Date: 20161222

File: 569-02-108

Citation: 2016 PSLREB 119

Public Service Labour Relations Act Before an adjudicator

BETWEEN

ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Association of Justice Counsel v. Treasury Board

In the matter of a policy grievance referred to adjudication

Before: Steven B. Katkin, adjudicator

For the Bargaining Agent: Craig Stehr, counsel

For the Employer: Christine Langill, counsel

Decided on the basis of written submissions,
filed March 31 and April 6, 2016.

I. Background

[1] On October 27, 2011, the Association of Justice Counsel ("the Association") filed a policy grievance against the Treasury Board ("the employer"), alleging a violation of Appendix "B" of the collective agreement concluded between the Association and the employer for the Law Group bargaining unit, which expired on May 9, 2011 ("the collective agreement"). More specifically, the grievance concerned the calculation of performance pay for lawyers who are promoted during a particular fiscal year and whether, under the collective agreement, the employer had to pay lawyers performance pay for all months spent in a performance-pay-eligible position.

[2] The employer denied the grievance and the grievance was referred to adjudication on June 12, 2012. I heard the reference to adjudication on August 9, 2013.

[3] 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 to replace the former Public Service Labour Relations 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 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as that Act read immediately before that day.

[4] In *Association of Justice Counsel v. Treasury Board*, 2015 PSLREB 18, I dismissed the policy grievance.

[5] At paragraphs 93 and 94 of the reasons in decision 2015 PSLREB 18, I noted as follows that during the adjudication hearing, the employer had made a concession concerning the months for which lawyers were entitled to performance pay:

> *[93] The AJC submitted that the collective agreement requires two elements for performance pay: first, that it is paid for all months that an LA holds a performance-pay-eligible position, including when the LA is promoted from a performance-pay-eligible position to another performance-pay-eligible position, and second, that the rate of pay applied to the performance pay formula is that for which the LA is*

> *eligible on March 31.*
>
> *[94] Concerning the first element, the employer stated that in 2010-2011, it had applied its policy so that a lawyer who had been promoted would receive performance pay based only on the time spent in the position to which he or she had been promoted. The employer then conceded that in such case, the lawyer should be awarded performance pay for the full 12 months of the fiscal year. Thus, the only remaining issue between the parties is the rate at which performance pay should be paid.*

[6] In the order in decision 2015 PSLREB 18, I dismissed the grievance in its entirety, without noting the employer's concession at paragraph 94.

[7] The Association filed an application for judicial review of decision 2015 PSLREB 18, in which it challenged that I had failed to recognize the employer's concession in the order.

[8] In *Association of Justice Counsel v. Canada (Attorney General)*, 2016 FCA 56, the Federal Court of Appeal found that the order in decision 2015 PSLREB 18 did not reflect the employer's concession. The Court allowed the Association's judicial review application and remitted the matter back to me "… for the sole purpose of issuing a new order that accurately reflects his [my] reasons for decision…." The Court further directed that the parties be provided the opportunity to file submissions "… regarding the wording of the new order." Both parties filed initial submissions on March 31, 2016, and reply submissions on April 6, 2016.

II. Summary of the arguments

A. The Association's submissions

[9] The Association submitted that the policy grievance it had filed raised two discrete issues, as follows. The first issue concerned whether the collective agreement required that performance pay be paid for all months that a lawyer holds a performance-pay-eligible position, including when the lawyer is promoted from a performance-pay-eligible position to another performance-pay-eligible position. The Association's position was that performance pay must be paid for all months that a lawyer holds a performance-pay-eligible position. The second issue concerned the rate of pay applied to the formula for calculating performance pay.

[10] The Association submitted that the employer had conceded at the adjudication

hearing, without qualification, that performance pay must be paid for all months that a lawyer holds a performance-pay-eligible position. In support of this argument, the Association annexed to its submission an affidavit sworn by one of its labour relations officers, Rick Swoffer. In it, Mr. Swoffer stated that he attended the adjudication hearing and that he took handwritten contemporaneous notes that support the Association's position concerning the employer's concession. A copy of his notes was attached as an exhibit to the affidavit.

[11] The Association argued that if the employer is permitted to resile from its clear concession at the adjudication hearing, the Association will suffer significant prejudice, as it will have been deprived of any opportunity to dispute the issue and make submissions.

[12] The Association submitted that a new order, partially upholding the grievance as follows, should reflect the full concession made by the employer: "The Employer is ordered to pay performance pay for all months that a lawyer holds a performance-pay-eligible position. This includes both the period before and after the promotion."

B. <u>The employer's submissions</u>

[13] In its submissions, the employer alleged that the Association is attempting to enlarge what the employer specifically conceded at the adjudication hearing. It argued that the Association is doing so in two ways: first, by stating that what the employer conceded was that lawyers should be paid performance pay, whether or not they meet the terms of the collective agreement for the payment of performance pay; and second, the Association's argument that lawyers are to be paid performance pay for every month of a fiscal year that they hold their positions. The employer submitted that the Association appears to be taking out of context the words "… full 12 months of the fiscal year …" in paragraph 94 of decision 2015 PSLREB 18.

[14] At paragraphs 13 and 14 of its submissions, the employer set out its concession as follows:

> *13. The grievance disputed that there were no provisions in the Collective Agreement allowing for the pro-rating of performance pay for lawyers in receipt of promotions from the effective date of their promotion. As a result, the AJC was grieving Appendix B of the Collective Agreement that applied at that time (the one expiring May 2011) and the practice of*

> *limiting performance pay to the period worked following promotion and disregarding all previous work performed in the fiscal year preceding the date of promotion. Remedies were sought as relates to the 2010-2011 fiscal year.*
>
> *14. In response, at the hearing, the Employer changed its position from the lawyer who was promoted in the 2010-2011 fiscal year only receives their performance pay from the date of promotion on and $0.00 for any pre-promotion performance pay; to instead acknowledging that it should not necessarily be* nil *for the pre-promotion period. Thus, that it should not be* nil *for the pre-promotion time period of the 2010-2011 fiscal year, but proportional between the pre-promotion and the post-promotion period. That was the acknowledgment or "concession."*

[15] The employer submitted that the question at the adjudication hearing concerned lawyers who already qualified for performance pay and the timing of that pay. It stated that it agreed that the timing is not solely post-promotion to the exclusion of work performed pre-promotion and that it did not exclude pre-promotion work. The employer argued that if the Association is seeking an interpretation that in any year, lawyers are paid performance pay for every single month whether or not they meet the criteria of the collective agreement, then that is not the issue the employer was responding to; nor did the Association argue it at the adjudication hearing. The employer submitted that accepting the Association's argument would effectively amend the collective agreement, which is prohibited by s. 229 of the *PSLRA*.

[16] The employer stated that what it understood it was responding to when making its concession was the following: the affected lawyers had received a sufficient rating to merit performance pay in accordance with the relevant provisions of the collective agreement, which included the lawyers having been observed and assessed.

[17] The employer submitted that paragraph 94 of decision 2015 PSLREB 18 should be "clarified", to reflect what it conceded, although it did not indicate how, and that a paragraph should be added to the order in decision 2015 PSLREB 18 to reflect the following:

> *In respect of the Collective Agreement concluded between the AJC, on behalf of the Law (LA) group / bargaining unit, and the employer (Treasury Board), which expired on May 9, 2011 (the Collective Agreement), the performance pay for members in the LA group who were promoted from an LA position to an LA position during the fiscal year 2010-2011 is proportional as follows:*

> i. *April 1, 2010 up to the date of promotion in the 2010-2011 fiscal year (the pre-promotion time period)*
>
> *Performance pay is calculated for the pre-promotion time period based on the LA'S pre-promotion time period salary. Performance pay is paid if the LA employee meets the provisions of the Collective Agreement as relate to performance pay, such as, but not limited to, having held the LA position for enough time to have allowed a meaningful assessment of performance, a written assessment of performance was completed for the period of assessment, and a performance award was assessed for him/her.*
>
> ii. *The date of the promotion in the 2010-2011 fiscal year up to March 31, 2011 (the post-promotion time period)*
>
> *Performance pay is calculated for the post-promotion time period based on the LA'S post-promotion time period salary. Performance pay is paid if the LA employee has met the provisions of the Collective Agreement as relate to performance pay, such as, but not limited to, having held the LA position for enough time to have allowed a meaningful assessment of performance, a written assessment of performance was completed for the period of assessment, and that a performance award was assessed for him/her.*
>
> iii. *As of March 12, 2013 the parties, being the Treasury Board and the AJC, signed a new Collective Agreement. That agreement was not the subject of the grievance nor was it before the Board in its Decision in* AJC v Treasury Board, 2015 PSLREB 18.
>
> [*Sic* throughout]

[18] The employer argued that at the judicial review hearing before the Federal Court of Appeal, the Association advanced that its interpretation was not limited to the collective agreement at issue in decision 2015 PSLREB 18, which expired May 9, 2011, but also to the subsequent collective agreement signed in March 2013, despite the fact that the subsequent collective agreement involves a new pay system, namely, lockstep as opposed to in-range increases. The employer submitted that the subsequent collective agreement was not before the adjudicator and that at paragraph 4 in the "Background" section of decision 2016 FCA 56, the Court stated as follows: "The Association filed a policy grievance against the Employer alleging a violation of the collective agreement in force at the time."

[19] The employer submitted that the Department of Justice has implemented that which the employer had conceded at the adjudication hearing.

C. <u>The Association's reply submissions</u>

[20] In its reply submissions, the Association stated that the employer had not provided any evidence concerning the scope of its concession made at the adjudication hearing that competes with Mr. Swoffer's affidavit or with paragraphs 12, 24, 25, and 94 of decision 2015 PSLREB 18.

[21] The Association submitted that the concession made at the adjudication hearing that a lawyer is entitled to be paid performance pay for all months that the lawyer holds a performance-pay-eligible position is not inconsistent with the proper operation of the collective agreement.

[22] In the Association's submission, at the adjudication hearing, the employer did not limit its concession to the extent set out in its submissions.

[23] The Association argued that what it termed the employer's new proposal would lead to an absurd outcome, as demonstrated by the following example: a lawyer on strength on April 1 and promoted shortly before the end of the fiscal year would conceivably be deprived of the performance pay of the promoted position, since the time spent in the post-promotion position would arguably not afford a meaningful period for assessment in that position. The employer did not point to any collective agreement language that would require separate assessments in specific positions throughout the fiscal year. The employer's concession was that a lawyer who is on strength in a performance-pay-eligible position for the full year is entitled to performance pay for the full year, regardless of the timing of that lawyer's promotion.

[24] As for the employer's submission that the Department of Justice implemented that which the employer had conceded at the adjudication hearing, the Association argued that there is no evidence of what was implemented, the date on which the employer implemented it, and whether any implementation was retroactive to the date of the concession or of the grievance. Furthermore, as that is not evidence that was before the adjudicator, it should not be admitted.

D. Employer's reply submissions

[25] The employer submitted that Mr. Swoffer's affidavit should be struck, as the Federal Court of Appeal ordered that submissions be received by the adjudicator and did not say that evidence be received. Should the adjudicator admit the affidavit, on which the employer did not have an opportunity to cross-examine Mr. Swoffer, the employer requests that an oral hearing be held at which the employer may call its own evidence.

[26] Concerning the Association's submission that the employer is seeking to qualify decision 2015 PSLREB 18, the employer submitted that at the adjudication hearing, there was no need for any qualifications as the employer was responding to a specific issue, namely that lawyers promoted during the 2010-2011 fiscal year did not receive any performance pay before being promoted, even though they had otherwise met the collective agreement criteria for performance pay.

[27] The employer submitted that the Association is attempting to import a significantly broader meaning into decision 2015 PSLREB 18 than that which the employer understood was grieved or that it responded to. As an example, the employer stated that the grievance concerned a Department of Justice bulletin, yet the Association would seek to enforce 2015 PSLREB 18 against the Public Prosecution Service, a separate entity under the schedules to the *Financial Administration Act* (R.S.C., 1985, c. F-11) that was not named in the grievance.

[28] The employer argued that the grievance did not state that lawyers should be paid performance pay for each and every month, whether or not their performance was observed and assessed. The collective agreement provisions requiring a meaningful assessment to qualify for performance pay were not mentioned in the grievance. The order that the Association seeks would effectively deal with an issue and collective agreement clauses that were not grieved. The employer disagrees with the notion that a lawyer who has not met the collective agreement criteria for performance pay should automatically receive performance pay every single month. That issue was neither grieved nor raised by the Association at the adjudication hearing.

[29] An order according to the wording sought by the Association would result in overly broad enforcement against the employer on issues that were not grieved and

collective agreement provisions that were not challenged and to which the employer did not respond.

III. Reasons

[30] In 2016 FCA 56, the Federal Court of Appeal stated that having accepted the employer's concession at the adjudication hearing, my manifest intention must have been to partially uphold the grievance. The Court ordered that I issue a new order that accurately reflects my reasons for decision in 2015 PSLREB 18. In brief, the Court ordered me to correct my order in decision 2015 PSLREB 18, not to modify the reasons set out in that decision.

[31] By suggesting that paragraph 94 of decision 2015 PSLREB 18 be clarified and that the proposed wording set out in paragraph 17 of this decision be added to decision 2015 PSLREB 18, the employer overstepped the limits of the Court's order.

[32] With respect to Mr. Swoffer's affidavit, it constitutes fresh evidence, which I do not admit and I shall disregard.

[33] What I understood at the time and what I meant when I referred to the employer's concession at paragraphs 24, 25, and 94 of decision 2015 PSLREB 18 must be set in the context of my reasons for decision as a whole. Those paragraphs read as follows:

> *[24] The employer put the issue as follows. When an LA-1 is promoted to LA-2A or from LA-2A to LA-2B, must performance pay be calculated based only on the higher salary of the position to which he or she was promoted? The employer stated that this question was prompted by Bulletin 545. It referred to the following provisions of Bulletin 545: section 4.6, which sets out the following non-exhaustive situations in which performance pay would be prorated, which are new hire, leave without pay, acting pay, promotion and retirement; section 6.2, which, among other things, provides that in-range increases will be calculated using the salary in effect on March 31, 2011; and section 6.3, which deals with exceptional situations.*
>
> *[25] The employer submitted that while section 4.4 of Part 2 of Appendix "B" of the collective agreement stipulates that LAs on strength on March 31 and April 1 are eligible for performance pay, it does not mean that the salary dates back 12 months. Referring to the first example in Exhibit 2, in which an LA-1 on strength on April 1 is promoted to LA-*

> *2A effective December 1, the employer stated that in 2010-2011, it had applied its policy so that the individual promoted would receive performance pay based only on the time spent in the LA-2A position. The employer then conceded that such an individual should be awarded performance pay for the full 12 months of the fiscal year. It said that the remaining issue between it and the AJC is the rate at which the performance pay should be paid.*
>
> …
>
> *[94] Concerning the first element, the employer stated that in 2010-2011, it had applied its policy so that a lawyer who had been promoted would receive performance pay based only on the time spent in the position to which he or she had been promoted. The employer then conceded that in such case, the lawyer should be awarded performance pay for the full 12 months of the fiscal year. Thus, the only remaining issue between the parties is the rate at which performance pay should be paid.*

[34] In its arguments at adjudication, the employer had disagreed with the Association's position that performance pay be based on the lawyer's salary on the last day of the fiscal year, March 31, as it would mean that in the case of a lawyer who was promoted on March 30, any performance pay for the pre-promotion work during the fiscal year would be calculated on the basis of the post-promotion salary as of March 31. The employer also argued throughout that performance pay must be based on duties assigned to the lawyer and performed by him or her provided that the relevant collective agreement criteria were met.

[35] In paragraph 95 of decision 2015 PSLREB 18, I referred to the definition of "performance pay" set out in the applicable collective agreement. I found that the language of the collective agreement required that to qualify for performance pay, a lawyer must have actually performed the assigned tasks of his or her classification and must have met the collective agreement criteria for performance pay.

[36] Against that background, the following is what I understood from the employer's concession during the adjudication hearing: lawyers who were promoted from one performance-pay-eligible position to another performance-pay-eligible position during the 2010-2011 fiscal year are to be paid performance pay for the pre-promotion time period based on their pre-promotion salary, and from their dates of promotion to the end of the fiscal year, they are to be paid performance pay based on their post-promotion salaries. In both cases, I understood that the lawyers must have

met the criteria set out in the collective agreement for performance pay.

[37] Accordingly, the following order corrects the order set out in decision 2015 PSLREB 18 to reflect my understanding and intention at the time.

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

(The Order appears on the next page)

IV. Order

[39] Paragraph 137 of decision 2015 PSLREB 18 is replaced by the following:

> [137] I declare that the employer conceded that, for the 2010-2011 fiscal year, the employer will pay performance pay on the following basis to all lawyers in the Law Group bargaining unit who were promoted during that year:
>
> (a) a lawyer who was promoted during that year and who meets the criteria set out in the collective agreement for the payment of performance pay while he or she occupied a performance-pay-eligible position before being promoted, will be paid performance pay from April 1, 2010, to the date immediately preceding the promotion based on his or her salary on the date immediately preceding the promotion; and
>
> (b) a lawyer who was promoted during that year and who meets the criteria set out in the collective agreement for the payment of performance pay while he or she occupied a performance-pay-eligible position after being promoted, will be paid performance pay from the date of the promotion to March 31, 2011, based on his or her salary on March 31, 2011.
>
> [138] The grievance is allowed to the extent of the employer's concession reported in paragraph 137.

December 22, 2016.

Steven B. Katkin,
adjudicator