Date: 20161220

Files: 566-02-9384, 9386, 9387, and 9389

Citation: 2016 PSLREB 118

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

LUC FERLATTE AND ANNIE PHAM

Grievors

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Ferlatte v. Deputy Head (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Stephan J. Bertrand, adjudicator

For the Grievors: Wassim Garzouzi, counsel

For the Respondent: Paul Deschênes and Nadine Perron, counsel

Heard at Montreal, Quebec,
November 21 and 22, 2016.
(PSLREB Translation)

I. Individual grievances referred to adjudication

[1] This decision involves a request by Luc Ferlatte and Annie Pham ("the grievors") for an order requiring the Canada Border Services Agency ("the Agency") to honour a commitment made in a memorandum of understanding the parties signed to settle four individual grievances that the grievors filed in January 2013.

[2] In the grievances at issue, the grievors challenged disciplinary action that the Agency had taken against them for their failure to report receiving credit vouchers from a European airline that issued them during an escorted removal.

[3] After they were unsuccessful in the grievance process, the grievors referred their grievances to adjudication, and I was appointed to handle them and to render a decision as the adjudicator.

[4] At the hearing, the parties agreed to explore the possibility of voluntarily settling the issues in dispute. They signed an agreement to mediate form, and I acted as a mediator in accordance with s. 226(2) of the *Public Service Labour Relations Act* (*PSLRA*), enacted by s. 2 of the *Public Service Modernization Act* (S.C. 2003, c. 22). Subsection 226(2) of the *PSLRA* reads as follows:

> ***226 (2)*** *At any stage of a proceeding before an adjudicator, the adjudicator may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the adjudicator to continue the adjudication with respect to the issues that have not been resolved.*

[5] On November 6, 2014, the parties reached and signed a memorandum of understanding. I then ended the hearing by reminding them to inform the Registry of the Public Service Labour Relations and Employment Board ("the Board") that the grievances at issue would be withdrawn once all the terms of the memorandum of understanding were fulfilled.

[6] Having received no confirmation from the parties, the Board's Registry wrote to the grievors' counsel on March 9, 2015, for an update on the case. Counsel then informed the Registry that one of the terms of the memorandum of understanding had still not been fulfilled and that discussions were ongoing to resolve the issue.

[7] Since the discussions were unsuccessful, the grievors filed their request. At the hearing, the parties jointly agreed that an adjudicator had the authority to review the

grievors' allegation, which was that the Agency did not observe the final and binding memorandum of understanding concluded on November 6, 2014 (see *Amos v. Canada (Attorney General),* 2011 FCA 38).

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

II. Summary of the evidence

[9] At the hearing, the parties filed a joint statement of facts, which stated the following:

> [Translation]
>
> 1. [Text removed by the parties at the beginning of the hearing.]
>
> 2. *On November 6, 2014, an amicable memorandum of understanding was reached, which provided the following for the two grievors, at paragraph 6:*
>
>> The employer agrees to issue clear directives on using credits and credit vouchers that airlines issue when boarding is denied.
>
> 3. *On or about April 16, 2015, following its agreement to the terms of the memorandum, the Agency informed its directors of the following directive:*
>
>> On March 11, 2015, the message **Attention travellers: Notice about future travel credits** was posted on Atlas to provide information on what to do with future travel credits (FTCs), also known as airline credits, unused tickets, and voucher tickets. Following that message, I should point out that if you receive a credit voucher when an airline denies you boarding, you must immediately report it to management as soon as you return from your trip.

4. *Ms. Annie Beauséjour, director, told Mr. Lespérance that she shared his opinion that the note did not answer the question of credit voucher ownership.*

5. *This directive is no longer accessible on Atlas.*

6. *In November 2015, Mr. Marc Thibodeau prepared the following draft directive:*

> Commercial airlines issue travel vouchers directly to travelling government employees to compensate them for disruptions caused by changes to their itineraries. Once they return to work, those employees must report the following information to their managers:
>
> 1) The employee received a travel voucher from a commercial airline during a trip.
> 2) The value or amount of the travel voucher.
>
> Since travel vouchers that commercial airlines issue to employees are Crown property, managers must ensure that they are applied to the next trip for government business.
>
> If the value of the travel voucher is minimal and expires within 60 days, and employees have no trips planned for that period, managers may allow them to use travel vouchers for personal purposes.
>
> Requests for leave will be subject to operational requirements, and it is possible that certain travel vouchers cannot be used before they expire.
>
> Please share this message with your management team and your employees.
>
> If you have any questions, please do not hesitate to contact the regional human resources advisor.
>
> Thank you

7. *The draft directive was submitted to the union. Its opinion was that it did not meet the requirement set out in paragraph 6 of the memorandum; namely, the Agency did not communicate it.*

[Emphasis in the original]

[10] Counsel for the respondent also submitted the final version of the "[translation] Directive on Credits and Credit Vouchers Issued by Commercial Airlines" ("the directive"), which the Agency proposed to distribute to its employees very soon. This

final version stated the following:

. . .

> [Translation]
>
> ***Subject: Credits and credit vouchers issued to government employees travelling by commercial airlines***
>
> *Commercial airlines issue credits (especially via cash, electronic bank transfers, bank transfers, or cheques) and credit vouchers (mainly through travel vouchers) directly to travelling government employees to compensate them for disruptions caused when boarding is denied. When they return to work, employees must give their managers the following information:*
>
> *1) They received a credit or credit voucher issued by a commercial airline when boarding was denied.*
> *2) The value or amount of the credit or credit voucher.*
>
> *Since the credit or the credit voucher the commercial airline issued to the employee is Crown property, the manager must ensure that the value of the credit is returned to the Crown or that, for credit vouchers, they are applied to their next trip for government business.*
>
> *If the value of the credit voucher is $100 or less and it expires within 60 days, and the employee has no trips planned for government business during that period, then managers can allow employees to use the credits for personal purposes.*
>
> *Requests for leave will be subject to operational requirements, and it is possible that certain credit vouchers cannot be used before they expire.*
>
> *Please share this message with your management team and your employees.*
>
> *If you have any questions, please do not hesitate to contact the regional human resources advisor.*
>
> *Thank you*
>
> [Emphasis in the original]

[11] The grievors' counsel confirmed that the grievors reviewed the Agency's proposed final version of the directive and that they still believed that it did not meet the Agency's commitment outlined in paragraph 6 of the memorandum of understanding.

III. Summary of the arguments

A. For the grievors

[12] According to the grievors, the Agency did not fulfil the commitment it made in paragraph 6 of the memorandum of understanding because it failed to issue a clear directive on using credits and credit vouchers that commercial airlines issue when boarding is denied. The grievors referred me to the definition of the term "[translation] clear" in the Larousse dictionary, as follows:

. . .

> [Translation]
>
> - *That which evokes or demonstrates truthfulness, absence of uncertainty, serenity. . .*
> - *That which is obvious, definite, evident. . .*
> - *That which is perfectly intelligible, unambiguous, which can be easily understood or is expressed as such and that is understood. . . .*

[13] Specifically, the grievors argued that the directive is unclear because it states that, on one hand, the airlines provide credits and credit vouchers to compensate for disruptions to employees (first paragraph), and that, on the other hand, those credits and credit vouchers are Crown property (second paragraph), which, according to the grievors, makes it unintelligible and incomprehensible.

[14] The grievors argued that European Commission Regulation No. 261/2004 clearly states that credits and credit vouchers issued by airlines are specifically intended to compensate passengers, that the Agency's statement that credits and credit vouchers are Crown property is erroneous, and that a directive containing an erroneous statement cannot be considered clear and unambiguous.

[15] As an example, the grievors suggested that if the Agency's directive targeted any institution by referring to an incorrect municipal address, it would not be possible to consider such a directive clear because it would lead to confusion.

[16] The grievors also referred me to the Treasury Board of Canada Secretariat "Travel Directive" that was in force in February 1993. At that time, it stated that public service employees could not keep frequent flyer points or travel vouchers and that if they were given such products, they were considered Crown property. However, things

have changed; according to the grievors, since October 2002, the National Joint Council (NJC) "Travel Directive" has stated that public service employees can now join loyalty programs and retain benefits offered by the tourism industry for personal use, provided there are no additional costs to the Crown. Furthermore, the Crown no longer claims ownership of such offers under the new NJC directive. According to the grievors, therefore, it must be inferred that such credits and credit vouchers are the property of the public service employee in question, and the Agency is wrong to claim such a right in its directive.

[17] The corrective action the grievors seek is a declaration that the credits and credit vouchers that the Agency's directive targets belong to the employees who receive them and that, consequently, the Agency's directive is unclear.

[18] The grievors' counsel also requested that the title of this decision not mention the names of the grievors in question but instead that of their bargaining agent, the Public Service Alliance of Canada ("the Alliance"). He also asked that this decision avoid referring to either the facts that led to the disciplinary action or the disciplinary action the Agency imposed on the grievors.

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

[19] The respondent argued that an adjudicator's authority over a request for an order is restricted to determining if the Agency's directive meets the requirements set out in paragraph 6 of the memorandum of understanding that the parties signed on November 6, 2014, and that I do not have the jurisdiction to grant the grievors' requested corrective measure.

[20] According to the respondent, those requirements will be met once the final version of the Agency's directive is issued, since it is clear and is about using credits and credit vouchers that airlines issue when denying boarding to Agency employees. According to the respondent, the purpose of the directive is to ensure that border services officers who conduct escorts in a foreign country and who are given credits or credit vouchers by an airline are aware of what is expected of them once they return to work in order to avoid situations like those that led to the memorandum of understanding.

[21] The respondent also argued that the Agency's proposed directive is not contrary to the NJC Travel Directive, since none of its provisions specifically deals with who

owns credits and credit vouchers issued by airlines. Furthermore, the respondent's opinion is that the Agency is in no way bound by European Commission Regulation No. 261/2004.

[22] According to the respondent, paragraph 6 of the memorandum of understanding requires a clear directive; it does not require one that the grievors or their bargaining agent agrees with.

[23] Finally, the respondent argued that even if the Agency's directive contained an inaccurate statement, it would not make it unclear or unintelligible.

[24] With respect to the title of this decision, the respondent submitted that only the grievors were the parties involved in the grievances and in the memorandum of understanding that led to this request. Thus, it is their request and not their bargaining agent's.

IV. Reasons

[25] With respect to the request about this decision's title, I agree with the respondent's position that such a request could have originated only from the grievors and not from their bargaining agent. The Alliance does not have standing to submit a request as part of a settlement agreement about individual grievances that could have been referred to adjudication without its support. The matter of the lack of compliance with the memorandum of understanding arose, essentially, from the four grievances involving the grievors. The Alliance was not a party to the initial dispute that led to the memorandum of understanding and had no independent right or even standing to submit that request in its name. Only the parties to the initial dispute and the memorandum of understanding could have done it. In this case, the Alliance did not act as a party to the dispute but instead as a representative of one party. Thus, it is appropriate and necessary that the decision's title include the grievors' names. Furthermore, although it seems essential to me to mention the basic facts that led to the disciplinary action, to the make the reasons behind this decision intelligible and understandable (which I did at paragraph 2 of this decision), my view is that, for the purposes of this decision, it is unnecessary to mention the disciplinary action that the Agency imposed on the grievors or the other facts that led to the memorandum of understanding.

[26] With respect to the merits of this request, it is clear that the grievors attempted

to question not the clarity of the Agency's directive but instead the validity of its claim that it owns the credits and credit vouchers that airlines issue. However, I am not responsible for deciding that question as part of this exercise; it will have to be the subject of an entirely different debate in a distinct proceeding, if the parties deem it necessary. If so, the parties will then be able to submit testimonial and documentary evidence in support of their respective positions, specifically with respect to the right of ownership claimed by both sides, which was not done in this request. Although the grievors are the authors of this request, they did not attend the hearing and did not testify. In fact, no testimony was given during the hearing. The joint statement of facts and the different attachments to the parties' respective books constituted all the evidence before me in this case.

[27] In my opinion, the fact that the Agency might appear to be appropriating compensation intended for an employee does not make its directive ambiguous. In my view, the final version of the directive that the Agency proposes to issue is clear and unambiguous. It specifies the use of credits and credit vouchers that airlines issue when boarding is denied. As a result, it fulfils the Agency's commitment in paragraph 6 of the memorandum of understanding. Now, whether the Agency is entitled to treat such credits and credit vouchers as Crown property is entirely another matter, which I do not need to address in this case. For this type of request, my role is not to decide whether all the statements in the directive are correct in law or are erroneous, specifically the one about the ownership of credits and credit vouchers. That is not before me.

[28] As the respondent suggested, the directive's intent is to ensure that a border services officer who conducts an escort in a foreign country and receives a credit or credit voucher from an airline is aware of what is expected of him or her when returning to work. If the border services officer disagrees with the Agency's directive or is of the opinion that it is not founded in law and violates his or her rights or terms and conditions of employment, nothing prevents him or her from challenging the directive in question, with the support of his or her bargaining agent. However, that procedure is separate from what was dealt with in this case.

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

(The Order appears on the next page)

V. Order

[30] I declare that the directive on credits and credit vouchers that the Agency proposes to issue, part of which is cited at paragraph 10 of this decision, is clear and that is fulfils the Agency's commitment in paragraph 6 of the memorandum of understanding signed on November 6, 2014.

[31] I order the Agency to issue the directive within 10 business days after this amended decision's publication.

[32] I order files 566-02-9384, 9386, 9387, and 9389 closed on the receipt of confirmation from the parties that the directive has been issued.

December 20, 2016.

PSLREB Translation

Stephan J. Bertrand,
adjudicator