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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

DOMINIC CIANCIARELLI

Grievor

and

**TREASURY BOARD
(Department of the Environment)**

Employer

Indexed as
Cianciarelli v. Treasury Board (Department of the Environment)

In the matter of an individual grievance referred to adjudication

Before: Michael F. McNamara, a panel of the Public Service Labour Relations
and Employment Board

For the Grievor: Sarah Godwin, employment relations officer, Professional
Institute of the Public Service of Canada

For the Employer: Jenna-Dawn Shervill, articling student, and Michel Girard,
counsel

Heard at Ottawa Ontario,
September 9, 2015.

I. Individual grievance referred to adjudication

[1] The grievor, Dominic Cianciarelli, was a long-term public service employee. In 2012, he was classified at the ENG-5 group and level with Environment Canada and was a member of the Professional Institute of the Public Service of Canada (PIPSC). His position was deemed surplus under s. 64 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13). As such, he became subject to the workforce adjustment agreement (WFA) between the PIPSC and the Treasury Board.

[2] Of the options available to the grievor via the WFA, he chose to retire and to receive a lump-sum payment, which is referred to in the WFA as a “Transition Support Measure” (TSM). He asked the employer to pay his TSM over two calendar years, to reduce the tax consequences. His request was denied.

[3] On March 4, 2013, the grievor filed a grievance, which was referred to adjudication before the former Public Service Labour Relations Board (PSLRB) on August 28, 2013.

[4] 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 Public Service Labour Relations and Employment Board (“the Board”) to replace the former PSLRB and the former Public Service Staffing Tribunal. The Board continues the work of the PSLRB; consequently, this decision is being rendered by a panel of the Board.

[5] This adjudication raises the following issue: Is the grievor entitled to receive the payment of his TSM under the WFA in two lump sums over two calendar years, as he requested?

[6] In my view, in these circumstances, he is, and accordingly, I allow the grievance.

II. Background

[7] The options available to the grievor are set out in clause 6.3.1 of the WFA, which is found at Appendix G of the Architecture, Engineering, and Land Survey collective agreement between the PIPSC and the Treasury Board (expiry date: September 30, 2014; “the collective agreement”). They are as follows:

6.3.1 Only opting employees who are not in receipt of the guarantee of a reasonable job offer from the deputy head will have access to the choice of options below:

(a)

(i) Twelve-month surplus priority period in which to secure a reasonable job offer. Should a reasonable job offer not be made within a period of twelve months, the employee will be laid off in accordance with the Public Service Employment Act. Employees who choose or are deemed to have chosen this option are surplus employees.

...

or

(b) Transition Support Measure (TSM) is a cash payment, based on the employee's years of service in the public service (see Appendix B) made to an opting employee. Employees choosing this option must resign but will be considered to be laid off for purposes of severance pay;

or

(c) Education Allowance is a Transitional Support measure (see Option (b) above) plus an amount of not more than \$10,000 for reimbursement of receipted expenses of an opting employee for tuition from a learning institution and costs of books and mandatory equipment.

Employees choosing Option (c) could either:

(i) resign from the Core Public Administration but be considered to be laid off for severance pay purposes on the date of their departure;

or

- (ii) *delay their departure date and go on leave without pay for a maximum period of two years, while attending the learning institution. The TSM shall be paid in one or two lump-sum amounts, at the employee's request over a maximum two-year period. During this period, employees could continue to be public service benefit plan members and contribute both employer and employee share to the benefits plans and the Public Service Superannuation Plan. At the end of the two-year leave without pay period, unless the employee has found alternate employment in the Core Public Administration, the employee will be laid off in accordance with the Public Service Employment Act.*

[8] In a nutshell, the options in clause 6.3.1(b) (“option (b)”) and 6.3.1(c)(i) (“option (c)(i)”) are silent with respect to paying the TSM in instalments. The option in clause 6.3.1(c)(ii) (“option (c)(ii)”) specifically indicates that the payment can be done in one or two lump sums.

[9] On June 5, 2012, the grievor selected option (c)(i).

[10] In February 2013, he requested that his TSM be paid over two calendar years.

[11] On March 29, 2013, he retired from the public service.

[12] His grievance was heard only at the final level, by Assistant Deputy Minister Karen Dodds, and was denied by a letter dated August 12, 2013.

III. Summary of the arguments

A. For the PIPSC

[13] The PIPSC submitted that a TSM meets the definition of a “retiring allowance” under the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) and that according to the Canada Revenue Agency (CRA), an employer may provide a retiring allowance in instalments over a number of years, with the amounts paid being taxed in the year in which they are received.

[14] Public Works and Government Services Canada issued “Compensation Directive 2006-002: Information Notice to Employees” (“the notice”), which set out questions and answers on retiring allowances. It states as follows: “All other retiring allowances [other than severance pay] may be deferred over a two year [sic] period only ...”.

[15] On June 15, 2012, Gary Corbett, then-president of the PIPSC, wrote to Assistant Deputy Minister Marc-Arthur Hyppolite, requesting that the Treasury Board approve TSM payments selected under options (b) and (c)(i) to be paid in two instalments.

[16] On July 31, 2012, ADM Hyppolite responded, stating that “... it remains that the existing administrative mechanisms and the language currently contained in the existing WFA provisions do not provide an authority to split the payment, save for option c (ii).”

[17] Despite ADM Hyppolite’s contention, according to ADM Dodds’ decision on this grievance, at least two departments were permitting option (c)(i) TSMs to be paid in instalments at the time of ADM Hyppolite’s July 31, 2012, correspondence. The employer advised that that practice ceased on August 29, 2012.

[18] An employer must exercise its discretion fairly, reasonably, in good faith, and for a business purpose. The employer is required to consider a request on its merits. The WFA’s wording does not restrict the number of instalments in which a TSM can be paid. Therefore, the employer has the discretion to issue the TSM in instalments. Further, option (c)(ii) can clearly be paid in two lump sums. Accordingly, it is certainly possible to pay the TSM in instalments; otherwise, the language of option (c)(ii) would not make sense.

[19] Had the parties wanted to restrict the TSM payment to one lump sum, they could have done so explicitly. They did not.

[20] Although an instalment option is explicitly referenced in the WFA only with respect to option (c)(ii), this does not preclude instalment payments for

the TSM under options (b) and (c)(i). See *Professional Institute of the Public Service of Canada v. Treasury Board*, 2011 PSLRB 80 at para. 20, in which the adjudicator noted that the parties to an agreement might simply have thought that clarification was necessary in one section but not in another.

[21] The provision providing for Transition Support Measures must be interpreted consistently with the rest of the WFA, including clause 1.1.1, which states that departments are to ensure that affected and surplus employees are treated equitably. The WFA does not restrict the employer's discretion to pay the TSM in instalments. Therefore, the employer did not act reasonably, fairly, or in good faith by simply denying that it had discretion to pay the TSM in two instalments.

[22] The employer has provided no business purpose for its position and for fettering its discretion. There is no known legal barrier to paying the TSM in instalments, yet the employer refuses to even consider the request on its merits.

B. For the employer

[23] The employer submits that there has been no violation of the collective agreement and that there is no basis to conclude that one lump-sum payment was unreasonable or that it was made in bad faith.

[24] Words should be given their ordinary meaning. Each word should be given some meaning, and dissimilar terms should be given different meanings.

[25] Sections 7 and 11.1 of the *Financial Administration Act* R.S.C., 1985, c. F-11; (FAA) grant the employer broad unlimited power to set general administrative policy, to organize the federal public service, and to determine and control personnel management. Subsection 7(1) grants the employer the exclusive authority on all matters relating to "... human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it ...".

[26] The burden of proof is on the grievor to clearly demonstrate that on a balance of probabilities, the employer contravened the collective agreement. That burden has not been met.

[27] An adjudicator can only interpret and apply the express words of a collective agreement; no modification of them is possible. Even if a provision may seem unfair, it cannot be ignored.

[28] Option (b) expressly provides that an employee is entitled to a one-time TSM payment. The ordinary meaning of “a” in the context of “a cash payment” is as an indefinite article before a singular noun; therefore, the employee is entitled to a singular cash payment.

[29] In the alternative, the WFA is silent on how the TSM is to be paid under option (c)(i). Had the parties wanted to specify two TSM instalments in the agreement, they would have specifically stated so. In the absence of a specific reference to the payment method, the employer is entitled to exercise its management rights under the *FAA* to issue the TSM in one payment.

[30] The only provision in the WFA allowing for more than one instalment of a TSM payment is option (c)(ii), which states that an employee can delay his or her departure date by going on leave without pay for up to two years. Doing so means that employee remains a public service employee, continues as a public service benefit plan member, and continues to contribute to the Public Service Superannuation Plan. The grievor did not choose that plan. He chose option (c)(i), which does not contemplate paying the TSM in instalments. Under that option, the employee resigns, and the TSM is payable immediately. The employment relationship ends.

[31] The fact that the CRA allows a retirement allowance to be paid in instalments has no bearing on this case. The CRA allowing it does not obligate the employer to do it. Rather, the employer’s discretionary authority under the *FAA* prevails.

[32] The Board should not rely on the notice. It is not an employer document;

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it was posted by Public Works and Government Services Canada in 2006, was not incorporated into the collective agreement, and the employer has not agreed to its terms.

[33] The fact that the grievor believes that the tax consequences of a one-time TSM payment are unfair is not a reason to ignore long-established management rights.

IV. Reasons for decision

[34] After reviewing the relevant collective agreement language, it seems to me that a principle of fairness has been ignored. The employer has agreed, in the collective agreement proper and in the WFA, to treat employees fairly.

[35] In this case, an employee retired early as a consequence of being identified as surplus. He then had one opportunity to ensure that the employer handled his severance compensation in the most advantageous manner, within the context of the applicable legislation. It seems to me that an employer, acting fairly and reasonably, would exercise its power to afford an involuntarily exiting employee every advantage available to assist with the involuntary transition to retirement.

[36] In contrast to the WFA, clauses 19.06 and 19.07 of the collective agreement regarding severance pay contain specific language with respect to the method of paying severance entitlement.

[37] This language specifies that a single payment is to be made but allows for a one-time opportunity to split any accrued entitlement into two portions, while making it very clear that going forward, a single payment will be the only option.

[38] However, in the WFA, the language is silent except for option (c)(ii), which specifies the option to pay the TSM in either one or two lump sums. The rest of the clause is simply silent and does not specify a single payment, as the severance pay provisions of article 19 very clearly do.

[39] Had the parties wanted to restrict the possibility of two instalments to only option (c)(ii), they could easily have done so, just as they did in article 19 of the collective agreement.

[40] I am also cognizant that, in fact, some departments allowed the two-payment scenario. I am of the mind that I need to be fair to the grievor, and I can find no reasonable explanation from the employer of any impediment to the two-payment option, especially when it clearly had been in place for some time, at least in some departments.

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

(The Order appears on the next page)

V. Order

[42] The grievance is allowed.

[43] I order the employer to reissue the grievor's statement of employee earnings to reflect splitting the TSM over two years, as the grievor requested.

April 12, 2017.

**Michael F. McNamara,
a panel of the Public Service Labour
Relations and Employment Board**