Date: 20130513

Files: 566-34-5682 and 5683

Citation: 2013 PSLRB 50

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

AHMAD MOTAMEDI and YASHVANT PARMAR

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Motamedi and Parmar v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

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

***For the Employer*:** Martin Desmeules, counsel, Department of Justice

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Heard at Toronto, Ontario,
February 12 and 13, 2013.

The facts

[1] On March 3, 2009, Ahmad Motamedi and Yashvant Parmar ("the grievors"), both employed by the Canada Revenue Agency ("the employer") as regional science advisors and both classified at the CO-02 group and level, filed grievances to challenge the employer's determination of the rate of pay they had been receiving since 2007. They had both enjoyed salary protection since 2002 following the reclassification of their positions.

[2] The facts, which are not in dispute, are identical in the case of each grievor. They can be summarized as follows:

(a) Until 2002, the grievors were classified at the PM-06 group and level (where they were in a bargaining unit represented by the Public Service Alliance of Canada ("PSAC")).

(b) By letters dated November 22, 2002, the employer informed them that their positions were to be reclassified to the CO-02 group and level (where they were to be in a bargaining unit represented by the Professional Institute of the Public Service of Canada ("PIPSC")). There was no change in their duties at that time, and there had been none as of the date these grievances were filed.

(c) Since the CO-02 maximum rate of pay was lower than the PM-06 maximum rate of pay, the employer's letters informed them that they would be entitled to "salary protection" until the CO-02 maximum salary surpassed the PM-06 maximum salary. More specifically, they were told that they would ". . . continue to receive the pay entitlements for the PM-06 group and level."

(d) Until November 2007, they received the same salary as employees at the maximum rate of pay for the PM-06 group and level.

(e) In 2007, the employer embarked on a comprehensive classification reform programme, with a view to replacing the Treasury Board classification system with a system tailor-made for itself. As a result, effective November 1, 2007, the PM-06 classification was discontinued, and the employer classified the majority of employees who had been at the PM-06 group and level (as well as the majority of employees formerly classified AS-07, IS-06 and PG-05) to the SP-

10 group and level. The grievors' positions, however, continued to be classified at the CO-02 group and level.

(f) In the first collective agreement between the PSAC and the employer following the conversion to the new classification system (having an expiry date of October 31, 2010), the parties agreed to conversion rates of pay for the SP group (i.e., rates that preceded the economic increase effective November 1, 2007, which they negotiated). The maximum rate of pay for the SP-10 group and level on conversion to the new classification system was set at $93 669.00. The then-current PM-06 maximum rate was $90 901.00.

(g) Since the SP conversion, the employer has paid the grievors at a rate that is lower than the SP-10 maximum rate. Specifically, the annual salary they have received and the SP-10 maximum rate since November 1, 2007, are as follows:

Effective Date	Grievors' Salary	SP-10 Maximum Rate
November 1, 2007	93 174	96011
November 1, 2008	95 503	98 411
November 1, 2009	96 936	99 887
November 1, 2010	98 391	101 386
November 1, 2011	99 867	102 907
November 1, 2012	99 867	102 907

[3] The grievors claimed that they are entitled to be paid at the SP-10 maximum rate by reason of being salary protected at the PM-06 group and level. In essence, their complaint was that, since the PM-06 rate no longer exists and has been effectively replaced by the SP-10 rate, the employer has been bound to pay them since November 2007 at the SP-10 rate, which is the only rate that corresponds to the old PM-06 rate.

[4] The employer replied that the pay the grievors have received since November 1, 2007, is based on the old PM-06 rates and has been revised to reflect the percentage increases negotiated for the SP-10 rates since then. This is not a negotiated

rate (although the percentage increases for the SP-10 rates have been negotiated), but one the employer has established. That is the extent of their entitlement.

Relevant provisions

[5] On July 21, 1982, the PIPSC and the Treasury Board signed a memorandum of understanding ("MOU") relating to pay upon reclassification. The following provisions appear in the MOU:

> *GENERAL*
>
> *. . .*
>
> *3. This Memorandum of Understanding supersedes the Regulations respecting Pay on Reclassification or Conversion where the Regulations are inconsistent with the Memorandum of Understanding.*
>
> *. . .*
>
> *5. This Memorandum of Understanding will form part of all collective agreements to which the Professional Institute of the Public Service of Canada and Treasury Board are parties, with effect from December 13, 1981.*
>
> *PART I*
>
> *Part I of this Memorandum of Understanding shall apply to the incumbents of positions which will be reclassified to a group and/or level having a lower attainable maximum rate of pay after the date this Memorandum of Understanding becomes effective.*
>
> *. . .*
>
> *2. Downward reclassification notwithstanding, an encumbered position shall be deemed to have retained for all purposes the former group and level. In respect to the pay of the incumbent, this may be cited as Salary Protection Status and subject to Section 3(b) below shall apply until the position is vacated or the attainable maximum of the reclassified level, as revised from time to time, becomes greater than that applicable, as revised from time to time, to the former classification level. Determination of the attainable maxima rates of pay shall be in accordance with the Retroactive Remuneration Regulations.*
>
> *. . .*

It should be noted that a memorandum of understanding, identical in its material terms with the above-noted one, was entered into by the PSAC and the Treasury Board on February 9, 1982.

[6] Article 45 of the applicable collective agreement between the employer and the PIPSC, with an expiry date of December 21, 2007 ("the collective agreement"), is entitled "Pay Administration." Clause 45.06 reads as follows:

> ***45.06*** *This Article is subject to the Memorandum of Understanding signed by the Treasury Board Secretariat and the Professional Institute of the Public Service of Canada dated July 21, 1982 in respect of red-circled employees.*

[7] The *Reclassification or Conversion Pay Regulations (RCPR)* ("the *RCPR*"), referred to in section 3 ("General") of the MOU, contain a provision, section 4, that is essentially identical to Part I, section 2, of the MOU quoted earlier in this decision. It also contains the following provision:

> *7. If the group or level at which the employee's salary is protected ceases to exist, pay entitlements shall be adjusted to reflect revisions approved from time to time for the more recently identified position level.*

Parties' submissions

[8] The grievors' representative argued that the employer had promised them, in its letters of November 22, 2002, that they would continue to receive PM-06 rates until such time as the CO-02 maximum salary surpassed the PM-06 maximum salary. In 2007, with the introduction of the new classification system, there was no change in the grievors' duties, merely a change in the name of the old PM-06 group and level: it was now called SP-10. The employer's promises to the grievors should therefore be understood as guaranteeing them salary protection at the SP-10 group and level. There was no justification to deprive the grievors of that rate. Since both the PIPSC and the PSAC had entered into essentially identical MOUs, the grievors were undoubtedly entitled to the benefit of salary protection despite their change of bargaining agent. The *RCPR* were inconsistent with the MOU, and therefore, as a result of section 3 (General) of the MOU, they did not apply to the grievors. The adjudicator should therefore declare that they have been entitled to the SP-10 rate since November 1, 2007, and order the employer to compensate them accordingly. In the course of her submissions, the grievors' representative referred to *Fok and*

Stromotich v. Treasury Board (Fisheries and Oceans), PSSRB File Nos. 166-02-25912 and 25913 (19950830), *Janveau v. Treasury Board (Natural Resources Canada) and the Public Service Alliance of Canada,* 2002 PSSRB 2, *Janveau v. Canada (Attorney General),* 2003 FC 1337, and *Johnson v. Canada (Customs and Revenue Agency),* 2004 FC 646.

[9] Counsel for the employer acknowledged that the grievors continued to be entitled to salary protection. However, their entitlement, according to counsel, had been to protection at the PM-06 group and level. Section 7 of the *RCPR* deals with the specific circumstance that has arisen in the grievors' case, namely, the PM-06 group and level has ceased to exist. Section 7 provides that, in such a situation, the salary-protected employee should receive pay that (a) is based on the old group and level (PM-06, in the grievors' case) but (b) is increased periodically to reflect pay increases to the "more recently identified position level" (SP-10, in the grievors' case). The employer had complied with section 7 by applying to the old PM-06 rate the same percentage increases that were negotiated for the SP-10 group and level and by paying the grievors accordingly. The grievors were trying to obtain salary protection at the SP-10 group and level, but they had no such entitlement.

Reasons

[10] Having carefully reviewed the collective agreement, the MOU, the *RCPR* and the letters of November 22, 2002, I am able to find no basis to support the grievors' claim that they are entitled to salary protection at the SP-10 group and level. The situation in which they find themselves, namely, one where the group and level at which they were salary-protected (PM-06) has ceased to exist, is not explicitly addressed in any of these instruments except the *RCPR*. As for the *RCPR*, section 7 states that in such a situation ". . . pay entitlements shall be adjusted to reflect revisions approved from time to time for the more recently identified position level." It is not disputed that the employer has faithfully complied with section 7 of the *RCPR* by adjusting the old PM-06 maximum rate by the same percentages that have been negotiated for the SP-10 rates. The grievors, however, have taken the position that section 7 of the *RCPR* does not apply to their case at all.

[11] I have considered whether the opening sentence in Part I, section 2, of the MOU, which states: "Downward reclassification notwithstanding, an encumbered position shall be deemed to have retained for all purposes the former group and level," could be understood as alluding to the situation in which the grievors find themselves.

However, that provision would offer no support for the grievors' contention that they are entitled to the SP-10 rate and, at best, might give them the right to continue receiving the 2007 PM-06 rate of pay, unadjusted by any subsequent revisions. However, I am not satisfied that it would give them even that right, unattractive to them though it might be, since Part I, section 2, assumes that rates of pay for salary-protected employees will be "revised from time to time," which has not happened and will not happen in the case of the PM-06 rate.

[12] I note that section 7 of the *RCPR* is not squarely incorporated into the collective agreement. To the extent that there is any incorporation, it comes by virtue of section 3 (General) of the MOU, which read as follows:

> *3. This Memorandum of Understanding supersedes the Regulations on Reclassification or Conversion where the Regulations are inconsistent with the Memorandum of Understanding.*

At best, that is an oblique incorporation since section 3 (General) does not state in so many words that, except where the *RCPR* are inconsistent with the MOU, it will continue to apply. Rather, it limits the application of the *RCPR* and merely assumes that, except to the extent of that limitation, the *RCPR* will continue to apply. Since the *RCPR* are only indirectly, if at all, integrated into the collective agreement, I am not sure that I would have jurisdiction to deal with a dispute relating to their application. I also note that, even if section 7 of the *RCPR* were inapplicable to the grievances, there would still be no basis to conclude that the grievors are entitled to salary protection at the SP-10 group and level. Nevertheless, I believe that it is appropriate for me to examine whether section 7 deals with the grievors' case.

[13] There is no dispute that the situation described in section 7 of the *RCPR* is exactly what has transpired for the grievors: the group and level ". . . at which the employee's salary is protected [has ceased] to exist . . . ." The grievors were entitled to salary protection at the PM-06 group and level, but the PM-06 group and level is no more. No employee of this employer has been so classified since 2007, and no negotiations since then have adjusted PM-06 rates of pay. Section 7 states that, in such a situation, the employee is entitled to receive pay that is ". . . adjusted to reflect revisions approved from time to time for the more recently identified position level." The pay they have in fact received since November 2007, which is based on the last

negotiated PM-06 rate but has been "adjusted to reflect revisions approved" for the SP-10 rate, complies with section 7.

[14] However, the grievors argue that section 7 of the *RCPR* does not apply to this case in view of section 3 (General) of the MOU. In order to decide whether section 7 is applicable, I must address two related issues having to do with the interpretation of section 3 (General) of the MOU.

[15] The first issue results from the failure of the MOU to deal with the specific situation raised by these grievances. The MOU makes no provision for, and does not even refer to, the possibility that a group and level at which an employee is salary-protected might cease to exist. This is a gap, a lacuna, in the MOU. If, as here, the *RCPR* provide for a situation that the parties have overlooked or ignored in the MOU, should one conclude that the *RCPR* are, to that extent, "inconsistent" with, and therefore "superseded" by, the MOU within the meaning of section 3 (General)?

[16] In order to answer that question, I have to examine what relationship the parties foresaw between the MOU and the *RCPR* when they negotiated section 3 (General) of the MOU. In the first place, it seems self-evident that they intended that, where the MOU and the *RCPR* dealt with the same issue in different ways, the provisions of the MOU would apply and not those of the *RCPR*. However, if that had been all they intended to accomplish by section 3 (General) of the MOU, there would have been no rational purpose, in my view, for them to draft that section the way they did; they could simply have declared that the MOU superseded the *RCPR*, and it would have been quite unnecessary for them to make any mention of the notion of inconsistency. I cannot simply ignore the words ". . . where the Regulations are inconsistent with the Memorandum of Understanding" and hold that the *RCPR* have been completely superseded by the MOU, but I must attempt to understand the parties' intention in using those words. I rely, in this regard, on the well-known presumption in the interpretation of contracts that the parties intended each word to have some meaning and effect: see, e.g., Palmer & Snyder, *Collective Agreement Arbitration in Canada*, 4th ed. (2009), at pages 29 to 30. It would appear that the parties must have had in mind situations where the *RCPR* would continue to apply, despite the signing of the MOU. More specifically, it seems to me that, by introducing the notion of inconsistency in section 3 (General), the parties must have envisaged the very circumstance revealed in these grievances, namely, the MOU failed to address a scenario dealt with in the

RCPR, and in such a case, they must have intended that the *RCPR* would apply. I can see no other possible explanation for section 3 (General) being drafted this way.

[17] The second issue can be stated as follows: since the MOU is not identical to the *RCPR*, does it follow that the *RCPR* are "inconsistent" with the MOU and are therefore superseded by it in all respects?

[18] According to the terms of the MOU, it supersedes the *RCPR* only "where" the latter are inconsistent with the MOU. I take it from the use of the word "where," rather than, say, the word "if," that the parties to the MOU did not intend that the *RCPR* as a whole would cease to apply once any inconsistency between the MOU and the *RCPR* were identified. In addition, in line with what I stated earlier, if the parties had intended that the MOU would supersede the *RCPR* in all respects, they would scarcely have introduced the notion of inconsistency in section 3 (General) of the MOU. I am therefore satisfied that they intended that the *RCPR* would cease to apply only to the extent of any inconsistency between the two documents.

[19] In light of all these considerations, I have concluded that section 7 of the *RCPR* is applicable to the grievors' case. The employer has complied with section 7. The pay they have received since November 2007 is authorized by the *RCPR*. Nothing in the collective agreement, the letters of November 22, 2002 or any other pertinent instrument can be interpreted as giving them the right to more.

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

(The Order appears on the next page)

Order

[21] The grievances are dismissed.

May 13, 2013.

Michael Bendel,
adjudicator