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Citation: 2016 PSLREB 113

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

JOËLLE BARBOT

Grievor

and

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

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Bertrand Myre, labour relations officer, Canadian Association of Professional Employees

For the Employer: Michel Girard, counsel

Heard at Ottawa, Ontario,
February 8, 2016.
(Written submissions filed January 29 and February 5, 2016.)
(PSLREB Translation)

I. Individual grievance referred to adjudication

[1] Joëlle Barbot ("the grievor") is an evaluation manager classified at the EC-06 group and level at the Strategic Policy and Performance Branch of the Department of Foreign Affairs, Trade and Development, also known as Global Affairs Canada. Following an administrative error by the employer, she contested its decision that she had to reimburse a sum of over $50 000 involving her Canada Pension Plan and Supplementary Death Benefit Plan benefits from May 28, 2003. At the hearing, her representative withdrew the allegation that the recovery was discriminatory.

[2] The facts that led to the grievance being filed are not in dispute. On January 15, 2016, at a pre-hearing conference, the employer objected to the jurisdiction of the Public Service Labour Relations and Employment Board ("the Board") under the *Public Service Superannuation Act* (R.S.C., 1985, c. P-36) as well as under the *Public Service Superannuation Regulations* (C.R.C., c. 1358) and the *Supplementary Death Benefit Regulations* (C.R.C., c. 1360) ("the *PSSA* and its regulations"). It argued that the Board does not have jurisdiction to decide pension plan issues. To support its objection, it referred to *Dodd v. Canada Revenue Agency*, 2015 PSLREB 8.

[3] The parties filed written submissions about the employer's preliminary objection to the Board's jurisdiction. Then a hearing on the merits was held.

[4] For the following reasons, I find that the Board does not have jurisdiction to decide issues about recovering Canada Pension Plan and Supplementary Death Benefit Plan contributions. With the exception of certain individuals outlined in the *PSSA* and its regulations, the payment of those benefits is a term or condition of employment of all public service employees. The employer had a statutory duty to recover benefits in deficit.

II. Background

[5] On February 11, 2013, the Canadian Association of Professional Employees (CAPE) referred the grievance to adjudication under s. 209(1)(a) of the *Public Service Labour Relations Act* ("the *Act*"), which is about the interpretation or application of a provision of a collective agreement or an arbitral award, and clause 16.01 and article 47 of the applicable collective agreement that the Treasury Board and the CAPE concluded for the Economics and Social Science Services Group (all employees) that

expired on June 21, 2011 ("the collective agreement").

[6] On February 26, 2013, the employer raised a preliminary objection against the Board's jurisdiction to hear the grievance on the grounds that it was filed after the time limit provided in clause 40.12 of the collective agreement. On April 8, 2014, in *Barbot v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2014 PSLRB 45, the Board dismissed the employer's objection on the grounds that it had failed to meet the conditions of s. 95(2) of the *Public Service Labour Relations Board Regulations* (SOR/2005-79). The Board ruled that "[translation] [i]t was not permissible or reasonable, given the facts in the case, to wait until the grievor's grievance was sent to adjudication to raise that it was late."

[7] On June 26, 2013, the Canadian International Development Agency (CIDA) merged with the Department of Foreign Affairs and International Trade to form the new Department of Foreign Affairs, Trade and Development.

[8] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed in force (SI/2014-84), creating the Public Service Labour Relations and Employment Board, which replaced the former Public Service Labour Relations Board ("the former Board") and the Public Service Staffing Tribunal. This proceeding continued in accordance with the enabling Parliamentary statutes and their associated regulations.

III. Summary of the evidence

[9] The parties agreed to proceed by an agreed statement of facts. The grievor did not testify. Oral testimony was not given on her behalf other than through the cross-examination of the employer's witness.

[10] According to the agreed statement of facts, the grievor has been working for the department since December 1, 1992. Over a 21-year period, she took several leaves of absence without pay, sometimes due to illness, followed by several gradual returns to work, and relapses.

[11] From May 28, 2003, to May 1, 2005, she was on unpaid sick leave. On June 25, 2003, the employer sent her a letter entitled "[translation] Unpaid sick leave - disability", in which it advised her of her options with respect to the payment of her disability benefits, her pension plan, and other benefits, as well as her other

employment benefits and related questions.

[12] From May 2, 2005, to May 31, 2006, the grievor was covered by an approved accommodation plan, and she made a gradual return to work at the rate of three days per week. From June 1, 2006, to January 1, 2008, she was again on unpaid sick leave.

[13] In accordance with the employer's policy and the *PSSA,* during leave without pay, contributions to pension and supplementary death benefit plans are not made, to avoid deductions from a salary that has already been reduced. All employees are given the option to make their benefits contributions during leave without pay. The grievor chose not to take advantage of that option as it was outlined in the June 25, 2003, letter.

[14] On August 15, 2006, the grievor asked Marie Boudreau, an advisor at Public Works and Government Services Canada's Superannuation Division, to send a letter to Guy Martel of GML Actuarial Services Inc., to confirm certain information about her pension and leave without pay. The letter indicated that no details were available about reimbursing benefits in deficit.

[15] On August 28, 2006, Mr. Martel contacted Susan Gauthier, a compensation advisor at the CIDA, to find out the pension and supplementary death benefit plans arrears, among other things. Although no details were available about the arrears, on August 28, 2006, her actuary, Mr. Martel, informed her that her benefits had been in deficit since 2003.

[16] On April 4, 2007, the grievor received a handwritten note from Ms. Gauthier confirming the Canada Pension Plan and Supplementary Death Benefit Plan deficits that had resulted from the leave that had been taken.

[17] From January 7, 2008, to October 28, 2008, the grievor was on a gradual return to work of three days per week under an approved accommodation program. On August 2, 2008, after checking the deductions from her paycheque, she contacted Ms. Gauthier to ask her to stop the $250.00 deductions per pay for a savings bond. The grievor and the employer did not follow up about benefits in deficit. Although she and the employer had been aware of the exact amounts of the deficits since April 4, 2007, neither followed up on them.

[18] The grievor was notified only on May 15, 2012, of the Canada Pension Plan and

Supplementary Death Benefit Plan contributions arrears dating to 2003. An email from Johanne Bélisle, a compensation advisor, confirmed that the error was corrected on April 11, 2012.

[19] On June 27, 2012, Ms. Bélisle informed the grievor that the recovery of the pension and supplementary death benefit plans arrears would begin on July 4, 2012. The recoverable amounts were $108.85 and $2.02 per pay for pension plan benefits until January 23, 2030. With respect to the supplementary death benefits, the recoverable amount was $13.50 per pay until November 30, 2029.

[20] The debt recovery began on July 4, 2012. The original value of the debt, as calculated by the Payroll Office, was $50 887.49 for the pension plan benefits arrears and $2821.25 for the supplementary death benefits plan. Despite the differences, the employer confirmed and the bargaining agent agreed that the pensionable service appears in the grievor's account.

[21] In an email dated July 4, 2012, without providing an explanation, the Payroll Office indicated that the recovery had not been performed after the grievor returned to work full-time on October 28, 2008. She stated that she was not aware of the situation.

[22] On March 13, 2013, Darren Schemmer, the vice-president of the Partnerships with Canadians Branch, responded to the grievance at the third level of the grievance process and confirmed that sums of $51 233.83 for pension plan arrears and of $2821.25 for supplementary death benefit arrears were to be paid until December 11, 2030. He confirmed that an administrative error had occurred due to a failure to reactivate the pension deduction code in the payroll system when the grievor returned to work full-time on October 28, 2008.

[23] Mario Sabourin was the manager of labour relations, compensation and benefits, occupational health and safety, at the CIDA between September 2005 and January 14, 2013. In his testimony, he said that he found out about the file for the first time in spring 2012 and that Ms. Bélisle, a compensation advisor, had brought it to his attention. He explained that the obligation to contribute to the pension and supplementary death benefit plans is statutory and that it must be done at the source. The employer has no authority to set pension plans' contribution rates or to allow employees to pay less than required or to not pay. The *PSSA* and its regulations govern contributions and their rates.

[24] He indicated that under the *PSSA*, the employer must effect the debits for every employee who works more than 30 hours per week or for more than 6 months. During unpaid sick leave, employees receive a form letter that outlines their pension plan contributions and supplementary death and health benefits options and how their choices will affect them. Employees are informed of the steps they must take. The default option is to repay the arrears as soon as they return to work for more than 30 hours per week.

[25] When employees participate in a rehabilitation program or gradually return to work, the Sun Life insurance company or another one supports them so that they can return to work full-time. Employees can receive up to 100% of their salaries and are not limited to 70%. During leave without pay, no source deductions are made. It is considered a period of transition to rebalance the employee's health. Employees have the choice of continuing to pay for benefits during leave without pay, and they are responsible for taking the necessary steps to exercise their chosen options.

[26] In accordance with the employer's practice, Mr. Sabourin explained that if an employee does not make a choice, then option (b) in the form letter is selected by default. It states that once the employee returns to work, salary deductions are made for a period equal to double the period of pensionable leave without pay. Only the employee's contribution is recovered at the single rate.

[27] In cross-examination, he testified that the onus is on the employer to change the coding to recover the arrears at the single rate, with the employee's legal authority. However, the employee must request it.

[28] The evidence showed that on October 29, 2008, when she returned to work full-time, she and the employer did not follow up on the benefits in deficit. Neither attempted to contact the other to follow up on the arrears.

IV. Summary of the arguments

A. For the grievor

[29] The grievor alleged that the employer's decision to recover the sums in question directly violated article 27, "Pay Administration", of the collective agreement. She asked the employer to exercise its discretion provided under s. 155 of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*) to write off the debt.

[30] The circumstances as well as the nature of this grievance differ considerably from those in *Dodd.* The pith and substance of this grievance does not involve the pension and supplementary death benefit plans. The grievor is fully aware that the *PSSA* and its regulations require all contributors to contribute for all pensionable periods. She is also aware that that obligation extends to supplementary death benefits.

[31] She was aware of the deficits. During an unpaid sick leave absence of more than three months, as specified in the June 25, 2003, letter, a period of leave without pay is recorded as pensionable when no other option is selected.

[32] The grievance was not intended to alter a term or condition of employment provided under the *PSSA* but instead to contest the compensation advisor's unilateral and voluntary decision to suspend recovering the arrears and, in particular, to change the pay codes to suspend the pension and supplementary death benefits while the grievor gradually returned to work, which lasted until July 4, 2012, the date on which the debt recovery began. In its response at the final level of the grievance process, the employer admitted and acknowledged that the grievance resulted from a pay administration error, the result of which was an exponential increase in the deficit.

[33] Pay administration affects not only salary overpayments but also can include any benefits administration issue, as shown in the case law. It can also be about benefits overpayment as a result of an employer error or decision, as it is in the circumstances of this case.

[34] According to the *PSSA* and its regulations, an employee is not required to make contributions to pension and supplementary death benefit plans when on leave without pay. The employer pays them during that time, and the employee must reimburse them on his or her return to work. For that payment, the employee can choose payroll deductions for a period equal to double the period of leave without pay. In reality, no pension fund deficit occurred.

[35] This case deals only with the employer's decision to recover the sums that it voluntarily and in all good conscience paid on the grievor's behalf for nine years. In reality, the outstanding amounts that the employer seeks to recover did not result from a suspension of contributions, as it claimed, but instead from the fact that it failed to withhold statutory contributions directly at the source or from the grievor's

salary.

[36] If the employer benefits from flexibility or discretionary authority to suspend a recovery for nine years, it must necessarily benefit from that same flexibility or authority with respect to its re-collection. The employer has discretionary authority for recovering a debt, and under the relevant *FAA* provision, it was not required to recover this debt, based on the impact of the harm caused to the grievor.

[37] The employer must adopt the principles of justice and fairness as its fundamental doctrine for each decision it makes when exercising its discretionary authority, which it must do reasonably. The grievance challenged those principles.

B. For the employer

[38] After an administrative error, the pension deduction code was not reactivated in the payroll system. The grievance is about recovering pension and supplementary death benefit plan contribution deficits required by the *PSSA* and its regulations, in respect of which the Board does not have jurisdiction. It does not involve a salary overpayment. The *PSSA* and its regulations are clear. Due to her employment status, the grievor must contribute to the Canada Pension Plan and Supplementary Death Benefit Plan.

[39] Section 113 of the *Act* expressly prohibits a collective agreement from directly or indirectly altering a term or condition of employment established under the *PSSA.* Thus, pension plan matters are explicitly excluded from the adjudication process because they could not have been included in the collective agreement.

[40] The pith and substance of the grievance deals with questions arising from the *PSSA* and its regulations. The grievance is not about the application or interpretation of the collective agreement under s. 209(1)(a) of the *Act.* Consequently, the Board does not have jurisdiction to hear it.

[41] It claims that Parliament's intentions are not ambiguous, according to which the pension under the *PSSA* is not subject to the collective agreement and therefore is outside the Board's jurisdiction.

[42] Finally, the *FAA* does not provide any authority that would allow exempting the grievor from paying her pension and supplementary death benefit contributions as

required under the *PSSA*. Had her contribution deficit not been discovered in 2012, it would have been discovered when she retired, and the contributions would have been deducted from any amount of money payable to her then.

[43] The employer also relied on the Board's decisions in *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, to draw a parallel with the public service staffing system, which is also exempt from the collective agreement and outside the Board's jurisdiction under the *Act*.

[44] For all those reasons, the employer requested that the grievance be dismissed.

V. Reasons

[45] I will begin by addressing the employer's preliminary objection. Thus, I must decide if the Board has jurisdiction to hear the grievor's grievance about the question of recovering contributions to the Canada Pension Plan and the Supplementary Death Benefit Plan.

[46] The employer referred me to *Dodd*, in which the Board addressed the same issue, i.e., its authority to recover pension plan contribution arrears that occurred due to an administrative error on its part. In this case, the grievor argued that the facts, the circumstances, and the nature of her grievance differed from those in *Dodd*.

[47] Although the facts that led to filing the grievance in *Dodd* differed from the grievor's grievance, the fact remains that the crux of the grievance deals with recovering pension and supplementary death benefit plan contributions. In *Dodd*, the grievor's salary had been increased for reclassification purposes, in accordance with the collective agreement. Despite his salary increase, as a result of an administrative error by the employer, the amount of his contributions during the period in question did not change.

[48] Consequently, the contributions to the pension plan deducted from his pay did not correspond to his contribution amounts with respect to his new salary level. Just like the circumstances that led to the grievor's grievance, the collective agreement made no mention of the pension plan rates or the statutory deductions.

[49] The Board determined that even though the deductions were made using the

compensation system, they involved recovering arrears from the grievor's pension plan. The pay administration article and the recovery of pension plan contribution arrears were not connected.

[50] The Board determined that when the pith and substance of a grievance deals with issues originating from the *PSSA*, then it can only be about the application or interpretation of the collective agreement under s. 209(1)(a) of the *Act*. This issue requires the interpretation and application of the *PSSA* and its regulations and does not fall within the Board's jurisdiction. Section 113 of the *Act* expressly prohibits a collective agreement from directly or indirectly altering a term or condition of employment established under the *PSSA* and its regulations.

[51] The grievor pointed out that the grievance was not about recovering an amount that arose from a simple pension calculation error, as in *Dodd*. According to her, it dealt with recovering an amount that arose from the employer's wrongful decision to suspend benefit contributions for a completely unreasonable period of nine years.

[52] The evidence submitted by the parties contradicted that position. On June 25, 2003, during the grievor's first unpaid sick leave, the employer informed her of her benefit payment options, as provided under the *PSSA* and its regulations. According to the *PSSA*, an employee is not required to pay pension and supplementary death benefit contributions during unpaid leave. The grievor had the choice of not counting her sick leave as pensionable service. No evidence was submitted to disclose why she did not make a choice.

[53] The grievor knew that if she did not make a choice, option (b) would be selected by default. It stated that on her return to work, payroll deductions would occur for a time equal to twice the pensionable leave without pay period. Even if the employer makes contributions during such a period, the employee must reimburse it after returning to work.

[54] As payment, the employee can choose payroll deductions for a period equal to twice the unpaid leave period. Even though in theory there was no pension fund deficit, she has to repay the employer, which paid contributions in her name. As noted, in accordance with the *PSSA* and its regulations, all contributors must reimburse such sums once they return to work. Furthermore, on April 4, 2007, the grievor was aware of how much the benefits deficit had risen with respect to used leave, since she had

received a handwritten note from Ms. Gauthier. No evidence was submitted as to why she did not contact the compensation advisor at that time.

[55] The grievor pointed out that because the deductions were made using the payroll system, their legitimacy fell under article 27 of the collective agreement, which is about pay administration. I disagree. She did not provide any evidence to establish such a link. Referring to a collective agreement clause to show that it is a pay matter is insufficient, especially when the clause does not contain pension or supplementary death benefits information.

[56] The event that gave rise to this grievance was a compensation advisor's discovery of arrears involving the grievor's benefits that dated to 2003. Had the CIDA not reviewed the pension plan data and the *PSSA* and its regulations, this grievance would not have been filed. That is the grievor's view — she should not have been required to make payments several years after they should have been deducted; that resulted in this grievance.

[57] This is clearly a grievance about an obligation relating to benefit payments in accordance with the *PSSA* and its regulations. Its wording challenged the employer's decision to establish pension and supplementary death benefit plans arrears since May 2003. The grievor challenged its decision to recover the sums directly from her pay and to require her to reimburse them until 2030.

[58] It is clear that the pith and substance of her grievance did not challenge the employer's right to make payroll deductions but instead its right to recover pension and supplementary death benefit plan contribution arrears.

[59] In this case, the evidence clearly established that the grievor's concerns were about her obligation to make additional payments to settle the pension and supplementary death benefit plan contribution arrears. She did not submit any evidence that established a link between the collective agreement and the contributions, which does not violate s. 113 of the *Act*.

[60] In *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20, the Board ruled that pension plan matters are expressly excluded from the adjudication process because they are a term or condition of employment that has been or may be established under the *PSSA*. For that reason, they could not be included in the

collective agreement.

[61] Section 113 of the *Act* stipulates as follows that a collective agreement may not, directly or indirectly, alter a term or condition of employment established by the *PSSA*:

> ***Collective agreement not to require legislative implementation***
>
> ***113*** *A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if:*
>
> > ***(a)*** *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or*
> >
> > ***(b)*** *the term or condition is one that has been or may be established under the* Public Service Employment Act, *the* Public Service Superannuation Act *or the* Government Employees Compensation Act.

[62] The Board has no jurisdiction, inherent or explicit, to render a decision that would require modifying the collective agreement (see s. 229 of the *Act*). In fact, no collective agreement may alter the *PSSA* and its regulations or any other Act.

[63] As a result, the case law referred to by the grievor, *Murchison v. Treasury Board (Department of Human Resources and Skills Development)*; *Conlon, Hoffer and Patrick v. Treasury Board (Public Works and Government Services Canada)*; and *Lapointe v. Treasury Board (Department of Human Resources and Skills Development)*, which deals with salary overpayment, is not relevant to determining this issue.

[64] This case is not about a salary or other benefit overpayment as a result of an employer error or its unilateral decision. It is about an issue directly related to the Canada Pension Plan. Therefore, it is not subject to the interpretation or application of the collective agreement under s. 209(1)(a) of the *Act.*

[65] Although I empathize with the complainant, the evidence clearly shows that she was aware of the amounts in deficit at her first gradual return to work. At the hearing, she acknowledged that when one owes $54 000, one does not rush to pay it. She did not submit any evidence as to why she did not make a choice or could not have made one about her contributions while she was on unpaid leave.

[66] Despite the grievor's lack of diligence in this case, it would have been desirable and prudent for the employer to contact her again at the beginning of each unpaid sick leave to advise her of the consequences of not paying her benefits.

[67] Based on the facts of this case and the current legislative scheme, and as determined in *Dodd*, the Board may not change the collective agreement to subject the pension and supplementary death benefit plans established under the *PSSA* and its regulations to article 27 of the collective agreement. Since I determined that the Board does not have jurisdiction, I cannot decide the merits of the grievor's grievance.

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

(The Order appears on the next page)

VI. Order

[69] I allow the employer's objection to the Board's jurisdiction.

[70] I order the file closed.

December 2, 2016.

PSLREB Translation

Chantal Homier-Nehmé,
a panel of the Public Service Labour Relations and Employment Board