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File: 561-02-703

Citation: 2015 PSLREB 76

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

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

BETWEEN

ROHAN ALAN BROWN

Complainant

and

ASSOCIATION OF JUSTICE COUNSEL

Respondent

Indexed as
Brown v. Association of Justice Counsel

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

Before: Bryan R. Gray, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Sandra Guttman, counsel

Decided on the basis of written submissions, filed November 13 and 27, 2014.

I. Introduction

[1] The complainant, Rohan Alan Brown, was employed as a lawyer at the Department of Justice ("the Department") until March 31, 2014, when he resigned to take a job outside the federal public service. Shortly after his departure from the Department, he received a $2682 bonus payment for his good work performance in the previous fiscal year. However, the Department contacted him within a week and requested that he return the full amount of the bonus payment. The Department indicated that the payment had been made in error, citing relevant language in the collective agreement between the Treasury Board and the Association of Justice Counsel for the Law Group (All Lawyers), expiring on May 9, 2014 ("the collective agreement"), requiring that he be employed on both March 31 and April 1 to be eligible for bonus payment.

[2] The complainant communicated with his bargaining agent, the Association of Justice Counsel ("the respondent"), and employer, seeking an informal resolution in order to keep the bonus payment. When this did not work out, he requested that his bargaining agent file a grievance. It explained to him that it shared the same interpretation of the collective agreement as his employer and that he was not entitled to retain his bonus and thus declined his request to file a grievance. This complaint was then filed, alleging that his bargaining agent's failure to provide fair representation was an unfair labour practice.

[3] For the reasons that shall be explained later in this decision, the complaint is dismissed as the facts presented show that the bargaining agent acted reasonably and in good faith and that it provided a rational justification for its decision to decline the grievance filing request.

II. Jurisdiction and authority

[4] The complaint was filed on July 25, 2014, under the authority of the legislation then in force.

[5] 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) (*PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[6] The complainant alleges that the bargaining agent engaged in an unfair labour practice, pursuant to paragraph 190(1)(*g*) of the *PSLRA*. According to section 185 of the *PSLRA*, an "unfair labour practice," includes the following prohibition, set out in section 187: "No employee organization . . . shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit."

[7] Neither the evidence nor arguments presented to me in the parties' written submissions show any evidence or allegation of discrimination or bad faith. My examination of the facts shall therefore focus upon the issue of the bargaining agent having been "arbitrary" (as contemplated in section 187 of the *PSLRA*) in its decision to decline to grieve the Department's request to the complainant to return the bonus payment made to him.

III. Relevant facts

A. Employment and performance payment

[8] The complainant worked as a lawyer with the Department from September 2009 until his resignation and final day of work on March 31, 2014. He then began to work as a lawyer for the Government of the Northwest Territories, on April 1, 2014. In an uncontested written submission, the complainant states that at all times in his tenure with the federal government, he received good performance appraisals, receiving the "Fully Meets" designation throughout, including his final year of work there.

[9] On May 1, 2014, one month after his departure from the Department, the complainant received a $2682 payment, being the net amount of his bonus pay for good performance, by direct deposit into his bank account. Four days later, on

May 5, 2014, he received an email from his former acting supervisor of compensation in the Department stating that pursuant to the terms of the collective agreement, the performance bonus he received was, in fact, not owed to him and that he had to return it to the federal government. The complainant immediately disputed this request.

B. Collective agreement

[10] The determination of this complaint turns upon how the bargaining agent decided to decline the complainant's request.

[11] The relevant section of the governing collective agreement states in clause 5.1, of Part 2 of Appendix "B", as follows:

> *5.1 A performance award (bonus) shall be granted to an employee whose performance has been assessed at "Fully Meets" or "Exceeds", and whose salary is already at the job rate or has just reached the job rate by the application of an in-range increase, or, as of May 10, 2013 and thereafter, whose salary is at the top of the lock step pay range, and who is on strength on March 31st and April 1st. These lump sums must be re-earned each year.*
>
> [Emphasis added]

C. Timeliness of grievance request

[12] The parties submitted in evidence many of the email communications that they exchanged, in the period from almost immediately after the notice was given of the need to return the performance bonus to the filing of this complaint on July 25, 2014.

[13] One of the issues raised by the parties was whether the complainant's request that the respondent file a grievance was timely. The collective agreement requires that a grievance be filed within 25 days of the date of the incident giving rise to the issue.

[14] However, given my finding that the respondent acted reasonably when deciding on the merits of the matter not to file a grievance, I need not determine the issue of procedural timeliness and of whether a potential grievance would have been barred by the procedural deadline in the collective agreement.

IV. Arguments and reasons

[15] As the authorities submitted by both parties to which I refer later in this decision indicate, the deciding factor in this complaint is not the merits of the respondent's interpretation of the collective agreement but rather whether this interpretation and the respondent's subsequent decision to decline the request to file a grievance were rational.

[16] The complainant submits that it is "incorrect", "untenable", "absurd, wholly unreasonable, and illogical" and "completely illogical" and "no rational basis to support it" for both his former employer and his former bargaining agent to interpret clause 5.1 of Part 2 of Appendix "B" to the collective agreement to mean that he was required to be on strength, that is, at work, on March 31, 2014, and April 1, 2014, to be eligible for his performance bonus accruing from his work in the fiscal year that had just ended.

[17] To justify this argument, the complainant suggests that the treatment of *pro-rata* eligibility for partial-year performance-bonus pay is untenable if the collective agreement is interpreted as proposed by the Department and the respondent. To illustrate this point, the complainant references "Infopersonnel Bulletin No. 554", dated July 2012 ("the Bulletin") which is published by the Department's Human Resources and Professional Development Directorate for the stated purpose of providing a summary of Treasury Board Secretariat (TBS) Policies and Directives with regard to performance pay. It also states that it "provides information about the Department of Justice discretionary decisions affecting performance pay where TBS policy permits." He suggests that the "Bulletin," which speaks at paragraph 4.5 to this issue of "pro-rating" the payment of a performance bonus, cannot be used to "fill in the blanks" on this topic in the collective agreement. In his arguments related to paragraph 4.5 of the Personnel Bulletin, the complainant states: "Such provisions cannot be implied in the collective agreement." The complainant continues in this line of reasoning by stating the following:

> *…the result of applying the Treasury Board's and Association of Justice Counsel's interpretation of "April 1" in the collective agreement is that any new employee employed for as little as a day or two at the end of the fiscal year and on strength the first day of the following fiscal year is eligible for performance pay as if that individual had been employed for the entirety of the fiscal year. This outcome is clearly absurd,*

> *wholly unreasonable and illogical; yet it is the unavoidable outcome of the Treasury Board's and AJC interpretation.*

[18] I note that clause 9.2 of Part 2 of Appendix "B" to the collective agreement deals with performance pay paid to an employee who is receiving acting pay. It states: "The commencement date of the acting assignment will not affect an employee's eligibility for performance pay when these conditions are met. Prorating the performance increase, based on the length of time in the acting assignment, is an option."

[19] That clause speaks to the Department's ability to logically administer the performance bonus program. It provides the "option" for the Department to prorate a performance bonus. I infer from the cited portion of the Personnel Bulletin that the Department has elected to use a similarly logical approach to prorating a performance bonus that might have accrued to an employee eligible for part of the year and who was on strength on both March 31 and April 1. I find no reason to suggest the Department is not allowed to administer the performance pay by prorating payments. Contrary to the submissions of the complainant, I find the Department's administration of the merit pay provisions in question to be entirely consistent with the rest of the collective agreement when viewed as a whole.

[20] The complainant did not refer to any provision of the collective agreement nor provide any statutory or jurisprudential authority in support of his assertion that the Department cannot prorate merit pay.

[21] The complainant, in argument, sets out an unreasonable outcome of administering merit pay that relies upon his assertion that the collective agreement cannot be interpreted with flexibility in order to support his case.

[22] The complainant provides a useful authority in the Ontario Labour Relations Board's decision in *Hotel Employees Restaurant Employees Union, Local 75 and The Delta Chelsea Inn, Delta Chelsea Hotels & Resorts*, [1996] O.L.R.D. No. 452 (QL), at para 23, which states as follows:

> *. . . If a union adopts and advances an interpretation of a collective agreement which is not merely arguably incorrect but has absolutely no rational logical basis to support it, that union may well be said to have conducted its affairs in an arbitrary fashion. Where, however, the Board is faced with competing reasonable interpretations of a collective agreement, the Board will not conclude that the union has*

> *acted unlawfully merely because the Board might prefer the applicant's interpretation. So long as the union's interpretation of a collective agreement is reasonable, has some rational basis, it is unlikely that the Board will conclude that union conduct founded on that interpretation is arbitrary. . . .*

[23] The literal reading of the words of clause 5.1 of Part 2 of Appendix "B" to the collective agreement suggests the parties' deliberately chose to write the phrase, "…and who is on strength on March 31st and April 1st," with the dates appearing in that specific sequence, namely, March 31 preceding April 1. This drafting is logically consistent with how the Department and bargaining agent have interpreted the agreement.

[24] I also note the fact that the respondent negotiated the collective agreement. If the Department's interpretation of that clause was inconsistent with the respondent's, then I would expect that an objection would have already occurred.

[25] The respondent's interpretation of the clause is consistent with an explanation provided in the bulletin. The Department's human resources and compensation officials distributed that document, which explains the interpretation of the collective agreement section dealing with eligibility for performance pay as follows:

> *Eligibility – An employee must have been in an eligible position on March 31, 2012 and on April 1, 2012.*
>
> *An employee who terminated employment, or whose acting appointment in an eligible position ended, on March 30, 2012 will not entitled [sic] to performance pay.*

[26] The complainant argues that that bulletin does not form part of the collective agreement and that it should not be persuasive with respect to the meaning of the language in question as it ". . . only applies to the extent that it is reconcilable with the provisions of the collective agreement." However, I find it helpful as it demonstrates that the Department had in fact turned its mind to the exact wording in question in this case and that it had provided all staff with an interpretation consistent with what was given to the complainant in this case two years later. No evidence was presented to me suggesting that this 2012 bulletin was outdated or was no longer accurate with the terms of the collective agreement in force at the time the circumstances surrounding this complaint arose. And perhaps more importantly, no evidence was

produced to the effect that the respondent took issue or opposed in any way the interpretation in that bulletin on the point being contested in this case.

[27] The bargaining agent also produced in evidence an internal email dealing with the complainant's file and dated July 3, 2014, from its general counsel, concurring with the bulletin from 2012 and stating as follows:

> *It's unfortunate that neither the collective agreement nor the AJC were consulted in advance of his decision to retire as we would have most certainly suggested he retire after April 1… That same performance award eligibility language and its application have been in place for years.*

[28] In its defence, the respondent refers to the former Board's decision in *Cousineau v. Walker and Public Service Alliance of Canada*, 2013 PSLRB 68, which provides a thorough examination of the well-established principle that the burden of proof in such an allegation of duty to represent is upon the complainant. And further, that in examining the meaning of "arbitrary," the ". . . union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary . . ." (citing *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39). At paragraphs 32 and 33, *Cousineau* adds as follows:

> *[32] . . . the respondents demonstrated that the circumstances of the complainant's case were investigated, that its merits were properly considered and that a reasoned decision was made as to whether to pursue it* [a grievance] *on her behalf. The respondents did not demonstrate an uncaring or cavalier attitude toward the complainant's interests; nor was it established that the respondents acted out of improper motives or out of personal hostility or that it or its representatives distinguished between members of the bargaining unit based on illegal, arbitrary or unreasonable grounds.*
>
> *[33] The complainant disagreed with* [the union's] *interpretation of certain* CHRA *provisions . . . but that is not enough to establish arbitrariness. . . .*

[29] The respondent also cites the former Board's decision in *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, in which it found as follows:

. . .

> *. . . the Board's role is not to examine on appeal the bargaining agent's decision of whether to file a grievance or to refer it to arbitration but rather to evaluate the manner in which it handled the grievance. In other words, the Board rules on the bargaining agent's decision-making process and not on the merits of a grievance or complaint. . . .*
>
> . . .

[30] Having thoroughly read all the parties' evidence and arguments, I am unable to accept the complainant's assertion that the interpretation of the collective agreement by his former employer and the respondent was unreasonable and was thus an illegal, arbitrary action as prohibited by section 187 of the *PSLRA*.

[31] I concur with the cited cases that a disagreement between the parties over the interpretation of collective agreement language cannot alone sustain an allegation that the bargaining agent failed in its duty to represent the complainant.

[32] I find on the evidence that the respondent acted promptly and professionally, that it explained in detail to the complainant its opinion and rationale, and that it demonstrated that its position was consistent and had been communicated to all its members.

[33] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[34] The complaint is dismissed.

September 11, 2015.

Bryan R. Gray,
a panel of the Public Service Labour Relations and Employment Board