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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

FREDERICK MONTLE AND DUNCAN GABRIEL

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Montle and Gabriel v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, a panel of the Public Service Labour Relations and Employment Board

For the Grievors: Tony Jones, Professional Institute of the Public Service of Canada

For the Employer: Allison Sephton, counsel

Decided on the basis of written submissions,
filed June 29 and July 20, 2015.

[1] 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*.

I. Individual grievances referred to adjudication

[2] Frederick Montle and Duncan Gabriel ("the grievors") are employed by the Canada Revenue Agency (CRA or "the employer"), Mr. Montle as a large file auditor at the AU-04 group and level and Mr. Gabriel as a tax auditor at the AU-03 group and level. Both grievors contest the employer's interpretation of clause 17.20 of the applicable collective agreement, which provides for pre-retirement leave.

[3] The parties requested that the matter proceed by way of written submissions, and the request was granted. They concluded an agreed statement of facts, which while not reproduced in full in this decision, is the basis for the facts set out in it.

[4] Both grievors became CRA employees on April 3, 2008, pursuant to the Corporate Tax Administration for Ontario initiative (CTAO), when their positions were transferred from the Ontario Ministry of Revenue (OMoR) to the CRA. This initiative between the Government of Canada and the Ontario provincial government had as its purpose transferring the administration of a single corporate tax service to the federal government.

[5] By extension of their employment status with the CRA, the grievors became members of the Audit, Financial and Scientific (AFS) Group bargaining unit and were subject to the terms and conditions negotiated between the CRA and the bargaining

agent, the Professional Institute of the Public Service of Canada (PIPSC). The parties agree that the applicable collective agreement is that concluded between the PIPSC and CRA that expired on December 21, 2011, but that remained in force until July 10, 2012 ("the collective agreement").

[6] Both grievors had joined the OMoR in 1982.

[7] Before the transfer, the CRA and OMoR entered into a human resources agreement ("the CTAO/CTAR"), which set out a number of provisions that the parties had negotiated to facilitate a smooth transition of former OMoR employees to the CRA.

[8] Section 8 of the CTAO/CTAR provides as follows:

> *8.1 The employee's continuous service date with the OMoR will be recognized by the CRA for the purposes of service from, and after, the commencement of employment with the CRA.*
>
> *8.2 This service recognition will apply to the following AFS collective agreement entitlements, as well as future AFS collective agreement provisions which may be negotiated:*
>
> *…*
>
> *v. Pre-Retirement Leave*
>
> *The parties agree that Professional Institute of the Public Service of Canada (PIPSC or the bargaining agent) was not privy to the negotiations between the Ontario Ministry of Revenue and the CRA which led to the signing of the CTAO/CTAR nor was it a signing party to the agreement. The parties also agree that the CTAO/CTAR does not form part of the collective agreement between the PIPSC and the CRA.*

[9] On July 31, 2007, still before the transfer, the PIPSC and CRA entered into a memorandum of understanding (MOU) about the CTAO initiative. Paragraph 3.1 of the MOU stated that "… the period of service or employment with the Government of Ontario shall be included for the purpose of calculating the period of service or employment of the Ontario Government employee."

[10] Paragraph 5 of the MOU specifically provided that the parties agreed that the MOU did not form part of the AFS collective agreement.

[11] When the grievors transferred from the OMoR to the CRA in 2008, they were not eligible to transfer their pensionable service with the OMoR to the CRA. However, a "Pension Transfer Agreement" (PTA) was subsequently applied to them, further to an amendment, in April 2008, of the Ontario *Ministry of Revenue Act* (R.S.O. 1990, c. M.33). The PTA between the Government of Canada and the Ontario Public Service Employees Union (OPSEU) was negotiated in accordance with subsection 40.2(2) of the *Public Service Superannuation Act* (R.S.C. 1985, c. P-36; *PSSA*), which reads as follows:

> ***40.2****(2) The Minister may, on terms approved by the Treasury Board, enter into an agreement with any eligible employer that*
>
> *(*a*) requires the Minister to pay to that employer, for the purpose of any plan referred to in subsection (1), an amount determined in accordance with subsection (3) in respect of any contributor who has ceased or ceases to be employed in the public service and is or becomes employed by that employer; and*
>
> *(*b*) may provide that any eligible employer pay into the Superannuation Account or the Public Service Pension Fund an amount determined in accordance with the agreement in respect of any person who has ceased or ceases to be employed by that employer and is or becomes employed in the public service.*

[12] However, under the terms of the PTA and the regulations under it, the grievors were not able to automatically transfer all their pensionable service with the OMoR to the Public Service Superannuation Plan (PSSP). Subsection 40.2(9) of the *PSSA* provides as follows:

> ***40.2****(9) If an employee of any eligible employer with whom the Minister has entered into an agreement under subsection (2) has ceased to be employed by that employer and is or becomes employed in the public service, any service of that employee that, at the time of leaving that employment, the employee was entitled to count for the purpose of any plan referred to in subsection (1) established for the benefit of employees of that employer may, if the agreement so provides, be counted by the employee as pensionable service for the purposes of subsection 6(1), to the extent and subject to the terms and conditions provided in the regulations, if the employer pays into the Superannuation Account or the Public Service Pension Fund, the amount that is required under the agreement to be paid by that employer in respect of that employee.*

[13] Following the transfer, and further to the grievors' requests for an estimated cost to transfer their service credits to the PSSP, they received letters from Public Works and Government Services Canada. Given section 40.2 of the *PSSA*, the grievors could not automatically credit an outstanding amount of their OMoR pensionable service to their pensions under the PSSP, and they were given the option to elect to buy back the uncredited service. In Mr. Montle's case, the letter indicated that the estimated cost associated with buying back his full pensionable service was $91 156.23. The letter further indicated that if he did not pay that amount when transferring his service, he would lose 4 years and 36 days of pensionable service. For Mr. Gabriel, the letter indicated a cost of $65 693.42 and stated that if he did not pay the amount, he would lose 3 years and 155 days of pensionable service. Both grievors opted not to transfer their pensionable service with the OMoR to the PSSP.

[14] In 2008, when the grievors joined the CRA, clause 17.20 of the collective agreement in effect at that time read as follows:

> *The Employer will provide thirty-seven decimal five (37.5) hours of paid leave per year, up to a maximum of one hundred and eighty-seven decimal five (187.5) hours to employees fifty-five (55) years old and over, with a minimum of thirty (30) years of service.*

[15] On November 6, 2009, following the transfer and before these grievances were filed, a new CRA-PIPSC collective agreement came into force. Although the expiry date of the collective agreement was December 21, 2011, it remained in force until July 10, 2012. In it, the language in clause 17.20 was amended to read as follows:

> *The Employer will provide thirty-seven decimal five (37.5) hours of paid leave per year, up to a maximum of one hundred and eight-seven decimal five (187.5) hours, to employees who have the combination of age and years of service to qualify for an immediate annuity without penalty under the Public Service Superannuation Act.*

[16] A transitional clause for CTAO employees was not negotiated as part of the new collective agreement.

[17] In 2011, both grievors contacted the CRA's Compensation Client Service Centre to inquire about their entitlement to pre-retirement leave. They were advised that they were not eligible for the leave yet as their prior years of service with the OMoR did not

count towards an immediate annuity as specified in clause 17.20, since neither grievor had bought back his pensionable service time to a pension plan under the *PSSA*.

[18] On May 16, 2011, Mr. Montle filed his grievance, and Mr. Gabriel followed suit on October 29, 2011. Both grievances refer to section 8 of the CTAO/CTAR, set out in paragraph 8 of this decision.

[19] Mr. Montle attained the age of 55 in February 2012 and Mr. Gabriel in April 2011.

[20] The employer denied the grievances at all levels of the grievance procedure at which they were presented. In substance, all the grievance responses were identical. The employer acknowledged that section 8 of the CTAO/CTAR provided for the recognition of provincial service for a number of collective agreement entitlements, one of them being pre-retirement leave, for which years of service was a qualifying criterion. However, it noted that eligibility for any collective agreement entitlement still required that all conditions in a provision be met.

[21] The employer's responses also stated that when the grievors joined the CRA and became subject to the AFS collective agreement, pre-retirement leave was available to those who were 55 years of age and who had a minimum of 30 years of service. However, with the signing of the new collective agreement, which came into effect on November 9, 2009, they were no longer entitled to such leave as the requirement to qualify for a pension under the *PSSA* had been added as a condition or requirement.

[22] To qualify for such a pension, CTAO employees would have had to have transferred their years of provincial service. As the grievors had not, they did not qualify for an immediate annuity and did not meet the conditions prescribed for granting pre-retirement leave. The employer acknowledged that each grievor, upon attaining age 60, would qualify for the collective agreement provision at issue.

II. Written submissions

A. For the grievors

[23] The grievors contended that based on the plain-language meaning of clause 17.20 of the collective agreement, they are entitled to pre-retirement leave as they have met all the conditions, specifically having reached 55 years of age with no less than 30 years of pensionable service.

[24] They argued that in accordance with subsection 13(1) of the *PSSA*, an employee becomes eligible for an immediate annuity without penalty in one of two scenarios: (a) if the employee has reached 60 years of age and has no less than 2 years of pensionable service, or (b) if the employee has reached 55 years of age and has no less than 30 years of pensionable service.

[25] The grievors submitted that they each met the age requirement and had 30 years of combined OMoR and CRA service as of 2012.

[26] The grievors' submissions also referred to subsection 40(13) of the *PSSA*, which provides as follows:

> ***Pensionable service in service transferred to Her Majesty***
>
> ***40****(13) Where the administration of any service is or has been transferred to Her Majesty in right of Canada, every person who becomes or has become employed in the public service as a result of that transfer may, notwithstanding any previous election made under this Act, count as pensionable service for the purpose of subsection 6(1) any period of service prior to that transfer that he was entitled to count for the purpose of any superannuation or pension fund or plan established for the benefit of persons employed in that service, subject to such terms and conditions as the Treasury Board may prescribe.*
>
> [Emphasis added by the grievors]

[27] The grievors also submitted that subparagraph 6(1)(*a*)(iii) of the *PSSA* confirms that service under subsection 40(13) of the *PSSA* may be counted as pensionable service.

[28] The grievors' submissions stated that it is trite law that when there is no ambiguity or lack of clarity in the meaning of the collective agreement language, effect must be given to the specific words in the agreement: Brown & Beatty, *Canadian Labour Arbitration* (4th ed.) at para. 4:2110 ("*Brown & Beatty*"); *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2013 PSLRB 88 at para 62; and *DHL Express (Canada) Ltd. v. CAW-Canada, Locals 4215, 144 & 4278* (2004), 124 L.A.C. (4th) 271 at para 51.

[29] The PIPSC argued that the collective agreement states that the CRA will provide pre-retirement leave to employees who have the combination of age and years of

service to qualify for an immediate annuity without penalty under the *PSSA* and that the grievors met this requirement.

[30] The grievors' submissions then turned to subsection 40(13) of the *PSSA* and to the phrase it contains, which states that when the administration of any service has been transferred to the federal government, individuals who become employed in the public service as a result of the transfer may, "notwithstanding any previous election made under [the *PSSA*]", count prior service as pensionable service pursuant to the *PSSA*.

[31] Although the grievors elected not to transfer their pensions from the OMoR plan to the PSSP, nonetheless, pursuant to the *PSSA*, they were eligible to count this service as pensionable service, and as such, each grievor had 30 years of pensionable service as of 2012, and there was no issue with respect to them meeting the age requirement.

[32] It is common ground between the parties that section 229 of the *PSLRA* provides that a decision of an adjudicator or of the new Board may not have the effect of requiring the amendment of a collective agreement or an arbitral award. The grievors contended that there is no requirement in the AFS collective agreement for them to have transferred their pensions to become eligible for the leave under clause 17.20. They argued that any such requirement would render meaningless the words "… have the combination of age and years of service …" in clause 17.20.

[33] The grievors argued that it is well established in the arbitral jurisprudence that all words in a collective agreement are presumed to have some meaning and that words should not be rendered superfluous: *Brown & Beatty*, at para. 4:2120; and *Weyerhaeuser Chapleau v. IWA-Canada, Local 2995* (2001), 98 L.A.C. (4th) 150 at paras. 24 and 25. According to the grievors, the CRA's interpretation requires me to accept an interpretation of clause 17.20 that would be akin to striking out the phrase "… have the combination of age and years of service …" and to read the clause at issue as follows: "The Employer will provide … paid leave … to employees who qualify for an immediate annuity without penalty under the *PSSA*". The parties to a collective agreement are presumed to have chosen the language they did with great care, and the phrase "… have the combination of age and years of service …" must be given some meaning.

[34] The grievors also argued that there is no requirement in the collective agreement that they actually qualify for an immediate annuity without penalty under the *PSSA*. If the parties had intended that to be the case, it is presumed that they would have drafted the clause to explicitly provide for such a result. The only reason that the words "… have the combination of age and years of service …" could have been included was to import the age and years of service requirements without requiring the individuals to actually qualify for an immediate annuity. The grievors asserted that by requiring them to actually qualify for an immediate annuity under the *PSSA* to receive the pre-retirement leave benefit is to render the words "… have the combination of age and years of service …" superfluous. They further contended that to rule in favour of the CRA would require that I amend the plain language of the collective agreement, which would violate section 229 of the *PSLRA*.

[35] The grievors then turned their attention to the CTAO/CTAR and the MOU. They maintained that given the plain language of clause 17.20, there was no need to resort to extrinsic evidence to determine this case. However, they stated that it was noteworthy that both documents supported their position that they are entitled to pre-retirement leave.

[36] Section 8 of the CTAO/CTAR, the grievors pointed out, provides that the CRA will recognize an employee's continuous service date with the OMoR for the purposes of the leave in question for the current as well as all future collective agreements. Moreover, the MOU provides the following at clause 3.1:

> ***Years of Service Recognition***
>
> ***3.1*** *Where the AFS Agreement refers to a period of service or employment to be worked in order for an employee to access a provision of the AFS Agreement, and/or where the amount of an entitlement set out in a provision is dependent upon a period of service or employment, the period of service or employment with the Government of Ontario shall be included for the purpose of calculating the period of service or employment of the Ontario Government employee.*

[37] Both agreements, the grievors asserted, recognize that their prior service with the OMoR would be accepted for entitlements outlined in the AFS agreement, including but not limited to pre-retirement leave.

[38] The grievors' submissions then turned to the case law on the issue and to a recent new Board decision in *Clough et al. v. Canada Revenue Agency*, 2015 PSLREB 48 ("*Clough*"). In *Clough*, the CRA and three PIPSC bargaining unit members disputed the proper interpretation to give to clause 19.05 of their collective agreement, on severance pay.

[39] The grievors in that case were tax auditors formerly employed by the province of British Columbia who began working for the CRA as part of a program to establish a harmonized sales tax (HST). There was a comparable human resources agreement between the provincial and federal governments and an MOU between the PIPSC and the CRA to facilitate transferring employees. As in this case, the collective agreement was not subject to the human resources agreement; nor did the MOU form part of the collective agreement.

[40] The adjudicator analyzed the context surrounding the negotiations between the CRA and PIPSC and determined that the collective agreement had to be interpreted in light of the MOU and the human resources agreements. The grievors cited paragraph 88 of her decision, in which she wrote as follows:

> *… it is impossible to escape the conclusion that the parties agreed that the prior service of the transferring employees should be comprehensively recognized and that it would be taken into account in the context of present and future entitlements under the collective agreement.*

[41] The adjudicator upheld the grievances and decided that service with the British Columbia government would count towards service for determining the calculation of severance pay pursuant to the AFS collective agreement.

[42] The grievors argued that the *Clough* case parallels the present grievances and that both the CTAO/CTAR and the MOU in the case before me support the conclusion that the parties intended that prior service with the OMoR be comprehensively recognized for the purpose of determining when individual bargaining unit members become eligible for pre-retirement leave in future collective agreements.

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

[43] The CRA submitted that there had been no violation of the collective agreement as neither of the grievors satisfied the wording of clause 17.20. Like the grievors, the

employer argued that my jurisdiction is limited to and by the express terms and conditions of the collective agreement and that I could not modify terms or conditions that are clear.

[44] However, it also argued that the words must be read in their immediate context and in the context of the agreement as a whole and that the parties are presumed to have intended to mean what the agreement says. The fact that a particular provision may seem unfair is not, the CRA argued, a reason to ignore a provision if it is otherwise clear. As support for this proposition, the CRA cited the following decisions: *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at para 51; *Cooper and Wamboldt v. Canada Revenue Agency*, 2009 PSLRB 160 at paras 26 and 34; and *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*, 2002 NBCA 30 at paras 10 and 11.

[45] The CRA agreed with the grievors' submission that all words in a collective agreement must be given some meaning and referred to this as the "rule against redundancy". All words in a document should be given effect, and a word should not be disregarded if some reasonable meaning can be given to it: Palmer & Snyder, *Collective Agreement Arbitration in Canada*, 5th ed. ("*Palmer & Snyder*"), at 30.

[46] The CRA argued that it is also a basic principle of collective agreement interpretation that specific provisions override general ones: *Palmer & Snyder,* at 30.

[47] According to the CRA, the grievors proposed that emphasis be placed only on one-half of the wording of clause 17.20 ("… the combination of age and years of service …"), completely ignoring the rest of the clause, which reads that an employee must "… qualify for an immediate annuity without penalty under the *Public Service Superannuation Act*". It submitted that this additional wording is there for a purpose and that it must be given some meaning. The new Board cannot ignore the clear wording of a provision that the parties negotiated. According to the employer, in negotiating this new wording, the parties clearly intended to change eligibility for pre-retirement leave from simple years of service to the years of service required under the *PSSA* to qualify for retirement without penalty.

[48] The employer disputed the grievors' submission to the effect that clause 17.20 did not require either that employees transfer their pensions to the PSSP or actually qualify for an immediate annuity without penalty under the *PSSA* to qualify for

pre-retirement leave. It submitted that clause 17.20 stated quite precisely that an employee must be able to so qualify. Commensurate with the wording of the collective agreement, such qualification is achieved by having the appropriate combination of age and years of service.

[49] The reference to "years of service" in clause 17.20 must, the CRA argued, mean pensionable service since the only way that an employee becomes eligible for an immediate annuity without penalty under the *PSSA* is to have the right combination of age and years of pensionable service. Any other meaning would be inconsistent with the clear wording of subsection 13(1) of the *PSSA*, and to interpret the phrase "years of service" as anything other than pensionable service as defined in the *PSSA* would render the last phrase in the clause "… to qualify for an immediate annuity without penalty under the *Public Service Superannuation Act*" completely meaningless.

[50] The CRA then turned its attention to the PTA. It stated that the *PSSA* sets out how the grievors could have elected to count and buy back their OMoR years of service to count as pensionable service and referred to subsections 6(1) and 7(1) of the *PSSA*. Subsection 6(1) sets out what service a contributor may count as pensionable service, and subsection 7(1) states that a contributor who is entitled to count a period of elective service as pensionable service is required to pay an amount determined in accordance with the regulations under it. Had the grievors elected to buy back their service, it would have been considered a period of elective service under subsection 7(1) of the *PSSA* and would therefore have counted as pensionable service for the purposes of subsections 6(1) and 13(1) of the *PSSA*.

[51] However, as both grievors had elected not to buy back their outstanding service, they were not entitled, under subsections 6(1) and 7(1) of the *PSSA*, to count those outstanding years as pensionable service for the purposes of subsection 13(1). As a consequence, the employer argued that neither of the grievors satisfied paragraph 13(1)(*a*) of the *PSSA* since neither had the combination of age and years of service that made him eligible for an immediate annuity without penalty. As such, they did not meet the requirements of clause 17.20 of the collective agreement.

[52] Next, the CRA turned its attention to the grievors' submissions on subsection 40(13) of the *PSSA*. It submitted that this subsection was inapplicable to them since it applied to "reciprocal transfer agreements" (RTAs) and that the grievors

were subject to a PTA, not an RTA. No provision under subsection 40.2(2) is equivalent to subsection 40(13).

[53] The CRA then set out its submissions on the issue of extrinsic evidence. Like the grievors, it argued that the clause in question is unambiguous and that therefore such evidence was not necessary to interpret its meaning. It argued that it is a basic principle of collective agreement interpretation that only documents incorporated by reference into a collective agreement may be considered part of it. An ancillary document will be part of the collective agreement only if it or the agreement explicitly so states. If an ancillary document expressly purports that it is not part of the collective agreement, then it will not be incorporated into the agreement by reference: *Palmer & Snyder*, at 7; *Brown & Beatty*, at para 4:1230; and *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2010 PSLRB 85 at para 57.

[54] Furthermore, it argued, if the document sought to be incorporated contains language inconsistent with the basic collective agreement, there can be no incorporation: *Palmer & Snyder*, at 7. In addition, an ancillary document will not form part of the collective agreement if one party has not agreed to its terms: *Brown & Beatty*, at para 4:1210.

[55] The CRA submitted that based on those principles, neither the CTAO/CTAR nor the MOU applied to the collective agreement in question, which contains no reference to either document that would incorporate it.

[56] In fact, the CRA pointed to article 5 of the MOU, which clearly states that "… it is agreed between the parties that this Memorandum of Understanding does not form part of the AFS Agreement". On the last page, it also states that "… the parties enter into this Memorandum of Understanding without prejudice to any position it [*sic*] may wish to take in future similar situations". As such, it was clear that the parties did not intend for the MOU to bind the collective agreement or to prevent them from taking different positions in the future with respect to provisions of the collective agreement.

[57] With respect to the CTAO/CTAR, it was concluded between the CRA and the OMoR and not between the same parties that concluded the collective agreement. The PIPSC did not agree to the CTAO/CTAR's terms, and therefore it cannot bind the parties to the collective agreement itself. Furthermore, section 8 of the CTAO/CTAR

refers to recognizing "prior service" and speaks to determining the employee's continuous service date. It does not refer to "pensionable service", which has a meaning different from the meaning attached to prior service or continuous service.

[58] As the parties had negotiated new wording for clause 17.20, which clearly intends to refer to pensionable service, to interpret the clause more broadly to mean years of service or years of continuous service would be inconsistent with the provision's clear wording. Since the language of section 8 of the CTAO/CTAR is inconsistent with the wording of clause 17.20 of the collective agreement, it cannot be incorporated and cannot apply.

[59] In the same vein, the CRA argued that clause 3.1 of the MOU between it and the PIPSC referred to a period of service or employment, not pensionable service. Therefore, the same argument that it outlined with respect to the CTAO/CTAR also applied. As the language of clause 3.1 was inconsistent with the wording of the collective agreement, it could not apply.

[60] The CRA stated that it is trite law that the parties to a collective agreement are presumed to be sophisticated and that changing the collective agreement wording as they did to specifically refer to qualifying for an immediate annuity under the *PSSA* indicated their clear intention for years of service to refer to pensionable service and not to simply all years of service or a continuous service date. The CRA stated that this was a clear departure from the previous collective agreement's wording and, it acknowledged, from the MOU's wording.

[61] Lastly, the CRA sought to distinguish the *Clough* decision from the present case and argued that it was unhelpful. In that case, the term "continuous employment" was at issue, a term that was not defined in the collective agreement. However, other documents and practices included similar terms, such as "continuous service" and "continuous/discontinuous service". In this case, the parties, in clause 17.20, explicitly refer to the years of service to qualify for an immediate annuity without penalty under the *PSSA*. According to the CRA, there is no ambiguity. The parties did not use an undefined term as in *Clough* and did not refer to years of service without any qualifiers. The wording "… to qualify for an immediate annuity without penalty under the [*PSSA*]" must mean something in relation to years of service and must give this

provision a different meaning than that determined for "continuous employment" in *Clough.*

III. Reasons for decision

[62] Both parties argued that I should base my decision on the clear and unambiguous language of the collective agreement, without resorting to extrinsic evidence. The grievors, who bore the burden of proof in this case, argued that the wording of clause 17.20 is clear and unambiguous and that they met the qualifications that it imposes.

[63] First, they argued that on the plain-language meaning of clause 17.20 of the collective agreement, they are entitled to pre-retirement leave as they have met all the conditions, specifically that they both have reached 55 years of age with no less than 30 years of pensionable service. The grievors argued that in accordance with subsection 13(1) of the *PSSA*, an employee becomes eligible for an immediate annuity without penalty in one of two scenarios: (a) if the employee has reached 60 years of age and has no less than 2 years of pensionable service, or (b) if the employee has reached 55 years of age and has no less than 30 years of pensionable service.

[64] As both grievors met the age requirement and as each had 30 years of combined OMoR and CRA service in 2012, they argued that they met the entitlement under the collective agreement. Attaining the age of 55 and having 30 years of service were criteria in the former collective agreement but references to them were removed from the collective agreement that I am called on to interpret. While the collective agreement at issue does refer to a "… combination of age and years of service …", and while one of those combinations is being age 55 with 30 years of service, the grievors' argument ignores the second part of the clause, which also refers to qualifying for an unreduced pension under the *PSSA*, which qualification the grievors did not meet.

[65] Next, the grievors argued that subsection 40(13) of the *PSSA* gives employees the right, in the case of transfers to the federal government, to count prior service as pensionable service. The employer refuted their claim by pointing out that the clause refers to RTAs and that the grievors were subject to a PTA, not an RTA. The grievors have not refuted the employer's argument on this issue as they chose not to file any reply argument. Nonetheless, I have considered their argument on this issue.

[66] Section 40 of the *PSSA* is titled "Reciprocal Transfer Agreements", which tends to give credence to the employer's argument on this issue. The new Board and its predecessors have consistently found that in statutory interpretation, headings may be used and considered as an aid to interpretation. If the parties have chosen to use the term "PTA" rather than "RTA" to characterize their pension transfer agreement, it is reasonable to believe that they intended to use a transfer mechanism other than the RTA provided for in the statute.

[67] However, in its submissions, the employer provided a copy of both the initial memorandum between it and the Board of Trustees of the OPSEU Pension Trust Fund, which became effective on January 19, 2000, as well as a copy of the amendment to it. Although signed in 2001, the amendment is retroactive to the date of the initial memorandum. The initial memorandum clearly refers to the *PSSA* and in the preamble states that the *PSSA* "… authorizes the President of the Treasury Board to enter into a pension transfer agreement with an eligible employer". In reading the *PSSA*, the only mechanism providing for such a transfer that I have been able to find is that contained in section 40, titled "Reciprocal Transfer Agreements". In addition, the amendment to the memorandum refers to paragraph 6(1)(*b*)(iii)(K) of the *PSSA*, and subsection 40(13), contained in the provision entitled "Reciprocal Transfer Agreements", refers to subsection 6(1). This tends to support the grievors' contention that subsection 40(13) of the *PSSA* applies to them.

[68] The grievors' submission on this matter was confined to paragraph 17 of their submissions, which reads as follows:

> *Subsection 40(13) of the PSSA provides that where the administration of any service has been transferred to the Federal Government, individuals who become employed in the Public Service as a result of the transfer may,* "notwithstanding any previous election made under [the PSSA]"*, count prior service as pensionable service pursuant to the PSSA.*
>
> [Emphasis in the original]

[69] Subsection 40(13) of the *PSSA* provides that transferring employees are eligible to count prior service as pensionable service "for the purpose of subsection 6(1)", which defines what service will count as pensionable service for the purposes of the *PSSA*. Without further evidence, jurisprudence, or argument on the issue, and given that the burden of proof rests on the grievors, I am unable to conclude that, on the

balance of probabilities, their argument based on subsection 40(13) of the *PSSA* is sustainable. In the end, I am left with questions about the applicability of subsection 40(13) to the facts at issue and with the interpretation to be given to that subsection. Therefore, I am left to conclude that the grievors have not convinced me, on the balance of probabilities, of the applicability of subsection 40(13) to this matter.

[70] Next, the grievors contended that the wording of clause 17.20 does not require an employee to have transferred his or her pension over to the PSSP to be eligible for the leave at issue. They argued that such a requirement would render the phrase "… have the combination of age and years of service …" meaningless. I agree with them that if one accepts the employer's interpretation, it would have been far clearer and easier to have simply dropped that phrase and indicated that leave is contingent upon actually qualifying for a pension under the *PSSA*. It is also true that there is no specific reference in the collective agreement to indicate that employees can qualify for this leave only if they have transferred their pensions. However, I note that the employer's interpretation of this clause does not require this either. In the grievors' case, they will still be eligible for the leave even if they did not transfer their pensions but will not become eligible for it until they reach age 60. Therefore, I reject the grievors' argument to the effect that the employer's interpretation of the clause in question requires that employees have transferred their pensions. While this may, in the present circumstances and for these grievors, be the result of the employer's interpretation, it is not a requirement the employer imposed to granting the leave.

[71] It is also true that, as both parties argued, all words in a collective agreement must be given meaning. The grievors have focused their argument on the first part of clause 17.20 and its reference to a combination of age and years of service, while the employer has focused on the latter half of the clause.

[72] In the earlier version of clause 17.20, employees could qualify for pre-retirement leave only if they had reached 55 years of age and had 30 years of service. With the change in the language of the collective agreement, together with the *PSSA* wording, the grievors lost their previous entitlement to such leave, while other employees who reached age 60 and had only minimal service (2 years or more) now became entitled to the leave. However, those 60-year-olds with minimal service would have been captured had the parties, as the grievors pointed out, changed the clause to read "… qualify for an immediate annuity without penalty under the [*PSSA*]".

[73] The change to the collective agreement clause was twofold. First, the reference to age 55 and to 30 years of service was removed and replaced with "… combination of age and years of service …", and second, the reference to the *PSSA* was added. Had the references to age and years of service been retained and the final phrase merely added, those aged 60 with at least 2 years of service would still have been excluded. This lends credence to the employer's argument that the clause was altered to make it clear that this leave was now contingent on eligibility for a pension under the PSSP.

[74] Therefore, I am unable to conclude that, as the grievors suggest, the reference in clause 17.20 to a combination of age and years of service is rendered meaningless if the employer's interpretation is accepted.

[75] I have determined that clause 17.20 is clear and unambiguous and that an ordinary individual, on reading it, would conclude that the qualification for pre-retirement leave is contingent upon an employee attaining a combination of age and years of service that would qualify them to receive an unreduced pension (i.e., a pension without penalty) under the *PSSA*. Briefly put, an employee is eligible for pre-retirement leave when he or she is eligible to receive his or her pension under the *PSSA*. Such an interpretation is consistent with what the employer stated (and the grievors did not dispute) is the purpose of the clause. Pre-retirement leave is provided as an incentive to employees who are eligible to retire to retain their services and knowledge to the employer's benefit. To link such a leave to the employer's pension plan seems reasonable and supports my interpretation of the clause.

[76] Having considered and dismissed the grievors' submissions on the interpretation to be given to clause 17.20 without resorting to the use of extrinsic evidence and having concluded that the clause is unambiguous, I need not further examine the issue of extrinsic evidence. However, I have nonetheless considered the matter since the parties devoted an extensive amount of time to this issue.

[77] The CTAO/CTAR between the OMoR and CRA appears clear and unambiguous and, as the grievors advanced, appears to state that the CRA will recognize an employee's continuous service date with the OMoR for the purposes of service and will apply it to the AFS collective agreement entitlements both now and in the future. It seems clear from this that the OMoR sought to protect its employees in the transfer and that it specifically sought to place them on the same footing as all CRA employees

with respect to entitlements that turned on service. Indeed, the CRA did not seem to deny this. In paragraph 28 of its submissions, it stated that because "… the language of s. 8.0 of the CTAO/CTAR HR agreement is inconsistent with the wording of Article 17.20 of the collective agreement, it cannot be incorporated and cannot apply."

[78] However, as the CRA argued, the engagement that purports to bind the present as well as future collective agreements was taken between two parties, one of which is not a signatory to the applicable collective agreement. The employer also pointed out that as the PIPSC did not sign the CTAO/CTAR and was not a party to it, it cannot bind the collective agreement. On the basis of well-established legal principles, I can only agree. Moreover, the grievors did not dispute this point. Rather, they argued that both the CTAO/CTAR and the MOU support their interpretation of clause 17.20 because "[b]oth agreements recognize that the grievors' prior service with the OMoR would be recognized for entitlements outlined in the AFS Agreement …" (the grievors' submissions, at para 34).

[79] While the CRA might have made the commitment that the grievors alleged it did (and I make no finding on this issue), it is clear to me that if so, what the grievors in fact argued was that the employer was without authority to change the collective agreement clause as it did since doing so violates the agreement it entered into with OMoR. I can find no legal authority for such a proposition, and the grievors provided me with none. They did not argue that an estoppel existed that prevented the employer from negotiating a clause that, by all appearances, runs counter to its prior engagement. Therefore, the fact that the CTAO/CTAR may purport to protect certain rights does not assist me in interpreting the change to the collective agreement. Although the grievors argued that the MOU and CTAO/CTAR supported their interpretation of clause 17.20, what they really argued was that the extrinsic evidence prevented the employer from agreeing to the change in the collective agreement. In other words, the PIPSC sought to enforce an agreement that is not its to enforce.

[80] Had the CTAO/CTAR been included in the collective agreement, this case would likely have been much different. However, it does not form part of the agreement, and neither party argued that it was incorporated into it, either explicitly or by reference.

[81] As for the MOU between the CRA and PIPSC, it clearly and explicitly states that it does not form part of the collective agreement.

[82] Finally, I turn to the new Board's recent decision in *Clough.* The grievors argued that it applies to the situation before me and urged me to allow these grievances on the basis of that decision. Although *Clough*, at first blush, appears quite similar to this case, there are significant details in it that militate in favour of a different outcome in this case.

[83] While the transfer of employees in *Clough* occurred two years later than the events in the case at hand, and while the transfer was the result of an HST transfer, not a corporate tax transfer, there are also many similarities between the two cases: the transfer of employees to the CRA occurred between a province and the federal government and was effected in the same manner in each case, that is, via an agreement with the province and a second agreement with the PIPSC.

[84] The *Clough* case reveals that the major concern for PIPSC members was that typically, transfers result in members being "swamped by outsiders" and having benefits "diluted" as a result. The CRA's major concern was to recognize the transferring employees' service, perhaps because of the agreement that it had signed with the Government of British Columbia, although this point is irrelevant to the issue before me. Indeed, in *Clough,* PIPSC members rejected an initial agreement with the employer, as they did not wish to recognize the transferring employees' prior service. However, the CRA and PIPSC returned to the table, and the PIPSC accepted the employer's proposal.

[85] The *Clough* decision refers to the CRA's negotiation of an agreement with the British Columbia government and states that clause 8 of that agreement provided the following:

> *8.1 Employees who accept a position at the CRA shall have their service seniority with the British Columbia government recognized by the CRA.*
>
> *8.2 This service recognition will apply to the following entitlements, provided for in the CRA-PSAC collective agreement as well as any future entitlements which are determined on the basis of a period of service or employment:*
>
> …
>
> *iv. Pre-retirement Leave*

> *v. Severance Pay as it pertains to the qualifying period to receive such pay…*

[86] That clause is worded in a virtually identical manner to the one in the CTAO/CTAR negotiated between the CRA and OMoR in this case.

[87] Although the present case may have important parallels with *Clough*, there are also several legal distinctions between them. In *Clough*, the adjudicator was required to interpret an ambiguous clause in the collective agreement. As she had concluded that there was ambiguity, she also held that therefore she could resort to extrinsic evidence in interpreting the disputed phrase in the collective agreement.

[88] In contrast, I have accepted the argument of both parties that clause 17.20 is not ambiguous and that I do not need to, and indeed should not, resort to extrinsic evidence to discern its meaning and intention.

[89] In *Clough*, the extrinsic evidence supported the PIPSC's interpretation of the collective agreement. In this case, I was asked to use similar documents, not as aids to interpretation but as evidence that the employer could not negotiate a clause that contradicts what appears to be its engagement to the Ontario government. The decision in *Clough* does not assist me in deciding this case.

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

(The Order appears on the next page)

IV. Order

[91] The grievances are dismissed.

December 22, 2015.

Steven B. Katkin,
a panel of the Public Service Labour Relations and Employment Board