Date: 20130220

File: 566-23-4727

Citation: 2013 PSLRB 15

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

SOL PERELMUTER

Grievor

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Employer

Indexed as
Perelmuter v. Office of the Superintendent of Financial Institutions

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

For the Grievor: Maeve Sullivan, Professional Institute of the Public Service of Canada

For the Employer: Sean J. Kelly, counsel, Department of Justice

Heard at Toronto, Ontario,
December 6, 2012.

I. The grievance and the facts

[1] The grievance of Sol Perelmuter ("the grievor"), formerly a senior supervisor at the RE-5 group and level, relates to his entitlement to the reimbursement of tuition expenses pursuant to the *Workforce Adjustment Policy* ("the Policy") of the Office of the Superintendent of Financial Institutions ("the employer"), which is incorporated into the applicable collective agreement. The agreement, between the employer and the Professional Institute of the Public Service of Canada ("the bargaining agent") for the Professional Employees Group ("the collective agreement"), had an expiry date of March 31, 2006. Specifically, the grievance alleges that the employer violated section 6.3.1 (c) of the Policy, which reads as follows:

> *Only opting employees who are not in receipt of a reasonable job offer from the Superintendent will have access to the choice of Options below:*
>
> . . .
>
> ***(c)*** *Education allowance is a Transitional Support Measure (see Option (b) above) plus an amount of not more than $8,000 for reimbursement of receipted expenses of an opting employee for tuition from a learning institution and costs of books and mandatory equipment. Employees choosing this Option must resign from OSFI but be considered to be laid-off for severance pay purposes on the date of their departure.*

[2] The employer refused to pay the tuition expenses claimed by the grievor for the sole reason that his claim was submitted over five years after the termination of his employment. Although the Policy does not stipulate any timeframe within which tuition expenses have to be claimed, the employer stated that the Policy implicitly required employees to submit such claims within a reasonable period, which the grievor failed to do.

[3] The facts are not in dispute. The parties filed the following "Agreed Statement of Facts":

> *1. The Employer is a separate agency. It is the primary regulator and supervisor of federally regulated deposit-taking institutions, insurance companies, and federally regulated private pension plans.*
>
> *2. The Grievor commenced employment in the greater federal public service on or about April 4, 1974.*

3. In 2004, the Grievor was employed as a Senior Supervisor. His position was classified at the RE-5 group and level. This is a unionized position governed by the collective agreement between the Employer and the Bargaining Agent regarding the Professional Employees Group (expiry of March 31, 2006). . .

4. By letter dated October 26, 2004, the Grievor was advised that he was declared surplus and not guaranteed a reasonable job offer. . . The Grievor was 56 years of age at the time he received this letter.

5. As a result, the Grievor elected option "C" under subsection 6.3.1 (c) of the OSFI Workforce Adjustment Policy (the "Policy"). . .

6. The Grievor then resigned effective February 18, 2005. . .

7. The Employer provided the Grievor with the following, before taxes:

> *(a) a lump sum payment Transition Support Measure of approximately $78,000.00, as outlined in the Policy;*
>
> *(b) severance payment of approximately $50,000.00, as outlined in the Collective Agreement;*
>
> *(c) reimbursement of financial planning advice (up to $400.00), as outlined in the Policy; and*
>
> *(d) reimbursement of receipted expenses for tuition from a learning institution and costs of books and mandatory equipment (up to $8,000.00), as outlined in the Policy.*

8. On February 18, 2005, the Grievor and the Employer exchanged emails. . .

9. On or about March 15, 2005, the Grievor started providing services as an independent accountant to various companies and organizations for limited periods of time. The Grievor continues to work as an independent accountant today.

10. On February 14, 2006, the Grievor submitted a claim in the amount of $2,247.00 for a number of CA Association Professional Development 2006 courses. The Employer subsequently reimbursed him in relation to this first claim on March 21, 2006.

11. In or about July and August of 2006, the Grievor submitted two further claims in the total amount of $1,460.95 (i.e. a second claim in amount [sic] *of $524.70 and*

> *third claim in the amount of $936.25) for Tax Update 2006 courses. The Employer subsequently reimbursed him for both claims totalling $1,460.95 on November 13, 2006.*
>
> *12. On May 21, 2007, the Grievor submitted a fourth claim in the amount of $1,325.00. . . The Employer reimbursed the Grievor for this fourth claim on or about June 8, 2007.*
>
> *13. On June 18, 2010, the Grievor submitted a fifth claim for tuition in the amount of $1,680.00 for a fraud examiner course (the "Fifth Claim").*
>
> *14. By email dated August 20, 2010, the Employer denied the Fifth Claim. . .*
>
> *15. On August 27, 2010, the Grievor submitted a grievance contesting the decision to deny the Fifth Claim. . .*
>
> *16. By letter dated September 28, 2010, the Employer denied the Grievance. . .*

[4] The letter of September 28, 2010, denying the grievance, signed by Gary Walker, Assistant Superintendent, Corporate Services Sector, reads, in part, as follows:

> *. . . The educational allowance outlined in the Workforce Adjustment policy in force at the time of your retirement did not stipulate a time-frame in which claims must be submitted. As such my deliberations on the merits of your grievance were focused on precedents and, what might be deemed reasonable.*
>
> *In determining what might be reasonable, I confirmed that Treasury Board (TB) provided an educational allowance as a "Transitional Support Measure" to provide affected staff with "an option to acquire new skills and knowledge that will help them find alternative employment." During our meeting you suggested that you had retired from OSFI electing to become an independent consultant, a position that you have been in ever since. As such I question whether one can still be in transition almost five and a half years after becoming eligible for such support particularly when one has been in the same position for the whole time. In contrast, the maximum period of financial transitional support under the policy is set at one year. Coincidentally your last submitted claim prior to June 2010, was about one year from the date of your eligibility in February 2005 despite the fact that you have continued to take training in the subsequent years to keep current with issues.*
>
> *The second thing I considered was precedent. Enquiries were made both within OSFI and TB to determine actual educational allowance reimbursement practice. No evidence*

> *of any claims for tuition reimbursement was found to have been submitted more than two years after eligibility commenced. In fact, TB provided OSFI with a fact sheet published in 1998 that clearly states that three years would be the maximum acceptable time-frame for submission and that, to their knowledge, this had never been disputed.*
>
> . . .

[5] In addition to section 6.3.1(c) of the Policy, quoted earlier, the parties in their submissions referred to several of its other provisions, including the following:

> ***General***
>
> . . .
>
> ***Collective agreement***
>
> *With the exception of those provisions for which the Public Service Commission (PSC) is responsible, this policy is deemed to be part of the collective agreements between the parties, and employees are to be afforded ready access to it.*
>
> . . .
>
> *1.1.29 OSFI shall inform and counsel affected and surplus employees as early and as completely as possible and shall, in addition, assign a counselor to each opting and surplus employee and laid-off person to work with them throughout the process. Such counselling is to include explanations and assistance concerning:*
>
> . . .
>
> *(b) the work force* [*sic*] *adjustment policy;*
>
> . . .
>
> *(f) the employee's rights and obligations;*
>
> . . .
>
> *(h) alternatives that might be available to the employee (…Education Allowance…);*
>
> . . .
>
> *(j) the meaning of…an Education Allowance;*
>
> . . .
>
> *4.1.3 Subject to the provisions of 4.1.2, the Superintendent shall approve up to two years of retraining.*

. . .

> *6.1.1 Employees who are not in receipt of a guarantee of a reasonable job offer from the Superintendent have 120 days to consider the three Options below before a decision is required of them.*
>
> . . .
>
> *6.3.3 The TSM, pay in lieu of unfulfilled surplus period and the Education Allowance cannot be combined with any other payment under the OSFI Workforce Adjustment Policy.*
>
> . . .

Reference was also made to clause 30.01 of the collective agreement, which reads, in part, as follows:

> *30.01 The following policies form part of this Collective Agreement:*
>
> . . .
>
> *(4) Workforce Adjustment Policy.*

II. <u>Parties' submissions</u>

[6] The grievor's representative argued that the employer, in this adjudication, should be held to the reasons given in Mr. Walker's letter of September 28, 2010, denying the grievance. She objected to Mr. Walker's assertion that the employer had ". . . . provided an educational allowance as a 'Transitional Support Measure' to provide affected staff with 'an option to acquire new skills and knowledge that will help them find alternative employment'." According to her, the education allowance was negotiated between the employer and the bargaining agent and was not "provided" unilaterally by the employer. The reference in Mr. Walker's letter to the acquisition of ". . . . new skills and knowledge that will help them find alternative employment . . . ." was not drawn from the language of the Policy or the collective agreement and could not be used to circumscribe the education allowance. Mr. Walker was also wrong, according to the grievor's representative, to describe the education allowance as a transitional support measure, since the Policy made it very clear (in sections 1.1.29, 6.3.1(c) and 6.3.3) that the two were distinct.

[7] The grievor's representative observed that the Policy contained several time limits (particularly in sections 4.1.3 and 6.1.1), as did the collective agreement.

She argued that it could be inferred from those time limits that, in accordance with the reasoning in *Canadian Union of Public Employees, Local 2316, v. Children's Aid Society of Toronto,* [2009] O.L.A.A. No. 286 (QL), the absence of a time limit in section 6.3.1(c) was deliberate.

[8] According to the grievor's representative, the employer had failed to prove that it would suffer any prejudice by accepting claims such as that of the grievor. She also referred to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which established a six-year limitation period that, according to her, could be used as a guide for a reasonable period for the submission of claims for the reimbursement of tuition expenses under the Policy.

[9] Counsel for the employer argued that the only issue to be determined was whether the employer had violated the Policy. According to him, the employer's earlier responses to the grievance were irrelevant since this was a *de novo* hearing and not a review of the employer's reasons for rejecting the grievance.

[10] Counsel for the employer argued that, while the Policy contained no express time limits to present claims like that of the grievor, the adjudicator should find that a term was implied, according to which such claims had to be submitted within a reasonable period. If an agreement anticipates that a party will perform an act and is silent as to when it should be performed, the law will imply that the party has a reasonable period to perform that act: *Ring Contracting Ltd. v. Aecon Construction Group Inc.* 2006 BCCA 304, *Skipper Online Services (SOS) Inc. (c.o.b. Boaterexam.com) v. 2030564 Ontario Inc. (c.o.b. Boatsmart Canada)*, 2012 ONSC 1852 (upheld in 2012 ONCA 606), *Halsbury's Laws of England*, vol. 97, 5th ed. (2010), at para. 349, and *Chitty on Contracts*, 27th ed. (1994), at para. 21-017. Adjudicators and arbitrators have regularly applied that principle: *Union of Canadian Correctional Officers - Syndicat des agents correctionnels - CSN v. Treasury Board (Correctional Service of Canada)* 2007 PSLRB 120, *Canadian Pacific Railway Co. Mechanical Services v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 101*, [2004] C.L.A.D. No. 9 (QL), *Hamilton-Wentworth (Regional Municipality) Police Services Board v. Hamilton-Wentworth Police Association* (2002), 105 L.A.C. (4th) 139, and *Public Service Employee Relations Commission v. British Columbia Government and Service Employees Union,* [1996] B.C.C.A.A.A. No. 418 (QL).

[11] According to counsel for the employer, the parties must have contemplated that any education undertaken by a former employee like the grievor would be completed within a reasonable time. Had the parties directed their minds to the issue, they would have agreed to such a proposition without hesitation. This is particularly the case in view of the obvious purpose of the education allowance under the Policy, which was to enable former employees to move into alternative employment, a purpose that would be defeated by a delay of several years. The bargaining agent's argument would lead to an absurdity, a result that must be avoided in the interpretation of collective agreements: *Catherine Billett v. Treasury Board (Department of Veterans Affairs),* 2006 PSLRB 28, and *CSA International v. Canadian Union of Public Employees*, [2001] O.L.A.A. No. 605 (QL).

[12] Counsel for the employer argued that five-and-a-half years was beyond the reasonable period implicitly agreed to by the parties for claiming tuition expenses. A reasonable period had to be determined on a case-by-case basis, with account being taken of the grievor's age, years of service, title and ability to obtain alternative employment, as well as the nature and availability of the education being sought. It would also be pertinent to examine the history of any claims for the reimbursement of tuition expenses under the Policy. It was clear that five-and-a-half years was beyond a reasonable period.

[13] In reply arguments, the grievor's representative emphasized that, had the grievor been advised that the employer was going to cut off his claims after a certain time, he could have acted accordingly. Thus, it was unfair for the employer to refrain from giving the grievor any such notice. That observation was reinforced by section 1.1.29 of the Policy, which required the employer to inform employees of their rights and obligations under the Policy. Moreover, contrary to the submissions on behalf of the employer, the Policy did not make entitlement to the reimbursement of tuition expenses dependent on a search for alternative employment. The grievor's representative also observed that the grievor was not a party to the collective agreement, merely a beneficiary, and she questioned whether the adjudicator could properly conclude that an agreement contained an implied term that would operate to the detriment of such a beneficiary.

III. Reasons

[14] I agree with the employer's submission that my role is not to scrutinize or parse Mr. Walker's reasons for rejecting the grievance but to decide whether the employer violated the Policy by denying the grievor's claim in June 2010 for $1680.00.

[15] Both parties accepted that, in the absence of an implied term, the grievance would have to be allowed. Counsel for the employer argued that the test for deciding whether the Policy contained an implied time limit on claims for reimbursement of tuition expenses was enunciated by the adjudicator in *Union of Canadian Correctional Officers – Syndicat des agents correctionnels -CSN*. In that decision, the arbitrator endorsed the test in *McKellar General Hospital v. Ontario Nurses' Assn.* (1986), 24 L.A.C. (3d) 97, at 107. According to the latter award, the power to declare the existence of an implied term could be exercised only in a case in which both the following conditions were met:

> *(1)if it is necessary to imply a term in order to give "business or collective agreement efficacy" to the contract, in other words, in order to make the collective agreement work; and*
>
> *(2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion.*

[16] I have two observations about the test in *McKellar General Hospital.*

[17] First, as I discussed with the parties during argument, the test in *McKellar General Hospital* is designed to decide whether a contract should be held to contain an implied term. However, in this case, the employer urged me to find an implied term not in the contract, but in the Policy. Although no evidence was adduced on the point, one assumes that the Policy, which was declared to form part of the collective agreement both in the agreement and in the Policy, was perhaps originally issued unilaterally by the employer, after consultation with the bargaining agent. I was referred to no authorities dealing with the interpretation of such policies and in particular with the implication of terms in such policies. It is clear that the approach to implying terms differs according to whether the text in question is a contract or a statute. For example, in *Murphy v. Welsh; Stoddard v. Watson*, [1993] 2 S.C.R. 1069, the Supreme Court of Canada, in commenting on the power to imply terms in the interpretation of statutes, wrote the following (at 1078 and 1079):

> *. . . Statutory interpretation presumes against adding words unless the addition gives voice to the legislator's implicit intention. As Pierre-André Côté states in* The Interpretation of Legislation in Canada *(2nd ed. 1991), at pp. 231-32:*
>
> > *Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say:*
> >
> > *. . .*
> >
> > *The presumption against adding words must be treated with caution because legal communication, like all communication, has both implicit and explicit elements. The presumption only concerns the explicit element of the legislature's message: it assumes that the judge usurps the role of Parliament if terms are added to a provision. However, if the judge makes additions in order to render the implicit explicit, he is not overreaching his authority. The relevant question is not whether the judge can add words or not, but rather if the words that he adds do anything more than express what is already implied by the statute.*
> >
> > *. . .*

[18] During argument, I asked the representatives whether, for example, a statute incorporated into a collective agreement by virtue of the reasoning in *Parry Sound District Social Services Administration Board v. O.P.S.E.U., Local 324,* 2003 SCC 42, should be interpreted according to the rules for interpreting statutes or the rules for interpreting contracts. To me, the answer to this question appears obvious: having first seen the light of day as a statute, the text had to be interpreted as a statute, despite its subsequent incorporation into the collective agreement. I was not provided with submissions from the parties as to whether the Policy should be interpreted according to the tests applicable to statutes, or those applicable to contracts, or some other tests.

[19] My second observation pertains to the evolution of case law in the area of implied terms generally. The decision by the Supreme Court of Canada in *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967**,** has been widely viewed as establishing a different approach to implied terms in collective agreements; see, for example, the discussion in Palmer & Snyder, *Collective Agreement Arbitration in Canada*, 4th ed. (2009), at pages 32 to 36.

[20] Despite these observations, I have decided to use the test set out in *McKellar General Hospital,* a test that continues to be followed. As noted above, the employer urged that I apply *Union of Canadian Correctional Officers – Syndicat des agents correctionnels –CSN,* a decision issued by the *Public Service Labour Relations Board* which sets out the test in *McKellar General Hospital,* to determine whether an implied term exists for the time for claiming the reimbursement of tuition expenses under the Policy.

[21] I have decided that there is no proper basis for implying that reimbursement had to be claimed within a reasonable period.

[22] Firstly, I note that the employer's liability for tuition expenses is limited to $8000.00 per opting employee. That is a significant sum, but not so large that a delay in payment for a few years would have an appreciable effect on the employer's budgeting or financial situation.

[23] Secondly, in addition to having no effect on the employer's budgeting or financial situation, a delay in the reimbursement of tuition expenses would have no impact on any other aspects of the employer's operations. The employer, in short, was able to identify no specific reason as to why, from its perspective, a claim for the reimbursement of such expenses had to be submitted within a reasonable period of time. That distinguishes this case from some of the awards relied on by the employer, including *Hamilton-Wentworth (Regional Municipality) of Police Services Board*, in which delays in giving notice of changes to vacation leave could have had an impact on staffing, and *Public Service Employee Relations Commission*, in which the delay in rebutting the presumption that a position had been abandoned could have had an impact on the employer's ability to staff the position. In this case, the employer could point to no operational problems likely to arise from a delay in claiming tuition expenses, and it is difficult to imagine any.

[24] I am not persuaded by any of the other cases relied on by counsel for the employer that an implied term as to a reasonable period for claiming tuition expenses is warranted. Thus, *Union of Canadian Correctional Officers – Syndicat des agents correctionnels - CSN* was a case in which the union contended that the employer should have been required to pay overtime to employees within a reasonable time. The adjudicator in that case agreed with the union's argument, presumably on the common-sense basis that most employees rely on their remuneration to meet their

living expenses and would be seriously inconvenienced or prejudiced by a delay in payment. As for *Canadian Pacific Railway Co. Mechanical Services*, the arbitrator in that case held not so much that relocation benefits had to be claimed within a reasonable time, but rather that, on the construction of the collective agreement, there had to be ". . . some reasonable connection between relocation and entitlement to the benefit provided" (see para. 10 of that case).

[25] The reality is that the absence of the implied term advocated by the employer in this case creates no problems for the employer. The only effect of implying such a term would be to deny the grievor a payment to which he is entitled under the express provisions of the Policy. There would be no advantage to the employer other than saving the money claimed by the grievor. According to *McKellar General Hospital*, before an adjudicator can properly conclude that a term should be implied, it must be shown that it is ". . . necessary to imply a term to give 'business or collective agreement efficacy' to the contract, in other words, in order to make the collective agreement work . . . ." I am satisfied that there is no such necessity in this case.

[26] Although those considerations are sufficient to support the conclusion that the grievance must be allowed, I should add that I am inclined to agree with the argument by the grievor's representative on the relevance of section 1.1.29 of the Policy, which, among other things, requires the employer to inform and counsel employees on "the meaning of … an Education Allowance." The employer asserted that there exist time restrictions on claiming such an allowance, which were apparently never revealed to the grievor before the rejection of the claim that is the subject of this grievance. If, contrary to what I concluded, there were an implied term about the time limit for claiming the reimbursement of tuition expenses, it seems to me that the employer would likely be in violation of section 1.1.29 by reason of having failed to explain it to the grievor at the relevant time, and the grievor would likely be entitled to compensation for such a violation. However, it also seems to me that the onus would be on the grievor to prove that he did not receive an explanation, and the "Agreed Statement of Facts" fails to state that the employer did not give that explanation to the grievor. Therefore, there is an insufficient basis in the evidence to find that a violation of section 1.1.29 occurred.

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

(The Order appears on the next page)

IV. Order

[28] The grievance is allowed. The employer is ordered to pay the grievor immediately the sum of $1680.00.

February 20, 2013.

Michael Bendel
adjudicator