Files: 166-2-27489
166-2-27490

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

BRADY A. AUBIN, ALEXANDER Y. KRAWCHUK

Grievors

and

TREASURY BOARD
(Transport Canada)

Employer

Before: J. Barry Turner, Board Member

For the Grievors: Captain Linton Sellen, Pete Firlotte, Regional Chairman
Aircraft Operations Group Association

For the Employer: Harvey Newman, Counsel

Heard at Winnipeg, Manitoba,
March 21, 1997.

Brady Allan Aubin and Alexander Yury Krawchuk, job classifications AO-CA-02, Air Navigation System Requirements Division, Transport Canada Aviation, Winnipeg, Manitoba have similar grievances under the collective agreement between the Treasury Board and The Aircraft Operations Group Association (AOGA), covering all employees in the Aircraft Operations Group bargaining unit, Code 401/90.

Mr. Aubin's grievance reads:

> *I believe that I have inappropriately been denied counting of Elected Pensionable Service as continuous service for the accumulation of vacation leave credits. Some of the relevant documents and directives are:*
>
> > *Treasury Board Manual of Personnel Management, Chapter 3 Article 3.2.8 pages 14 and 15, and Chapter 1-1 Appendix A paragraph 3 on pages A-5 and A-6.*
> >
> > *Protected Memorandum from RPRDC (Pay & Benefits) to B. Aubin, File No. RPR-1814-035-353-600, dated 1994 September 22.*

Mr. Krawchuk's grievance reads:

> *I believe that I have inappropriately been denied counting of Elected Pensionable Service as continuous service for the accumulation of vacation leave credits. Some of the relevant documents and directives are:*
>
> > *Treasury Board Manual of Personnel Management, Chapter 3 Article 3.2.8 pages 14 and 15, and Chapter 1-1 Appendix A paragraph 3 on pages A-5 and A-6.*
> >
> > *Protected Memorandum from RPRDC (Pay and Benefits) to A.Y. Krawchuk, file no. RPR-1814-074-340-414, dated 1994 September 22.*

Both grievors are requesting the following corrective action:

> *I request that my Elected Pensionable Service be counted as continuous service for the accumulation of vacation leave credits.*

It was agreed by the parties that I would hear both grievances together and that the facts are not in dispute for either grievance. Mr. Aubin transferred from the regular Canadian Armed Forces (CAF) to the CAF Reserves on April 29, 1986 and is

still a member of the Reserves. Mr. Krawchuk joined the Reserves on May 8, 1973 and is also still a member. Both are Primary Reservists, 402 Squadron, Winnipeg.

It was also agreed by all parties that the real issue before me is the interpretation to be given to the meaning of "continuous employment" in paragraph 2.01(c) and clause 23.02 of the collective agreement and in subclause 3. (A) (i) of the Public Service Terms and Conditions of Employment Regulations, as it pertains to the grievors' years of service in the Reserves before they became employees with Transport Canada for the purpose of calculating vacation leave credits.

Paragraph 2.01(c) of the collective agreement reads:

> *2.01 For the purpose of this Agreement:*
>
> ****
>
> *(c) "continuous employment" has the same meaning as specified in the Public Service Terms and Conditions of Employment Regulations;*

Clause 23.02 of the collective agreement reads:

> *Accumulation of Vacation Leave Credits*
>
> ****
>
> *23.02 An employee shall earn vacation leave credits at the following rate for each calendar month during which the employee receives pay for at least ten (10) days;*
>
> *(a) one and one-quarter (1 1/4) days until the month in which the anniversary of the employee's eighth (8th) year of continuous employment occurs;*
>
> *(b) one and two-thirds (1 2/3) days commencing with the month in which the employee's eighth (8th) anniversary of continuous employment occurs;*
>
> *(c) two and one-twelfth (2 1/12) days commencing with the month in which the employee's twentieth (20th) anniversary of continuous employment occurs;*
>
> *** effective October 26, 1990 two and one-twelfth (2 1/12) days commencing with the month in which the employee's nineteenth (19th) anniversary of continuous employment occurs;*

> ****
>
> *(d) effective October 26, 1991, two and one-half (2 1/2) days per month commencing with the month in which the employee's thirtieth (30th) anniversary of continuous employment occurs;*
>
> *(e) however, an employee who is entitled to or who has received furlough leave shall have the vacation leave credits, earned under this article, reduced by five-twelfths (5/12th) of a day per month from the beginning of the month in which the employee completes his or her twentieth (20th) year of continuous employment until the beginning of the month in which the employee completes his or her twentieth-fifth (25th) year of continuous employment.*

Clause 3. (A) of the Public Service Terms and Conditions of Employment Regulations reads:

> ***Continuous employment***
>
> *3. For the purpose of these regulations the following periods count* ***as continuous employment****:*
>
> *(A) In respect of a person appointed to Part I Service as an indeterminate employee:*
>
> *(i) immediately prior service in Part I Service or the Public Service on an indeterminate basis, or on a specified term basis for three months or more;*
>
> *(ii) a combination of prior service in Part I Service and the Public Service on an indeterminate basis, or on a specified term basis for three months or more;*
>
> *(iii) immediately prior service in the Canadian Armed Forces or the Royal Canadian Mounted Police, provided that the person was honourably released and has made or makes a valid election to contribute for that service under the Public Service Superannuation Act (the effective date will be the date the election is completed)*
>
> *provided that these periods of service are not separated by more than three months;*
>
> *(iv) service other than as a casual employee in the office of a minister or the leader of the*

> *opposition in the House of Commons, and service in Part I Service immediately prior to such service provided that such person ceased to be employed in such office because the person holding such position ceased to hold it; and*
>
> *(v) immediately prior service in Part I Service as a casual employee, provided that such service is not separated by more than five working days.*
>
> (emphasis added)

Captain Linton Sellen submitted eight exhibits (Exhibits G-1 to G-8) on consent. No witnesses were called. The hearing lasted one-half day.

I am being asked to decide if the employer has correctly interpreted the continuous employment provision of the Public Service Terms and Conditions of Employment Regulations as it is incorporated into the collective agreement.

Argument for the Grievors

Captain Sellen argued on behalf of the bargaining agent, accompanied by Mr. Pete Firlotte, Regional Chairman, AOGA, that the grievors should qualify for "continuous employment" as defined in their collective agreement, Article 2.01(c) (Exhibit G-8, page 2) when they began with Transport Canada based on their prior service in the CAF Reserves.

Captain Sellen argued the key question is whether or not Part I Service, as defined in the Public Service Terms and Conditions of Employment Regulations (Exhibit G-8, page 7) meaning, the departments and agencies listed in Part I of Schedule I to the *Public Service Staff Relations Act* (PSSRA), can be included in the calculation of continuous employment for members of the Reserve who join the Public Service. He said Part I Service and the Public Service are distinctly different. The Public Service has the meaning given to that expression in the *Public Service Superannuation Act*. This definition reads in section 3 of the *Public Service Superannuation Act*:

> *"Public Service" means the several positions in or under any department or portion of the executive government of Canada, except those portions of departments or portions of the executive government of Canada prescribed by the*

> *regulations and, for the purposes of this Part, of the Senate and House of Commons, the Library of Parliament and any board, commission, corporation or portion of the public service of Canada specified in Schedule I;*

Captain Sellen argued that Part I of Schedule I to the PSSRA (Exhibit G-8, page 10) refers to "Departments named in Schedule I to the *Financial Administration Act*". Schedule I of the *Financial Administration Act* includes the Department of National Defence (DND) (Exhibit G-8, page 12).

He concluded therefore that the chain of legal linkage is clear and unbroken from the collective agreement to the Public Service Terms and Conditions of Employment Regulations, to Part I of Schedule I to the PSSRA, to Schedule I to the *Financial Administration Act* that includes DND. Therefore the grievors' service in the Reserves should be read as continuous employment that would allow them to calculate Reserve service for vacation leave credits. He said Reserve service comes under DND. He reminded me that subclause 3. (A) (iii) of the Public Service Terms and Conditions of Employment Regulations refers to the Canadian Armed Forces under continuous employment.

Captain Sellen argued that both the regular members and the reserve members of the CAF are employees of DND as is demonstrated in a series of DND exhibits ranging from T-4's for reserve service, security clearance, Reserve Force Basic Attendance Register, and others (Exhibit G-7). To suggest therefore that the grievors were not employed by DND during their Reservist period leading up to their Transport Canada employment, is an absurdity according to Captain Sellen. He concluded that they have therefore met the definition in their collective agreement under Part I Service as DND employees.

Captain Sellen added that grievor Aubin holds the rank of Major and is a supervisor of a combined squadron of regular and reservist DND members. He submitted that it is therefore morally and legally correct, especially since there is no written reference anywhere that would exclude Reservists, that they should be treated like other public servants for vacation leave credits since they are DND employees.

Argument for the Employer

Although Mr. Newman found the grievors' argument interesting, he reminded me that military service is not prior service except in very specific circumstances, that is, immediately prior service in the CAF as per the requirements for continuous employment in clause 3. (A) (iii) of the Public Service Terms and Conditions of Employment Regulations (Exhibit G-8, page 8).

Mr. Newman argued that this issue was resolved twenty years ago in the decision of the Federal Court of Appeal in Bolling et al. v. Public Service Staff Relations Board [1978] 1 F.C. 85 that concluded neither the PSSRA nor the *Public Service Employment Act* applies to members of the Canadian Armed Forces.

This decision reads as follows at pages 85 to 87:

> *The question of law which arises on this application is whether service in the Canadian Forces should be counted in calculating vacation leave under Article 18 of a collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada covering employees of the Scientific Regulation Group.*
>
> *Under Article 18.02, for the purpose of the Article "service" means all periods of employment in the Public Service, whether continuous or discontinuous, except where a person,* [who on] *leaving the Public Service, takes or has taken severance pay. The agreement contains no definition of the expression "employed in the Public Service" or of the expression "Public Service" but, under Article 2.02, except as otherwise provided in the agreement, expressions used in the agreement, if defined in the Public Service Staff Relations Act, have the same meaning as given to them in that Act.*
>
> *In Section 2 of that Act, the expression "Public Service" is defined as meaning*
>
> > *the several positions in or under any department or other portion of the public service of Canada specified from time to time in Schedule I*
>
> *Schedule I lists inter alia departments named in Schedule A to the Financial Administration Act and the lists in that Schedule include "Department of National Defence".*

> *In our opinion, neither the general substantive provisions of the Public Service Staff Relations Act which confer collective bargaining rights on certain employees in the public service of Canada, nor those of the Public Service Employment Act which provide for selection on the merit principle, for rights with respect to promotion and for appeals, apply to members of the Canadian Forces. The terms and relationships under which they serve are prescribed by the National Defence Act and are largely, if not entirely, inconsistent with the application of either the Public Service Staff Relations Act or the Public Service Employment Act to them. That they are not included in the general body of persons to whom the Public Service Staff Relations Act and the Public Service Employment Act apply is borne out by the fact that they are specially mentioned in paragraph 2(2)(b) of the latter Act for the purpose of conferring particular rights on them.*
>
> *It would, therefore, in our view, be wrong to read the definition of that segment of the public service of Canada which is to be referred to as the "Public Service" throughout the Public Service Staff Relations Act, and indeed the Public Service Employment Act as well, where the definition refers to and coincides with that in the Public Service Staff Relations Act, as embracing members of the Canadian Forces.*
>
> *We are accordingly of the opinion that the adjudicator correctly decided that service in the Canadian Forces is not service within the meaning of Article 18 of the collective agreement.*
>
> *The application will therefore be dismissed.*

Mr. Newman concluded that what is before me is an issue dealing with armed forces personnel to which a clear exception was made to the collective agreement after 1977 in subclause 3. (A) (iii) to allow regular military service to count as continuous employment for certain benefits but this does not apply to service in the Reserves.

He argued that Part I of Schedule I to the PSSRA as it reads at the beginning applies to "departments and other portions of the public service of Canada in respect of which Her Majesty as represented by the Treasury Board is the employer", and reminded me that the Federal Court of Appeal in Bolling et al. (supra) concluded that public service collective agreement rights do not apply to the CAF.

To strengthen this argument Mr. Newman referred me to the decision of the adjudicator in Bolling et al. (Board files 166-2-2410 to 2412), that reads in part at page 6:

> *... Moreover, it was his position that in capitalizing the words "Public Service" in Article 18.02 the parties must be taken to have intended that phrase to have a more limited and narrow scope than any position or employment which could be said to be in the service of the public. Specifically, it was his position that from the capitalization of the words Public Service in Article 18.02, which is the same manner in which that phrase is described in various pieces of legislation, including s. 2 of the Public Service Staff Relations Act, the parties must have intended, inter alia, to exclude service in the armed forces which, while admittedly can be regarded as a public service, is not generally regarded by the public or by Parliament to form part of the "Public Service". ...*

He further argued that a person cannot serve in Part I Service unless he or she is an employee of the Treasury Board as defined in the *Public Service Employment Act*. The *Public Service Employment Act* definition of employee is:

> *"employee" means a person employed in that part of the Public Service to which the Commission has the exclusive right and authority to appoint persons.*

Mr. Newman also referred me to two similar adjudication decisions in Hough (Board file 166-2-25177) and Scott (Board file 166-2-6248).

Counsel argued that the grievors are trying to mix "apples and oranges" since the collective agreement before me is for public servants not for the military, and that the parties did not intend that service in the Reserves should count as immediately prior service or they would have said so in the collective agreement. He concluded that the key word is service and being employed under the *Public Service Employment Act*, under the PSSRA, and under the *Financial Administration Act* as Part I Service as a public servant does not apply to the military. He said a person has to be subject to the Public Service Terms and Conditions of Employment Regulations to get Part I Service. Therefore, on the basis of the legislation, of the jurisprudence and of common sense, he asked that I deny the grievances.

Rebuttal Argument for the Grievors

Captain Sellen argued that I should not be swayed by the Bolling et al. decision (supra) because it is now irrelevant; rather the matter turns on the wording of the collective agreement regarding continuous employment. He reminded me that the Public Service Terms and Conditions of Employment Regulations are incorporated into the collective agreement. He said that the word "or" was added for a reason by the parties to subclause 3. (A) (i) that reads "Part I Service or the "Public Service" (emphasis added). He concluded that the Reserves are part of DND and therefore have Part I Service and he asked me to allow the grievances.

Decision

Are Reservists enrolled in the DND? I believe that they are and are therefore not public servants or civilians. The *National Defence Act*, section 2, Interpretation, defines "enrol" as meaning "to cause any person to become a member of the Canadian Forces". Section 2 further defines "regular force" to mean "the component of the Canadian Forces that is referred to in subsection 15.(1)". Susbsection 15.(1) reads:

> *15.(1) There shall be a component of the Canadian Forces, called the regular force, that consists of officers and non-commissioned members who are enrolled for continuing, full-time military service.*

Section 2 defines "reserve force" to mean "the component of the Canadian Forces that is referred to in subsection 15.(3)". Subsection 15.(3) reads:

> *15.(3) There shall be a component of the Canadian Forces, called the reserve force, that consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active service.*
>
> (emphasis added)

The Federal Court of Appeal in Bolling et al. (supra) in 1977 decided that neither the PSSRA nor the *Public Service Employment Act* applies to members of the Canadian Forces. By extension therefore, I do not believe that they apply to members of the reserve force either.

Captain Sellen's argument of the unbroken chain is logical if one agrees that the Reservists are public servants. However, they are not; even though they serve the public, they are by law not public servants. They are not employed by the Treasury Board as is required under Part I of Schedule I to the PSSRA and therefore do not qualify for Part I Service.

Subclause 3. (A) (iii) reads in part, *"immediate prior service in the Canadian Armed Forces ... provided that the person was honourably released ..."*. I note that Mr. Aubin and Mr. Krawchuk are still members of the reserve force. Subclause 3. (A) (iii) therefore does not apply to them.

If the PSSRA does not apply to the Reserves, then Part I Service as defined by the Treasury Board, meaning the departments and agencies listed in Part I, Schedule I to the *Public Service Staff Relations Act*, does not apply either.

Time spent in the Reserves can therefore not be considered as continuous employment for the purposes of calculating vacation leave credits under the grievors' collective agreement.

If the parties intended that the provision under very specific circumstances in subclause 3. (A) (iii) should apply to the Reservists, I believe that they would have said so. This may well be a point of discussion during their next round of collective bargaining.

For all these reasons, these grievances are denied.

J. Barry Turner,
Board Member.

OTTAWA, April 29, 1997.