fashion when identifying a job into which it could place the grievor. Locating a position near to where she lived took time. Moreover, the grievor's representative had been slow to respond to the employer's various offers. It did not accordingly lie in his mouth to complain about any alleged delay on the employer's part.

[6] It was my decision that the grievor should not receive retroactive pay for the period in question. There were several reasons for this conclusion.

[7] First, there is no general rule that an employee is not entitled to pay if they have not worked for that pay. It all depends on the circumstances and the remedy. So, for example, an employee who was found to have been unjustly terminated and is returned to his or her job may be awarded retroactive pay for the period of his or her unemployment even though they did not work during the period.

[8] There is, however, a balancing principle, which is that an employee who has lost their job because of what they allege is the employer's default must nevertheless mitigate their loss while awaiting the outcome of their grievance. An employee who has worked and earned an income from another job while awaiting the outcome of a grievance must deduct that income from any loss they might otherwise have incurred. The employee is not, in other words, entitled to be paid twice for the same time.

[9] In this case the evidence was that the grievor was working at the time of the hearing and, so far as I knew, continued to be working as of the date of my decision and, indeed, up until the time she took up her new position with the employer in November 2013. However, I was not presented with any evidence regarding how much salary she earned during this period. That being the case there was no clear evidence of any loss between March 2013 and November 2013.

[10] Second, I was not satisfied in the peculiar circumstances of this case that an award of retroactive pay was appropriate even if there had been a difference between what the grievor was making in March 2013 and the income she would commence to earn in November 2013. The evidence at the hearing was that in August 2007 the only alternative positions then available were in Halifax. The grievor at that time was married, had a family and was living in New Brunswick. There was no evidence that she would have been prepared to move to Halifax even if the employer had offered her one of those positions (rather than terminating her as it did). That evidence was a factor in my conclusion that the grievor had failed to prove any economic loss as a result of the employer's decision to terminate her. The fact that circumstances as of November 2013 were different, so that the employer could now offer a position close to her home, did not entitle her to claim any retroactive pay prior to the commencement of that job.

[11] Finally, and flowing from the above, I was satisfied that the employer had made good faith efforts to locate a position in a timely way. Part of the delay stemmed from the fact that it was trying to locate a position close to the grievor's home. In other words, there is nothing to say that the job it could offer her as of November 2013 was available in March 2013 when my decision was released. Moreover, and in any event, at least some of the delay was attributable to the grievor's representative. He failed to respond in a timely way to some of the employer's offers, and failed to convey those offers to the grievor in a timely way.

[12] In the end then the grievor's representative failed to establish on the facts, or in law, that the grievor was entitled to any retroactive pay for the period between the date of my decision and the date the grievor took up her new position.

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

(The Order appears on the next page)

Order

[14] It is ordered that:

- a. the grievor will take up a position as a CR-03 level cashier in St. Stephen, New Brunswick, at the Ferry Point crossing, on November 12, 2013;
- b. the grievor is to be considered as having been on leave without pay from June 15, 2007 (when she would have become indeterminate had she not been the subject of gender-based discrimination), to November 12, 2013;
- c. the employer will contribute both its and the grievor's shares of pension payments for the period from June 15, 2007, to March 25, 2013 (the date of my decision), calculated at an AS-01 level rate of pay;
- d. the employer and the grievor are each responsible for their respective shares of pension payments for the period from March 25, 2013, to November 12, 2013, calculated at a CR-03 level; and
- e. the grievor's claim for retroactive pay for the period from March 25, 2013, to November 12, 2013, is dismissed.

December 4, 2013.

**Augustus Richardson,
adjudicator**