Date: 20130328

File: 566-02-2910

Citation: 2013 PSLRB 32

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARCEL COSSETTE

Grievor

and

TREASURY BOARD
(Department of Transport)

Employer

Indexed as
Cossette v. Treasury Board (Department of Transport)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Normand Audet

For the Employer: Pierre-Marc Champagne, counsel

Heard at Montreal, Quebec,
May 17 and 18, 2012 and February 6, 7 and 8, 2013.

I. Individual grievance referred to adjudication

[1] The grievor filed a grievance on June 17, 2008, seeking retroactive pay. When he filed the grievance, he was an aircraft inspector, classified AO-CAI-02, and was covered by the collective agreement between the Treasury Board ("the employer") and the Canadian Federal Pilots Association (CFPA) for the Aircraft Operations Group, which expired on January 25, 2008 ("the collective agreement"). Although the grievor stopped working for the employer on July 25, 2008, the date on which he retired, he claimed the retroactive pay at a higher level, namely, AO-CAI-03, for the period from September 28, 2002 to April 5, 2005.

[2] The employer raised a preliminary objection to the jurisdiction of an adjudicator of the Public Service Labour Relations Board ("the Board") to hear this grievance on the grounds that it does not fall under subsection 209(1) of the *Public Service Labour Relations Act* (*PSLRA*). It added that the grievance did not arise from an interpretation of the collective agreement but rather from a memorandum of understanding reached between the employer and the CFPA in July 2008.

[3] To ensure that I clearly understood the matter in dispute between the parties, I agreed to hear all the evidence and arguments on both the employer's preliminary objection and the merits of the case. For the reasons that follow, I allowed the employer's preliminary objection and found that I did not have jurisdiction to deal with this grievance.

II. Summary of the evidence

[4] During the hearing, I heard testimony from the following individuals: the grievor; Greg Holbrook, an inspector in Flight Operations at the Department of Transport; Frédéric Prillieux, a technical manager in Flight Operations at the Department of Transport; Ken Graham, the head of the team representing the employer, the Treasury Board; and Diane Desmarais who was Director General, Civil Aviation Division, Quebec Region, Department of Transport, when the grievance was filed.

[5] During the period for which he claimed retroactive pay, the grievor was an air carrier inspector (small aircraft), classified AO-CAI-02, and had been one since 1988. According to him, large-aircraft inspections were once performed by inspectors classified AO-CAI-03. However, in 2000, four positions classified AO-CAI-03 became

vacant, and the work of inspectors classified AO-CAI-03 was performed regularly by inspectors classified AO-CAI-02, including the grievor. He stated that he performed the duties of an AO-CAI-03 since at least 1995 and that he often pointed out that his work description did not reflect the work he was regularly required to perform. He added that his position should have been reclassified to AO-CAI-03 starting in the early 2000s. However, he indicated in his testimony that, to date, he has never filed a grievance about a work description or acting pay.

[6] The employer and the CFPA addressed those issues only in April 2008 after an unfair labour practice complaint in which the CFPA alleged that the employer violated the duty to bargain in good faith and the freeze provisions under the *PSLRA*. The complaint was filed after the employer appointed 22 AO-CAI-02 pilots to AO-CAI-03 term positions and offered them retroactive pay. The pilots were assigned to full-time positions as airline inspectors or senior operations inspectors for flight operations involving commercial and business "large aircraft" exceeding a certain weight category. It should be noted that the employer and the CFPA were in collective bargaining at the time of the employer's proposed appointments.

[7] On July 16, 2008, the unfair labour practice complaint was the subject of a confidential memorandum of understanding, the terms of which settled the matters about the 22 large-aircraft pilots assigned to inspector positions whom the employer originally selected for positions classified at a higher level. Three names were added to this list following the memo. All 25 employees were named in Schedule A of the memorandum of understanding. Additionally, 14 other large-aircraft pilots assigned to inspector positions, who had already begun performing the duties in question, were named in Schedule B, including the grievor. Essentially, the employer set out to appoint 25 employees to positions classified AO-CAI-03 for an indeterminate period and to offer them retroactive pay from the date of their change of duties (those named in Schedule A of the memorandum of understanding). It also set out to grant retroactive pay to employees for the periods in which they performed those duties in the past (those named in Schedule B of the memorandum of understanding), according to documentary evidence that the employer deemed satisfactory.

[8] After reviewing the documents that the grievor provided to demonstrate that he performed the duties of a position classified AO-CAI-03, the employer determined that he indeed met the retroactive pay eligibility criteria for the period from December 23,

1995 to September 27, 2002, and from April 6, 2005 to July 25, 2008, the date on which he retired. However, according to the employer, the grievor did not meet the eligibility criteria for the period from September 28, 2002 to April 5, 2005, which is the period in dispute. The grievor argued that the employer's eligibility criteria were random and inconsistent with the memorandum of understanding reached on July 16, 2008.

[9] The grievor described in detail the duties he performed between September 2002 and April 2005. Considering the reasons that follow about my jurisdiction and the fact that the employer did not contest the grievor's testimony about that issue, I will not reproduce that part of his testimony. In short, the employer did not deny that the grievor spent between 5% and 10% of his time inspecting large aircraft during that period. The grievor did not deny that he did not meet the two criteria set by the employer to establish eligibility for retroactive pay at the AO-CAI-03 level, which were that he was not a senior inspector of a commercial or business air operator with aircraft of maximum takeoff weight of more than 35 000 pounds for jet-engine aircraft and of more than 100 000 pounds for all other aircraft and that, at that time, he did not have a certificate attesting to his technical expertise for such aircraft. The parties did not agree about the legitimacy of those two criteria.

[10] For similar reasons, I will not reproduce the testimonies of Mr. Holbrook or Mr. Prillieux, as they did not provide any relevant evidence to help in my determination, with the exceptions that they offered some context for the unfair labour practice complaint that the CFPA filed in April 2008 and that they supported the grievor's argument that the employer's eligibility criteria were random and inconsistent with the memorandum of understanding.

[11] During his testimony, Mr. Graham indicated that, in December 2009, the parties reviewed the memorandum of understanding of July 16, 2008, to reconsider certain pending matters, which led to a new agreement between the CFPA and the employer on December 21, 2009. According to Mr. Graham, the main purpose of the new agreement was to settle pending issues, including, among other things, the addition of more names to the list of eligible employees and additional pay for certain applicable overtime hours. Mr. Graham added that, during the second round of bargaining that led to the agreement of December 21, 2009, the CFPA and the employer decided not to settle the grievor's claim and to allow him to proceed with the grievance procedure set

out in the collective agreement and the *PSLRA*. An exchange of correspondence between Mr. Graham and counsel for the CFPA substantiated Mr. Graham's related testimony.

[12] According to Mr. Graham, the grievor's claim was never subject to any settlement under either the memorandum of understanding or the subsequent agreement.

[13] During her testimony, Ms. Desmarais indicated that the eligibility criteria for AO-CAI-03 pay was disclosed to employees in April 2008 and that everyone was aware of it when the memorandum of understanding was signed on July 16, 2008. In addition, according to her, the memo in question clearly indicated that eligibility for that pay would be determined based on documents establishing to the employer's satisfaction that the eligibility criteria had been met for the applicable period or periods.

[14] In the grievor's case, Ms. Desmarais confirmed that, first, he met the eligibility criteria from December 23, 1995 to September 27, 2002. The documents that the grievor produced showed that, at that time, he was a senior inspector of a commercial or business air operator with aircraft of maximum takeoff weight of more than 35 000 pounds for jet-engine aircraft and of more than 100 000 pounds for all other aircraft. Second, she also confirmed that, as of April 6, 2005, he held a certificate attesting to his technical expertise for such aircraft, meaning that he met the second eligibility criterion until his retirement. However, since he did not meet either criterion from September 28, 2002 to April 5, 2005, therefore, in her opinion, he was not eligible for retroactive pay at the AO-CAI-03 level for that period. According to Ms. Desmarais, only employees who met those two criteria until now received the retroactive pay in question, which the grievor did not contest.

[15] Ms. Desmarais also indicated that the grievor did not receive retroactive pay from July 29, 2005 to August 31, 2005, from January 5, 2006 to August 31, 2006 and from November 28, 2006 to August 26, 2007 because he was on sick leave during those periods and therefore did not perform the duties of a position classified AO-CAI-03. He did not contest it. In fact, he made no claims for those periods.

III. Summary of the arguments

A. For the grievor

[16] Through his representative, the grievor acknowledged that this grievance is not about acting pay based on the collective agreement and that, even if it were, the corrective action he seeks could not extend beyond 25 days before the grievance was filed (*Coallier v. The National Film Board*, PSSRB File No. 166-08-13465 (19830308); and *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.) (QL)), in other words, a period during which he already received retroactive pay at the AO-CAI-03 level. Therefore, according to him, the grievance must be based on the contractual obligation arising from the memorandum of understanding signed between the employer and the CFPA on July 16, 2008.

[17] The grievor submitted that a Board adjudicator has jurisdiction to determine whether a memorandum of understanding is final and binding and whether one of the parties breached the conditions of the agreement. He referred me to *Amos v. Deputy Head (Department of Public Works and Government Services),* 2008 PSLRB 74, overturned by the Federal Court in 2009 FC 1181, then upheld by the Federal Court of Appeal in 2011 FCA 38, to support his argument that the remedial authority of adjudicators was extended by section 236 of the *PSLRA* and that the processes for executing and implementing memoranda of understanding were essential for harmonious labour relations. Moreover, he pointed out that, in *Amos,* the Federal Court of Appeal found that it would be unfair and inefficient to require an employee to file a new grievance seeking the execution of an obligation arising from the settlement of an earlier grievance and that such a requirement would not be consistent with the purpose of the *PSLRA* to settle disputes efficiently. In *Amos*, the grievor sought the application of a negotiated settlement and wanted the Board to continue to deal with his grievance because his employer did not fulfill its duties arising from the settlement agreement.

[18] In this case, the grievor sought retroactive pay from September 28, 2002 to April 5, 2005 on the grounds that he performed duties on large aircraft during that period and that those duties corresponded to those normally carried out by employees in positions classified AO-CAI-03. In addition, he added that paragraph 5 of the memorandum of understanding clearly states that he was entitled to that pay from

December 23, 1995 until the date of his appointment to an AO-CAI-03 position, on a continuing basis.

[19] The grievor maintained that the employer's eligibility criteria for determining whether he was eligible for retroactive pay were completely random and that they were clearly inconsistent with the memorandum of understanding signed by his union on July 16, 2008. He claimed that he was covered by the memorandum of understanding and that he was entitled to seek its execution and implementation.

[20] In closing, the grievor submitted that the employer violated the provisions of the memorandum of understanding by applying eligibility criteria to retroactive pay that were not provided for in the memorandum of understanding and by refusing to pay him at the AO-CAI-03 level during the applicable period, in other words, from September 28, 2002 to April 5 2005, contrary to the memo's provisions.

B. <u>For the employer</u>

[21] The employer argued that this grievance is solely about the execution of a contractual obligation arising not from the collective agreement but from the memorandum of understanding. In addition, the employer indicated that the union's complaint that eventually led to the memorandum of understanding was about allegations of bad-faith bargaining and a breach of the freeze provisions under the *PSLRA*, specifically paragraphs 190(1)(*b*) and (*c*), which the employer stated do not give rise to individual rights. According to the employer, the rights described in the complaint are strictly union rights. It added that the memorandum of understanding concluded between the union and the employer in no way amended the collective agreement.

[22] The employer maintained that Board adjudicators do not have jurisdiction to enforce settlements that are not part of a collective agreement applicable under the *PSLRA*. In support of that argument, it referred me to *Pelletier-Chabot and Perron-Croteau v. Treasury Board (Public Archives of Canada)*, PSSRB File Nos. 166-02-11948 and 11949 (19820713), as well as *MacLean et al. v. Treasury Board (National Gallery of Canada)*, PSSRB File Nos. 166-02-23640 to 23646 (19930720).

[23] The employer distinguished the facts in this case from those in *Amos*. In this grievance, the grievor is not included in the settlement that he seeks to have applied to him and is not a party to the memorandum of understanding. The employer submitted

that the grievor's grievance was not subject to a memorandum of understanding; instead, it was his union's complaint. According to the employer, the grievor is simply a third party who could benefit from the implementation of the memorandum of understanding.

[24] The employer argued that, even if the grievor were a party to the memorandum of understanding, I could not disregard the following certain relevant factors: 1) although the parties to the memo knew of the eligibility criteria before its execution, they were not specified in it; 2) the memo granted the employer broad discretion over eligibility for retroactive pay; 3) the grievor was never appointed to an AO-CAI-03 position; 4) he was not listed in Schedule A of the memo but instead in Schedule B; 5) his grievance was never settled, and the parties to the memo expressly stated that it would potentially be dealt with by the Board; and 6) the grievor was paid at the AO-CAI-03 level for the 25 days before he filed his grievance (see *Coallier*).

[25] The employer also cited *Wray et al. v. Treasury Board (Department of Transport)* 2012 PSLRB 64. It considered that case nearly identical in subject and facts. It encouraged me to make the same findings as were made in *Wray*.

[26] Finally, the employer argued that a grievance about an entitlement to retroactive pay under a memorandum of understanding to which the grievor was not a party should be denied for lack of jurisdiction.

IV. <u>Reasons</u>

[27] It has been acknowledged that Board adjudicators do not have inherent jurisdiction and that their jurisdiction is derived solely from the *PSLRA*. In the case of a grievance filed by an employee of the core public administration, as in this case, subsection 209(1) of the *PSLRA* limits adjudicators' jurisdiction to the following three circumstances: (i) a grievance about the interpretation or application in respect of the employee of a collective agreement provision (paragraph 209(1)(*a*)); (ii) a disciplinary action resulting in termination, demotion, suspension or financial penalty (paragraph 209(1)(*b*)); or (iii) demotion or termination for unsatisfactory performance or for any other non-disciplinary reasons not covered by other legislation, or deployment without the employee's consent (paragraph 209(1)(*c*)).

[28] In this case, since there was no disciplinary action, demotion, termination or deployment, the only paragraph that could apply is paragraph 209(1)(*a*). After

considering all the evidence, as presented by the witnesses, as well as the documents submitted to support it, it appears clear to me that the claim for retroactive pay made in this grievance does not meet the criteria set out in paragraph 209(1)(*a*) of the *PSLRA* as it does not arise from a breach of the collective agreement but instead from an entitlement under a memorandum of understanding reached between the CFPA and the employer about an unfair labour practice complaint.

[29] The grievor's representative acknowledged that the grievance in question was not based on the interpretation or application of a provision of a collective agreement and that, even if that were the case, the corrective action sought by the grievor could not cover a period before the 25 days preceding the grievance (see *Coallier*). He also acknowledged that the grievor received pay at the AO-CAI-03 level for those 25 days. However, when referring me to *Amos*, he argued that the grievor's grievance could nonetheless be referred to adjudication because adjudicators have not only the authority but also the duty to interpret and enforce agreements reached on matters submitted to the Board (see *Amos*).

[30] Although I accept the grievor's position that the Board has already ruled several times that adjudicators have jurisdiction to interpret and enforce memoranda of understanding, I reject his allegation that I have jurisdiction, in his case, to interpret and enforce a memorandum of understanding reached between the CFPA and the employer about an unfair labour practice complaint. On that point, I fully agree with the following comments, made by Adjudicator Rogers in *Wray*:

. . .

> *[25] However, the grievors' arguments ignore a fundamental fact. In both* Amos *and* Thom*, the issue of the adjudicator's jurisdiction arose in the context of the grievors' requests to reopen their original grievances following what they believed was the failure of the respective employers to honour their settlement agreements. That is not so in this case. These grievors are claiming the benefit of a settlement that was reached in a completely different case. They are not attempting to reopen the unfair labour practice complaint that gave rise to the settlement and could not do so, as they were not parties to that complaint or to its settlement.*

. . .

> *[28] In my view, the argument advanced by the grievors based on* Amos *and* Thom *would expand the jurisdiction of*

question. Additionally, the grievor received pay at the AO-CAI-03 level for the 25 days before he filed his grievance. Finally, his grievance was never settled, as the parties to the memorandum of understanding preferred instead to wait for a Board adjudicator to decide its merits.

[34] For all those reasons, I find that I do not have jurisdiction to deal with the grievor's grievance because it is solely about a claim for retroactive pay based on a memorandum of understanding that did not arise from his grievance and to which the he was not a party.

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

(The Order appears on the next page)

V. <u>Order</u>

[36] The employer’s preliminary objection about jurisdiction is allowed.

[37] I order the file closed.

March 28, 2013.

Stephan J. Bertrand,
adjudicator