Date: 20151120

File: 466-LP-379

Citation: 2015 PSLREB 87

Parliamentary Employment and Staff Relations Act

Before an adjudicator

BETWEEN

CARL MARTINEZ

Grievor

and

LIBRARY OF PARLIAMENT

Employer

Indexed as
Martinez v. Library of Parliament

In the matter of a grievance referred to adjudication mentioned in paragraph 63(1)(*a*), (*b*) or (*c*) of the *Parliamentary Employment and Staff Relations Act*

REASONS FOR DECISION

Before: Marie-Claire Perrault, adjudicator

For the Grievor: Goretti Fukamusenge

For the Employer: Céline Delorme and Carole Piette

Decided on the basis of written submissions
filed September 11 and October 2 and 9, 2015.
(PSLREB Translation)

I. Grievance referred to adjudication

[1] The grievor, Carl Martinez, filed a grievance on January 12, 2012, in which he challenged the method used by his employer, the Library of Parliament ("the employer"), to calculate his salary. In January 2015, the parties agreed to proceed via written submissions.

[2] The grievance is worded as follows: "[translation] That, in the future, the employer use an accurate method to calculate my salary and that the employer reimburse me all amounts owed for my regular and overtime hours that were incorrectly calculated."

[3] The grievance was denied at all levels. The bargaining agent, the Public Service Alliance of Canada ("the Alliance"), referred it to adjudication on June 20, 2012, under section 63 of the *Parliamentary Employment and Staff Relations Act* (R.S.C. 1985, c. 33 (2nd supp.); *PESRA*).

II. Summary of the evidence

[4] The parties presented an agreed statement of facts, which I have summarized.

[5] The grievor is a research librarian at the Library of Parliament. His position is classified at the LS-02 group and level. The Alliance represents him, and he is a member of the Union of National Employees. The grievance was filed under a collective agreement that the employer and the bargaining agent entered into and that was in effect from September 1, 2008, to August 31, 2011.

[6] The grievor has been paid according to a Library Science LS-02, Group C, pay scale since September 6, 2004. His annual salary when the grievance was filed was $73 693, in accordance with Appendix "A" of the collective agreement.

[7] On April 1, 1969, the Treasury Board Secretariat implemented a biweekly pay system (government employees were paid twice per month before then). The pay period covers 10 working days, beginning on Thursday and ending on Wednesday.

[8] The calendar year has 52 weeks, and public servants have 26 pay periods per year. Unfortunately, this does not coincide perfectly; a year has 365 days, and 366 every four years, such that the weekly factor is not 52, but 52.176 (365.25/7 = 52.176). In other words, for the 26 pay periods, the annual salary set out in Appendix "A" of the

collective agreement is divided by 26.088.

[9] For those reasons, the employer uses a factor of 1826.16 (35 (hours/week) X 52.176) to calculate the hourly rate (for calculating overtime pay) rather than 1820 (35 X 52 — the number of regular hours under the collective agreement). In other words, the hourly rate is calculated by dividing the annual salary by 1826.16, although an employee is required to work 1820 hours per year under the collective agreement.

[10] Every 11 years, the calendar year has 27 pay periods instead of 26, as was the case in 2002 and 2013.The grievor has been working at the Library of Parliament since 1998.

[11] The collective agreement states the following about remuneration:

> [Article 25]
>
> ***25.01*** *An employee is entitled to be paid for services rendered in the scale of rates of pay specified in Appendix "A" for the level of the position to which he/she is appointed.*
>
> . . .
>
> [Article 23]
>
> ***23.01*** *For the purpose of this Article, a week shall consist of seven (7) consecutive days beginning at 00:01 hours Monday morning and ending at 24:00 hours Sunday. The day is a twenty-four (24) hour period commencing at 00:01 hours.*
>
> . . .
>
> *b) The work year shall be eighteen hundred and twenty (1,820) hours.*
>
> . . .
>
> [Article 2]
>
> ***2.01*** *For the purpose of this Agreement:*
>
> . . .
>
> *g) "Daily rate of pay" means an employee's weekly rate of pay divided by five (5).*
>
> . . .
>
> *m) "Hourly rate of pay" means an employee's weekly rate*

> *of pay divided by thirty-five (35).*
>
> . . .
>
> *t) "Weekly rate of pay" means an employee's annual rate of pay divided by 52.176.*

[12] The definition in question in clause 2.01(t) of the collective agreement, about the 52.176 weekly factor, has been part of the collective agreement in its current form since April 1, 1989.

[13] The Alliance was accredited as the bargaining agent for the Library Sciences Group in May 1987.

III. Summary of the arguments

A. For the grievor

[14] Essentially, the grievor feels that by using 52.176 as a weekly factor, he is being deprived of the salary to which he is entitled. According to him, "[translation] the employer is using a method that it chose, that is not set out in the [collective] agreement, and that causes harm to the grievor."

[15] Because of the employer's biweekly pay calculation, the grievor suffers a loss each year that is partially recovered only every 12 years.

[16] The grievor carries out the following calculation using his figures.

[17] His annual salary is $73 693 under Appendix "A" of his collective agreement. Dividing that annual salary by 26.088 (for 26 pay periods, based on the 52.176 weekly factor) results in $2824.79 for each pay period. Multiplying that figure by 26 results in an actual pay of $73 444.42 per year, which is a shortfall of $248.46.

[18] Every 12 years, the employer pays a 27th pay. The accumulated loss over 12 years is $2981.52, but the additional pay is $2824.79. Therefore, there is a net loss of $156.73.

[19] Furthermore, overtime hours are being calculated incorrectly as using the 52.176 weekly factor means that the figure of 1826.16 hours is being used to calculate the hourly rate of pay for the purposes of calculating overtime hours.

[20] According to the grievor, pay should be based on the number of hours worked. The collective agreement sets out 1820 hours. Thus, the salary to which he is entitled is his exact annual salary for those 1820 hours. Using the calculation based on 1820 hours allows overtime hours to be paid fairly.

[21] The grievor proposes the following:

> [Translation]
>
> *The employer should simply divide the annual pay rate by the number of hours worked in the year. If it wants to pay employees every two weeks, it needs to simply adjust the amounts of the cheques accordingly to arrive at the amount of annual pay due* [paragraph 25 of his September 11, 2015, submissions].

[22] He claims the amounts owed to him and asks that the employer carry out the calculation. The remedy sought is indicated as follows:

> [Translation]
>
> *It is practically impossible for the grievor to* exactly *measure the amount claimed. In effect, his salary has fluctuated since 1999, particularly with pay raises, overtime, an appointment to a higher position, acting pay, and step increments. The employer's payroll services has all that information and has expertise in that area. Its participation in the calculation will be necessary to establishing the actual amount* [paragraph 27 of his September 11, 2015, submissions].

[23] The grievor also seeks a statement to the effect that the employer has contravened and is still contravening the collective agreement.

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

[24] The employer responds with four arguments: the calculation method used complies with the collective agreement; the grievor has not suffered any loss; the adjudicator does not have jurisdiction to amend the collective agreement (which would result from allowing the grievance); and, at the same time, the doctrine of estoppel applies.

[25] The collective agreement must be read as a whole. Article 25 states that annual salary is established based on the scales in Appendix "A". Article 2 states that the rate of pay is calculated by dividing the salary set out in Appendix "A" by a factor of

52.176. Thus, annual salary is a determining factor for pay, which is paid based on the reality of a 27th pay every 12 years.

[26] The collective agreement represents the parties' agreement.

[27] The employer also submits that the grievor did not suffer any loss, which it demonstrates via a table that I have reproduced as follows:

Fiscal year	Total days of pay	Total hours paid	Total hours worked by the grievor	Annual salary*	Salary received	Difference in the grievor's favour	Difference in the employer's favour
2001-2002	260	1820	1820	73 693	73 444		$249
2002-2003	261	1827	1820	73 693	73 726	$33	
2003-2004	262	1834	1820	73 693	74 009	$316	
2004-2005	261	1827	1820	73 693	73 726	$33	
2007-2008	261	1827	1820	73 693	73 726	$33	
2008-2009	261	1827	1820	73 693	73 726	$33	
2009-2010	261	1827	1820	73 693	73 726	$33	
2010-2011	261	1827	1820	73 693	73 726	$33	
2011-2012	261	1827	1820	73 693	73 726	$33	
2012-2013	260	1820	1820	73 693	73 444		$249
2015-2016	262	1834	1820	73 693	74 009	$316	

* Does not consider pay raises and other factors that modify base salary.

The employer explains this table as follows:

[Translation]

> *As the grievor indicated at paragraph 16 of the written submissions, the annual number of regular hours he works is 1820 hours, which is the maximum of regular hours that he is required to work per year.*
>
> *However, because a working fiscal year does not always have 260 days but often 261 days and sometimes 262 days (due to leap years, etc.), more often than not the grievor is paid for 1827 and 1834 hours when he works only 1820 hours.*
>
> *The table below* [earlier in this decision] *illustrates this concept and clearly shows that the grievor did not suffer any annual loss as alleged at paragraph 18 of the written submissions. On the contrary, it turns out that after a period of twelve (12) years, he receives a total annual remuneration that is greater than the annual salary set out in clause 25.01 of the Collective Agreement* [paragraphs 40 to 42 of the employer's written submissions, submitted October 2, 2015].

[28] According to the employer, if the adjudicator were to decide in the grievor's favour, it would be contrary to the *PESRA*'s wording, which sets out her jurisdiction. Subsection 67(2) of the *PESRA* states the following:

> *(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would require the amendment of a collective agreement or an arbitral award.*

[29] The employer adds that assigning any meaning other than the ordinary meaning to clause 2.01(t) of the collective agreement (which sets out the 52.176 weekly factor) would be contrary to the intent of the parties to the collective agreement.

[30] Finally, the employer cites estoppel in the alternative. It lists the three elements of estoppel: a clear representation, via words or conduct; the predictability of the other party relying on that representation; and the fact that the other party relied on the representation, to its detriment.

[31] In this case, the employer affirms that it has been using the weekly 52.176 factor since 1989. The practice is well known, and the Alliance has never objected to it. The change to the calculation method would be highly prejudicial to the employer and could have repercussions throughout the federal public service.

IV. Reasons

[32] Different pay methods exist, each with benefits and drawbacks. The one being challenged in this decision has the benefit of simplicity and predictability.

[33] The biweekly pay system is not perfect. In effect, each year, the grievor receives slightly less than the salary set out in the chart in the collective agreement as the amount is divided by 26.088 instead of 26. The hourly rate used to calculate overtime pay is also affected.

[34] However, every 11 years (not every 12 years, as the parties affirmed), federal government employees receive an additional pay in the same amount as their usual pay. If the grievor's figures are considered again but 11 years is used as the interval, the amounts balance, with a slight advantage to him (which would compensate for the overtime pay problem). Furthermore, over a period of 11 years, it is likely that salary will increase, meaning that the compensation in the 11th year will be based on an increased salary compared to the initial years of that period.

[35] I will not dwell any longer on the system's fairness as the grievor's fundamental error was claiming that the employer unilaterally imposed the calculation based on a 52.176 weekly factor. However, clause 2.01(t) of the collective agreement, which sets out that calculation, has been in the collective agreement since 1989.

[36] The employer's claim is fully justified that under subsection 67(2) of the *PESRA*, I cannot modify the collective agreement's wording.

[37] The parties negotiated the definition of "weekly rate of pay". There is no contradiction between article 25 of the collective agreement, which sets out the annual rate of pay under Appendix "A", and the definition of the weekly rate of pay in article 2, which refers to Appendix "A". The annual salary is the starting point; how it is paid reflects the variations in the civil calendar — the year does not perfectly coincide with pay periods. The collective agreement also sets out the hourly rate calculation, which is based on the weekly factor; again, it is a clause that the parties negotiated.

[38] Therefore, the collective agreement wording entirely resolves the issue. Furthermore, I do not retain the employer's calculations or its estoppel arguments.

[39] The table that the employer presented shows without a doubt that the government issues a pay every 11 years equal to 70 hours of work. That may be slightly to the employees' benefit, but they are not unworked hours that the employer generously pays for. Instead, it is the amount of partial hours retained by the 52.176 weekly factor or 26.088 biweekly factor paid to the employees. Between calendar years, fiscal years, and the planet's journey around the sun, it is understood that days come and go. That is the reason for using the 52.176 factor, to stabilize the pay of public servants and Parliament employees.

[40] The estoppel argument adds nothing to the debate. I see estoppel as a useful argument when the collective agreement is silent on a matter or when its ambiguity leads to the parties tacitly accepting an interpretation.

[41] In this case, the collective agreement wording is very clear and largely suffices to settle the debate. The parties agreed to a calculation of a weekly rate of pay, which in turn determines the hourly rate of pay. I would add that the grievor has twice benefitted from a 27th pay.

[42] In his rebuttal, the grievor cites the decision *Murray and Shaver v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-26588 to 26592 (19960301). In effect, that decision mentions the weekly rate of pay as being "… an employee's annual rate of pay divided by 52.176 …". That decision in no way questions that definition.

[43] The employer and the Alliance agreed to a method for reconciling the regularity of biweekly pay and the irregularity of the calendar. I do not need to intervene in that agreement.

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

(The Order appears on the next page)

V. Order

[45] The grievance is dismissed.

November 20, 2015.

PSLREB Translation

Marie-Claire Perrault,
adjudicator