Date: 20140904

File: 566-02-8384

Citation: 2014 PSLRB 80

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

EMMANUEL SKOULAS

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs, Trade and Development)

Employer

Indexed as
Skoulas v. Treasury Board (Department of Foreign Affairs, Trade and Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: George Filliter, adjudicator

For the Grievor: Claudine Pike, Professional Association of Foreign Service Officers

For the Employer: Lesa Brown, counsel

Decided on the basis of written submissions,
filed May 13, June 11, and July 21 and 30, 2014.

I. Individual grievance referred to adjudication

[1] On July 30, 2010, Emmanuel Skoulas ("the grievor") signed a grievance respecting the incorrect calculation of his transfer allowance by Treasury Board ("the employer")while he was working at the the Department of Foreign Affairs and International Trade, now called the Department of Foreign Affairs, Trade and Development.

[2] The grievance stated as follows:

> ***Grievance Details***
>
> *Part III of the NJC (domestic) relocation directive provides for a transfer allowance for relocation within Canada of "two weeks' salary. The allowance is based on the annual salary effective on the date of appointment of the new location." (3.4.2.2). I grieve that the transfer allowance paid to me was not based on my annual salary effective on the date of appointment – September 2, 2008 – at the new location (Winnipeg, MB) as per section 3.4.2.2 of the NJC Directive.*
>
> ***Corrective Action Requested***
>
> *To receive a transfer allowance based on my annual salary effective September 2, 2008, as agreed by my bargaining agent (PAFSO) and Treasury Board and implemented in 2010.*
>
> *I wish to be made whole.*

[3] The employer denied the grievance by stating as follows:

> *The following is in response to the grievance you have filed on August 18th, 2010, in which you grieve that the transfer allowance paid to you was not based on your annual salary effective on the date of your appointment (September 2nd, 2008) at your new location (Winnipeg) as per section 3.4.2.2 of the National Joint Council (NJC) Relocation Directive.*
>
> *Following the grievance hearing held on March 17th, 2010, I carefully reviewed the arguments and the written presentation your union representative, Mrs. Claudine Pyke from the Professional Association of Foreign Service Officers (PAFSO), presented to me as well as the circumstances surrounding your grievance.*
>
> *I have also reviewed section 3.4.2.2 of the NJC Relocation Directive and consulted with the Treasury Board Secretariat of Canada (TBS). The intent of the directive is that relocation*

> *allowance is based on the salary at the time of registration, not salary with retroactivity.*
>
> *Consequently, your grievance, as well as the corrective measures you requested are denied.*
>
> *If you are still dissatisfied with this decision and believe your grievance has not been dealt with to your satisfaction, you may present your grievance to the final level of the National Joint Council (NJC) grievance procedure, as per Article 20 of the Professional Association of Foreign Service Officers Collective Agreement.*

[4] The matter was referred to adjudication.

[5] On May 9, 2014, the parties participated in a teleconference. As a result of this teleconference, the parties agreed to present their cases by way of written submissions.

[6] The parties agreed further to provide an agreed statement of facts on May 13, 2014.

[7] The Professional Association of Foreign Service Officers (the "bargaining agent") on behalf of the grievor, submitted its written brief on June 11, 2014.

[8] The employer submitted its brief on July 21, 2014, after which the grievor submitted his rebuttal brief on July 30, 2014.

II. Summary of the evidence

[9] The agreed statement of facts included four documents as follows:

a) NJC Integrated Relocation Directive (74 pages);

b) collective agreement that expired in 2007;

c) collective agreement that expired in 2011; and

d) a series of emails.

[10] The statement of facts are set out as follows:

> *The Department of Foreign Affairs and International Trade Canada and the Grievor, Emmanuel Skoulas, represented by*

the Professional Association of Foreign Service Officers agree to the following:

1. *In 2008, the grievor accepted an assignment from his substantive FS-03 Foreign Service Officer position to a CO-03 Senior Trade Commissioner position.*

2. *While grievor's substantive position was located in Ottawa, the C0-03 position was located in Winnipeg. As a result, the grievor was required to relocate from Ottawa to Winnipeg.*

3. *The terms and conditions of the FS Collective Agreement continued to apply to the grievor during this assignment.*

4. *On September 2, 2008, the grievor commenced working in the CO-03 new position in Winnipeg.*

5. *The grievor's relocation from Ottawa to Winnipeg was governed by the* NJC Relocation Directive *(the Directive), which forms part of the Collective Agreement. A copy of the Directive in force at the time is attached at Tab 1.*

6. *Subparagraph 3.4.2.1 of paragraph 3.4 of the Directive provides for a Transfer Allowance equivalent to 2 weeks' salary. Specifically, under the sub-heading "Inadmissible Expenses", the Directive states:*

   > Non-EX/GIC employees shall receive a Transfer Allowance equivalent to two (2) weeks' salary. The allowance is based on the annual salary effective on the date of appointment at the new location.

7. *The grievor received his Transfer Allowance on September 2, 2008 based on the rates of pay identified at Appendix A of the FS Collective Agreement, signed 7 June 2005 with an expiry date of 30 June 2007. A copy of this Collective Agreement is attached at Tab 2.*

8. *On September 2, 2008 the grievor was receiving an annual rate of pay of $93,504. This was the salary on which his Transfer Allowance was based.*

9. *Although the collective agreement expired on June 30, 2007, as per section 107 of the* Public Service Labour Relations Act, *the provisions continued in force until a new collective agreement was negotiated, ratified and signed by the parties.*

10. *The subsequent FS Collective Agreement was signed on January 25, 2010 and provided new rates of pay that were retroactive to June 30, 2007, the expiry date of the previous collective agreement. A copy of this Collective Agreement is attached at Tab 3.*

11. *Pursuant to the retroactive pay adjustments resulting from the implementation of the new Collective Agreement, the grievor was at the maximum step in the FS-03 pay scale on September 2, 2008. Specifically, the grievor's salary was $100,974.*

12. *Following the signing of the new Collective Agreement, the grievor requested that the Transfer Allowance he received on 2 Sept 2008 be adjusted to reflect his rate of pay as per the new Collective Agreement. A copy of the e-mail correspondence between the grievor and the departmental representatives is attached at Tab 4.*

13. *The grievor's request was denied by the employer.*

III. Positions of the parties

A. For the grievor

[11] The grievor submitted the issue was whether the employer was obliged to recalculate the transfer allowance it paid to him in accordance with the collective agreement. He argued his transfer to Winnipeg occurred during a period covered by the "retroactivity" of a newly negotiated collective agreement, and the newly negotiated salary should be determinative of the allowance he received.

[12] The grievor referred to the National Joint Council (NJC) Integrated Relocation Directive. Specifically, he referred to the words, ". . . the allowance is based on the annual salary effective on the date of appointment at the new location." The grievor argued the word "effective" must relate to clause 46.03 of the collective agreement,

which refers to the "retroactive period." This article was not altered as a result of collective bargaining.

[13] The grievor also argued, as the transfer allowance was calculated based upon salary, the parties must have intended it to include retroactive salaries.

[14] It is noted by the grievor the amount of the transfer allowance should be increased by $287.31.

[15] In the grievor's submission and rebuttal, there was no reference to any case law supporting his submissions.

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

[16] The employer submitted the grievor relocated to Winnipeg on September 2, 2008. This relocation was governed by the NJC Integrated Relocation Directive, and he received a relocation allowance based upon his annual salary as of that date.

[17] The employer argued section 107 of the *Public Service Labour Relations Act* ("the *Act*") is applicable under the circumstances. According to the employer, this section provides for the terms and conditions of employment to continue in force during collective bargaining.

[18] At the time of the relocation, the employer submitted the operative collective agreement was that which expired in 2007. Therefore, the employer submitted the grievor was only entitled to the travel allowance calculated based upon the salary effective on that date, not the salary which was renegotiated and retroactively provided to the grievor in the new collective agreement expiring in 2011.

[19] The argument of the employer was the term "effective" is generally understood to mean "in operation at a given time" (Black's Law Dictionary, 9th edition, 2009, Thompson Reuters, page 592). The new collective agreement was signed approximately two years after the actual relocation of the grievor, and the employer argued it was not the intent of the parties to recalculate the transfer allowance based on the newly negotiated salary.

[20] The employer provided no case law in support of its contention.

IV. Analysis

[21] I have written about the approach adjudicators should adopt when interpreting collective agreements (see *Foote v. Treasury Board (Department of Public Works and Government Services)*, 2009 PSLRB 142).

[22] Several courts have provided guidance to decision makers on contract interpretation. I must determine the parties' true intent at the time they entered into the contract. To accomplish this, I must first refer to the meaning of the words as used by the contracting parties (see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129; and *Jerry MacNeil Architects Ltd. v. Roman Catholic Archbishop of Moncton et al.*, 2001 NBQB 135).

[23] In considering this issue, I must also take into account the context in which the words are used (see *Stenstrom v. McCain Foods Ltd.,* 2000 NBCA 13; and *Robichaud et al. v. Pharmacie Acadienne de Beresford Ltée et al.*, 2008 NBCA 12, at para 18).

[24] The use of this approach by labour arbitrators has found favour with many courts, specifically the New Brunswick Court of Appeal. The court in *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*, 2002 NBCA 30, in a well-reasoned decision, stated as follows:

. . .

> *[10] It is accepted that the task of interpreting a collective agreement is no different than that faced by other adjudicators in construing statutes or private contracts: see D.J.M. Brown & D.M. Beatty, Canadian Labour Arbitration (3rd Ed.), looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2001) at 4-35. In the contractual context, you begin with the proposition that the fundamental object of the interpretative exercise is to ascertain the intention of the parties. In turn the presumption is that the parties are assumed to have intended what they have said and that the meaning of a provision of a collective agreement is to be first sought in the express provisions. In searching for the parties' intention, text writers indicate that arbitrators have generally assumed that the provision in question should be construed in its normal or ordinary sense unless the interpretation would lead to an absurdity or inconsistency with other provisions of the collective agreement: see Canadian Labour Arbitration at 4-38. In short, the words of a collective agreement are to be given their ordinary and plain meaning unless there is a valid reason for adopting another. At the same time, words must be read in their immediate context and in the context of*

> *the agreement as a whole. Otherwise, the plain meaning interpretation may conflict with another provision.*
>
> . . .

[25] In determining the plain and ordinary meaning, parties are presumed to have intended what they have said. Occasionally, an arbitrator or adjudicator may be required to imply a term. However, this occurs only when it is necessary to give the collective agreement "business or collective agreement efficacy" and only if it is determined the parties would have agreed to the implied term without hesitation, had they been apprised of the deficiency (see Brown and Beatty, *Canadian Labour Arbitration*, at 4:2100).

[26] There is no dispute the Foreign Service Directives and NJC Integrated Relocation Directive are incorporated into the collective agreement with an expiry date of June 30, 2011, just as the previous Relocation Directive was integrated into the collective agreement that expired on June 30, 2007.

[27] There is no dispute the grievor was entitled, as a result of the relocation to Winnipeg, to a "Non-Accountable Incidental Expense Allowance." The calculation of such an allowance is defined in section 3.4.2.1.1 of the NJC Integrated Relocation Directive, which states in part as follows:

> *Non EX/GIC employees shall receive a Transfer Allowance equivalent to two (2) weeks' salary. The allowance is based on the annual salary effective on the date of appointment at the new location.*

[28] The stated purpose of this allowance is to offset some of the losses an employee may incur as a result of a move.

[29] In September 2008, the bargaining agent and the employer were involved in collective bargaining, as the collective agreement had expired on June 30, 2007.

[30] The calculation of the travel allowance for the grievor was based upon his salary on September 2, 2008, as set forth in the collective agreement that had expired on June 30, 2007. As a result of the collective bargaining and the signing of a new collective agreement in 2011, the salary of the grievor in 2008 was increased from $93 504.00 to $100 974.00. Article 46 of the collective agreement states as follows:

> *PAY ADMINISTRATION*
>
> *46.01 Except as provided in this Article, the existing terms and conditions governing the application of pay to employees, where applicable, are not affected by this Agreement.*
>
> *46.02 An employee is entitled to be paid, for services rendered, within the pay range specified in Appendix "A" for the level prescribed in his certificate of appointment issued by or under the authority of the Public Service Commission.*
>
> . . .

[31] Article 48 of the collective agreement states as follows:

> *48.01 The duration of this Agreement shall be from the date it is signed to June 30, 2011.*
>
> *48.02 Unless otherwise expressly stipulated, this Agreement shall become effective on the date it is signed.*
>
> . . .

[32] It is my view, under the circumstances of this particular case, the grievor is entitled to have his travel allowance adjusted to reflect the new salary negotiated between the bargaining agent and the employer.

[33] Section 107 of the PSLRA states that each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates is continued in force and must be observed by all parties. It is also true that an allowance is not the same as pay. However, as noted by the grievor, once a new collective agreement is signed, 46.02 of the collective agreement stipulates that the new annual rates of pay are retroactive to the June 30, 2007 expiry date of the previous collective agreement. In addition, the amount of the allowance is determined by the employee's salary effective on arriving at his new location.

[34] While the employer relies in part on the definition of "effective" from Black's Law Dictionary, that definition does not necessarily mean that the allowance is only determined by the employee's salary that was received at the time he arrived at his new location. It is also interesting to note that the definition of "effective date" on the same page of the Black's Law Dictionary submitted by the employer observes, in its second bullet point, that the effective date "sometimes differs from the date on which the instrument was enacted or signed."

[35] In coming to this conclusion, the first point of importance, in my view, is the timing of the relocation. The grievor was relocated at a time subsequent to the expiry date of the former collective agreement and during a time when the bargaining agent and the employer were involved in collective bargaining.

[36] In my view, the parties were therefore aware of the distinct possibility the salary the grievor was receiving at the time of his relocation would be adjusted. In this regard, his salary was in fact adjusted.

[37] If the intent of the parties was as stated by the employer, there would have to be clear and unequivocal language in the collective agreement stating the payment of the travel allowance would be calculated based upon the employee's salary at the date of appointment, and there would be no adjustment if as a result of collective bargaining, the salary level increased.

[38] In my view, the employer's reference to articles 46 and 48 does not support its position. In this regard, as noted by the grievor in his submission, the interpretation proposed by the employer would result in an absurdity.

[39] Let me explain. If I were to accept the interpretation proposed by the employer, an employee in a similar position as the grievor, who relocated on the day before a new collective agreement was signed, would receive a travel allowance based upon a salary in the expired collective agreement, whereas an employee who transferred the day after the collective agreement was signed would receive a travel allowance based upon the calculation of using the new salary level.

[40] Without clear and indisputable wording in the collective agreement, such a conclusion cannot be drawn. Therefore, I am of the view the parties did not intend to implement the provision of a travel allowance in the manner in which the employer proposed.

[41] The two exceptions from the collective agreement that were referred to by the employer do not establish that the NJC Relocation Directive should be read as assessing the salary on the amount received under the previous collective agreement. I agree with the grievor's argument that the additional wording provided by the employer was added given the nature of those provisions. For example, the provisions about maternity and parental leave without pay describe an exception because they are

special forms of leave without pay and deviate from the normal practice for leave without pay. The Foreign Service Directive 69 has specific wording but I agree with the grievor's submissions that this specification of retroactivity must be understood to be the general method of calculation, and not an exceptional one. As the grievor submits, this too supports the grievor's argument that retroactive adjustments of pay are the norm, not the exception.

[42] As a result, it is my conclusion this grievance must succeed, and as the employer took no issue with the calculation proposed by the grievor, I order the employer to pay the grievor, within 30 days of this award, the amount of $287.31.

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

(The Order appears on the next page)

V. Order

[44] The grievance is allowed.

[45] The employer will pay the grievor a gross amount of $287.31 within 30 days.

September 4, 2014.

George Filliter,
adjudicator