**Date:** 20150123

**File:** 566-34-8978

**Citation: 2015 PSLREB 08**

*Public Service Labour Relations Act*

Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

**PHILLIP DODD**

Grievor

and

**CANADA REVENUE AGENCY**

Employer

Indexed as
*Dodd v. Canada Revenue Agency*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

***For the Grievor:*** Harinder Mahil, Professional Institute of the Public Service of Canada

***For the Employer:*** Allison Sephton, counsel

Heard at Vancouver, British Columbia,
January 8, 2015.

## I. Grievance

[1] Phillip Dodd ("the grievor") alleged that the Canada Revenue Agency (CRA or "the employer") has violated article 45 — "Pay administration" — and Appendix A of the collective agreement between the Canada Customs and Revenue Agency and the Professional Institute of the Public Service of Canada for the Audit, Financial and Scientific Group (all employees) with an expiry date of December 21, 2011 ("the collective agreement").

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as that Act read immediately before that day.

## II. Summary of the evidence

[3] The grievor's representative submitted as exhibits the collective agreement (Exhibit 1), the grievance (Exhibit 2), the grievance responses (Exhibit 3), an email advising the grievor that pension contribution arrears had been discovered and would be recovered (Exhibit 4), and his response to that email dated March 23, 2011 (Exhibit 5), advising the employer that he disagreed with its actions to recoup the pension arrears and asking that any action to recover these amounts be postponed until he had an opportunity to investigate further (Exhibit 5). This was the sum and total of the evidence provided by the grievor's representative in support of the grievance. No *viva voce* (oral) evidence was led on behalf of the grievor other than through the cross-examination of the employer's witness.

[4] Michelle Bales testified on behalf of the employer. She is a compensation advisor at the employer's Compensation Service Centre in Winnipeg, Manitoba. In her role, she deals with pension applications and ensures that pension data is accurate. The actual administration of pensions is the function of Public Works and Government

Services Canada (PWGSC). All CRA employees who meet the conditions set out in the *Public Service Superannuation Act* (R.S.C., 1985, c. P-36; *PSSA*) are required to participate in the pension plan. This is a term and condition of their employment with the CRA (see Exhibit 6, tab 3). The grievor was advised of this by letter dated January 5, 1994 (Exhibit 7).

[5] In 2002-2003, the employer approved leave with income averaging (LWIA) for the grievor, which allowed him to take leave without pay of up to 3 months and to prorate his salary for 9 months over the 12-month period so that he would continue to receive a paycheque for the period of leave without pay. While on LWIA, all deductions remain at the same level as if there had been no reduction in salary. The grievor was advised of this by letter dated November 26, 2002 (see Exhibit 6, tab 4).

[6] During the period 2002-2003, and after the LWIA calculations were entered into the payroll system, the grievor's salary increased for reclassification and collective agreement reasons. For some pension system reason, the amount of his pension contributions for the period remained unchanged, despite the increases in the payroll system. Consequently, the pension contributions deducted from his pay did not accurately reflect the amount of contributions he owed for his new salary level.

[7] In 2011, as a result of a pension data integrity project conducted by the PWGSC in advance of the implementation of a new payroll system, it discovered the grievor's under-contribution by comparing his years of service, salary data and total contributions. Ms. Bales received notice of an underpayment of $1455.22 on the grievor's pension account, which the PWGSC would recover at the rate of $72.76 per pay over a 20-pay period (Exhibit 6, tab 2). This amount reflected deficiencies in the period from September 30, 1991, to December 31, 1996, when the grievor was on leave without pay (LWOP) and in the LWIA period in 2002-2003. The grievor was advised of this by email on March 22, 2011 (Exhibit 4). While he initially disagreed with paying arrears for either period, he eventually agreed to pay the arrears for the LWOP in 1996.

[8] The CRA has no authority to set pension contribution rates or to allow employees to pay less than required or to not contribute. Contributions and contribution rates are governed by the *PSSA* and its regulations. Contribution rates are based on gross salary and on a formula determined at the time by the Canada Pension Plan. The grievor's salary was accurate in the payroll system, but the pension system

did not recalculate the pension contributions when the salary increases were entered for the 2002-2003 period.

[9] Ms. Bales asked the PWGSC to delay the recovery of the contribution deficit after she received the grievor's email on March 23, 2011 (Exhibit 5). It refused, as the recovery had already begun by the time Ms. Bales received the recovery notice (Exhibit 6, tab 2).

## III. Summary of the arguments

### A. For the grievor

[10] The subject line in Ms. Bales' email of March 22, 2011 (Exhibit 4), clearly implies that she was communicating with the grievor about his pay. Thus, this issue is clearly about pay administration. By allowing illegal deductions, the employer violated article 45 and Appendix A of the collective agreement. The deductions demanded by the PWGSC on account of arrears in pension contributions violated section 32 of the *Crown Liability and Proceedings Act* (R.S.C. 1985, c. C-50; *CLPA*) and were therefore illegal (see *Gardner v. Canada (Border Services Agency)*, 2009 FC 1156, at para 38 to 40). The employer has control over the payroll system, and if an error is made in the amount of deductions, it is expected to correct the error within a reasonable time and certainly within the statutory limitation period set out in the *CLPA*.

[11] This grievance is not about pension contribution. It is, rather, about the employer's use of the payroll system to recover payments that are statute barred. This is a pay administration issue and is within my jurisdiction under section 209 of the *PSLRA*. The employer is not entitled to make unilateral retroactive deductions to an employee's pay. This is not a situation in which the grievor sought to change the terms and conditions of employment, as in the *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20 ("AJC"), case. The grievor did not try to incorporate the *PSSA* into article 45 of the collective agreement but rather relied on that article to prevent the employer from using the payroll system to make illegal retroactive deductions.

### B. For the employer

[12] The employer argued that I have no authority to deal with pension issues. The grievance deals with pension contributions and the recovery of a deficiency in contributions required by law, as set out in the *PSSA* and its regulations. Had the deficiency in the grievor's contributions not been discovered as a result of the PWGSC

pension data integrity project, it would have been discovered when he retired, at which point the contributions would have been deducted from any monies owed him at the time. If none was owed, he would have been required to pay the arrears out of pocket.

[13] The pith and substance of this grievance is PWGSC's authority to recoup arrears in pension contributions. It requires that I interpret and apply the *PSSA*, and it has the potential to require an amendment to the *PSSA*, all of which is expressly prohibited by section 113 of the *PSLRA*. Nothing in article 45 of the collective agreement speaks to pension rates or deductions. Mandatory pension deductions are a term and condition of employment. The grievor was paid accurately at all material times.

[14] There is no ambiguity in the intent of Parliament that pensions under the *PSSA* are not subject to collective bargaining and are beyond my jurisdiction. In the *AJC* case, pension matters were explicitly excluded from the arbitration process as they could not be included in a collective agreement (see paragraphs 28, 33 and 36). Even if there is only an incidental encroachment on pensions, as in the *AJC* case, I am without jurisdiction.

[15] Like the public service staffing regime, pensions under the *PSSA* are a separate statutory regime exempt from collective bargaining and outside my jurisdiction (see *Pelletier et al. v. Treasury Board (Department of Human Resources and Skills Development*), 2011 PSLRB 117, and *Hureau v. Treasury Board (Department of the Environment)*, 2008 PSLRB 47). I have no inherent jurisdiction under the *PSSA*. The only way that an adjudicator can look into the grievor's claims is if he or she has inherent jurisdiction, which is determined on the basis of an essential character test (see *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, at para 93 to 100). The essential character of this grievance is the authority to deduct pension contributions from the grievor in arrears.

[16] The proper method of challenging the recouping of pension contribution arrears was through judicial review of the employer's decision before the Federal Court (see *Schenkman v. Canada (Attorney General)*, 2010 FC 527). For me to apply the *CLPA*, I must have inherent jurisdiction. Nowhere does the *CLPA* grant me the jurisdiction to deal with disputes over the payment of arrears in pension contributions. Therefore, I have no jurisdiction, and this matter should be dismissed.

## IV. Reasons

[17] Section 113 of the *PSLRA* expressly prohibits a collective agreement from directly or indirectly altering a term or condition of employment established under the *PSSA*. Consequently, if the pith and substance of the grievance deals with issues arising out of the *PSSA*, it cannot be a grievance related to the application or interpretation of the collective agreement under paragraph 209(1)(*a*) of the *PSLRA*. The grievor argued that since the deductions were made through the payroll system, the legitimacy of these deductions fell under article 45, Payroll Administration. By allowing illegal deductions, the employer has violated its obligations to pay the grievor correctly, as required by article 45. The grievor provided no evidence to establish such a link. It is not sufficient to refer to a subject line in an email (Exhibit 4) as proof that this is a payroll issue, especially when the body of the email clearly communicates pension-related information to the grievor.

[18] The action that gave rise to this grievance was a notification that a deficit had been discovered in the amount of pension contributions the grievor had made during the period 2002-2003 when he was on LWIA. But for the fact that the PWGSC conducted a review of the *PSSA* pension data, this grievance would not have been filed. It is the grievor's opinion that he should not have been obligated to make these payments eight years after they should have been deducted that gave rise to this grievance. It is most definitely a grievance about pension obligations under the *PSSA*.

[19] The grievance wording contests the ongoing recovery of the underpayment of pension contributions from his pay. There is nothing in the collective agreement that prohibits legitimate deductions from salary and the grievor has not pointed to any. Instead he relies on the *CLPA* as the source of his opposition to the additional pension contributions. It is clear that the pith and substance of his grievance does not attack the employer's right to make deductions from his salary but rather it attacks the employer's right to recover arrears in pension contributions beyond the time limit provided in the *CLPA*.

[20] In this case, the evidence clearly established that the grievor's concerns were his obligations to make additional payments to resolve the deficit in his pension contributions. He led no evidence whatsoever that would have established a nexus between the collective agreement and the contributions that would not violate section 113 of the PSLRA.

[21] I have no jurisdiction, inherent or explicit, to deal with matters that would require an amendment to the collective agreement (see the *PSLRA*, section 229). Furthermore, no collective agreement can amend the *PSSA* (see the *PSLRA*, section 113). An adjudicator cannot require an amendment to the collective agreement in order to make the pension plan established under the *PSSA* subject to article 45 or Appendix A, based on the facts of this case and the current legislative scheme.

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

*(The Order appears on the next page)*

## V. Order

[23] I order the file closed.

January 23, 2015.

**Margaret T.A. Shannon,**
**a panel of the Public Service Labour Relations and Employment Board**