**Date:** 20001213

**File:** 166-2-29597

**Citation:** 2000 PSSRB 111

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

**SYLVIE GIRARD**

Grievor

and

**TREASURY BOARD**
**(Transportation Safety Board of Canada)**

Employer

***Before:*** Léo-Paul Guindon, Board Member

***For the Grievor:*** Michel Paquette, Professional Institute of the Public Service of Canada

***For the Employer:*** Carole Bidal, Counsel

Heard at Ottawa, Ontario,
September 12, 2000

[1] A grievance contesting the employer's refusal to grant the grievor severance pay was filed on February 16, 2000.

[2] The relevant clauses of the collective agreement for the Computer Systems Administration group between the Treasury Board and the Professional Institute of the Public Service of Canada (Code: 303/200) read as follows:

…

***2.01*** *For the purpose of this Agreement:*

…

*(k)* ***"lay-off"*** *means the termination of an employee's employment because of lack of work or because of the discontinuance of a function (licenciement).*

…

***ARTICLE 19***
***SEVERANCE PAY***

***19.01*** *Under the following circumstances and subject to clause 19.02, an employee shall receive severance benefits calculated on the basis of his weekly rate of pay:*

***(a) Lay-Off***

****

*(i) On the first lay-off after June 20, 1969, two (2) weeks' pay for the first complete year of continuous employment and one (1) week's pay for each additional complete year of continuous employment, and, in the case of a partial year of continuous employment, one (1) week's pay multiplied by the number of days of continuous employment divided by 365.*
****
*(ii) On second or subsequent lay-off after June 20, 1969, one (1) week's pay for each complete year of continuous employment and, in the case of a partial year of continuous employment, one (1) week's pay multiplied by the number of days of continuous employment divided by 365, less any period in respect of which he was granted severance pay under sub-clause 19.01(a)(i) above.*

…

The Evidence

[3] Sylvie Girard had been working at the Transportation Safety Board of Canada since April 1984, and held a position at the CS-02 group and level at the time of her leave without pay for the care and nurturing of pre-school age children. This leave had been approved for the period from August 23, 1996 to August 21, 1998 (Exhibit P-3). This leave gave Ms. Girard an opportunity to explore the job market outside the Public Service, where the work environment was disrupted by budget cuts.

[4] The employer had indicated (Exhibit P-3) to Ms. Girard that:

- she would continue to be an employee of the Public Service during her absence;
- she could resign during this period;
- priority of appointment would be granted for a year following the leave period;
- should there be no appointment by the end of the priority year, she would cease to be an employee of the Public Service.

[5] On the basis of the employer's recommendation, Ms. Girard had been informed by personnel in the pay section (Jackie Waters, Staffing Officer; Johanne Ladouceur, Pay Clerk; and Diane Desjardins, Pay Supervisor) that, were she not appointed to a position in the Public Service by the end of the year following her leave, she would be considered laid off under the collective agreement and would receive severance pay.

[6] On August 17, 1998, Ms. Girard notified the employer that she would be available for work as of August 24, 1998 (Exhibit P-4). When her leave ended, the position she had held at the time she left was no longer available. The employer set up a one-year employment priority period and offered various positions to Ms. Girard. No appointment was made during that priority year, since none of the positions that were offered met the established criteria that the position be at the same level and classification and that Ms. Girard's qualifications meet the requirements.

[7] The employer terminated Ms. Girard's employment at the end of the priority year and advised her of her rights with respect to retirement and insurance benefits (Exhibit P-5). On August 23, 1999, Ms. Girard ceased to be an employee pursuant subsection 30(4) of the *Public Service Employment Act* (*PSEA*).

[8] Ms. Girard is asking for severance pay, since she considers she was laid off (Exhibit P-6). The employer is refusing this request, indicating that Ms. Girard's employment ended under subsection 30(4) of the *PSEA* and that the collective agreement does not provide for severance pay for this type of termination (Exhibit P-8, page 011).

[9] Ms. Girard filed the collective agreement between the parties (Exhibit P-1) as well as the employer's *Leave Without Pay Policy* published on the Internet (Exhibit P-2).

[10] Chantal Beausoleil, the person responsible for interpreting and applying policies for the Board, was called to testify by the employer.

[11] The *Leave Without Pay Policy* published in the employer's *Personnel Management Manual* (Exhibit E-1) provides that employment must be terminated according to the *PSEA*, through either voluntary resignation or lay-off (page 2). This policy, which dates from October 1992, was not updated with the addition of subsection 30(4) to the *PSEA* in June 1993.

[12] A directive issued by the employer on July 13, 1993 (Exhibit E-2) states that an employee who has not been reappointed to a position during the priority year following a period of leave that started prior to June 1, 1993 is laid off and receives severance pay if he or she does not resign or retire (page 4). Moreover, for periods of leave that started after June 1, 1993 (page 5), subsection 30(4) of the *PSEA* shall apply and there are no provisions covering the payment of severance benefits (page 4). This directive (Exhibit E-2) is the employer's official position and has not been addressed in collective bargaining.

[13] The employer is responsible for applying the legislation, and maintains that the policy (Exhibit E-1) does not reflect its position, which is set out in the directive (Exhibit E-2).

Arguments

For the Grievor

[14] Ms. Girard submits that clause 19.01 of the collective agreement covers situations where an employee collects severance pay. The clause in question refers to various pieces of legislation (the *Public Service Superannuation Act*, in paragraph 19.01(*c*); the *Financial Administration Act*; in paragraph 19.01(*f*); and the *Public Service Staff Relations Act*, in clause 19.04). For other types of lay-off, the collective agreement does not refer to the legislation, in keeping with the parties' wishes.

[15] Subparagraph *(a)(ii)* of clause 19.01 of the collective agreement shall be applied, since the employer terminated Ms. Girard's employment in August 1999. Paragraph 2.01(*k*) of the collective agreement defines lay-off as the termination of an employee's employment due to lack of work and this definition is consistent with the facts in this case. Section 30 of the *PSEA* must be interpreted in this manner, since the fact that Ms. Girard ceased to be an employee because an appointment had not been made stemmed from a lack of work.

[16] Furthermore, the legislator did not want to penalize those who took advantage of the leave provided for in section 17 of the collective agreement. Severance pay is referred to in paragraphs 17.03(*c*) and 17.09(*d*) of the collective agreement and, if we include a portion of the leave in the calculation of the severance pay, this means that the person taking leave is entitled to such compensation.

[17] Under section 26 of the *PSEA*, an employee ceases to be an employee when he or she resigns and paragraph 19.01(*b*) of the collective agreement provides for severance pay in such cases. Thus, the fact that an individual ceases to be an employee does not rule out entitlement to severance pay.

[18] The directive (Exhibit E-2) is simply the expression of the employer's unilateral interpretation and cannot violate the collective agreement or the policy (Exhibit P-2), which were never amended as a result of the addition of subsection 30(4) to the *PSEA*.

[19] In *Taucer* (Board files 166-2-28314 and 28315), adjudicator J. Barry Turner indicates that what must be looked at is in fact whether a lay-off took place and, if so,

whether this means that the individual is entitled to severance pay. This rationale applies in this case.

For the Employer

[20] The employer submits for its part that the termination of employment referred to in subsection 30(4) of the *PSEA* is not a lay-off and is not in keeping with the intent expressed in the collective agreement.

[21] The rules of interpretation for collective agreements as set out in subject 4:2100 of *Canadian Labour Arbitration* must apply here.

[22] Clause 19.01 of the collective agreement covers the specific circumstances that confer entitlement to severance pay. If an employee resigns (paragraph 19.01(*b*)), the right to such compensation is granted only to employees with six or more years of continuous service. It was not the intent of the parties to the collective agreement to grant severance pay to all those who leave. Subsection 30(4) of the *PSEA* was added by Order in Council on June 1, 1993, that is, close to seven years before the termination of employment in this case. This termination of employment is not addressed in the collective agreement and does not fall within the ordinary meaning of the term "lay-off" under the collective agreement.

[23] The *PSEA* makes a distinction between situations where an individual ceases to be an employee following a leave of absence (subsection 30(4)) and lay-off (section 29). A lay-off requires a positive act on the employer's part, whereas an individual ceases to be an employee as a result of the legislation. An employee being laid off because a position has been eliminated (section 29) is thus different from this case, where Ms. Girard decided to take a leave of absence knowing that there was a risk that she could cease to be an employee under subsection 30(4).

[24] Section 29 of the *PSEA* provides that an individual ceases to be an employee when he or she is laid off, while section 30 provides that such an individual has priority of appointment for another position for a one-year period and ceases to be an employee at the end of that priority period.

[25] In *Foster v. Canada (Treasury Board)* (Federal Court Trial Division file T-1323-95, August 20, 1996), Justice Joyal indicated that the Board had no jurisdiction

with respect to the challenge of the termination of employment, since the established mechanism for dismissal in the Federal Public Service was not engaged (through either the *Public Service Employment Act* or the *Financial Administration Act*). Since Mr. Foster's termination of employment was the inevitable outcome of section 748 of the *Criminal Code*, the Board had no jurisdiction in that regard. In the instant case, the termination of employment stemmed from the inevitable application of subsection 30(4) of the *PSEA* and the adjudicator therefore has no jurisdiction.

[26] In the subsequent *Foster* case (Board file 166-2-27360), Mr. Foster was claiming severance pay. Adjudicator Turner dismissed the grievance on the ground that the dismissal provided for in section 748 of the *Criminal Code* is not covered by the provisions pertaining to dismissal for incapacity or incompetence provided for in the collective agreement. Adjudicator Turner found that he could not grant severance pay in such circumstances without amending the collective agreement.

[27] *Taucer (supra)* cannot apply in this case since, in contrast with the facts in the instant case, the employer had taken steps resulting in the affected employees being chosen, whereas in this case the employer is simply taking note of the application of the *PSEA*.

[28] The employer's policy misinterprets the *PSEA*, which is overriding.

Reply

[29] In reply, Ms. Girard submitted that it is the collective agreement that must apply, and not the *PSEA*.

Reasons for Decision

[30] Ms. Girard is asking for severance pay following the termination of her employment. She considers that she was laid off according to the meaning of the collective agreement and that she is entitled to severance pay.

[31] Contrary to the facts submitted in *Foster (supra)*, Ms. Girard's employment was terminated as a result of the application of the *PSEA*. Accordingly, *Foster* cannot apply in this case.

[32] Ms. Girard is not contesting the termination of her employment, but the application of the collective agreement by the employer, which is refusing to grant her severance pay.

[33] An adjudicator has the jurisdiction to determine a grievance claiming a benefit that the collective agreement provides in the event that employment is terminated.

[34] To determine the grievance before me, I must decide whether the facts adduced in evidence confer entitlement to severance pay as a result of a lay-off.

[35] Since both parties to the dispute admitted at the hearing that a lay-off caused by a lack of work confers entitlement to severance pay, I must interpret the provisions of the collective agreement and decide whether they apply to the facts adduced in evidence.

[36] In order for a "lay-off" to confer entitlement to severance pay, it must necessarily be the result of a lack of work or the discontinuance of a function (sub-clause 2.01(*k*) of the collective agreement). In this case, only the notion of "lack of work" could be applied.

[37] Since "lack of work" is not defined in the collective agreement, it must be attributed the meaning ordinarily given to it. It is commonly accepted that a worker lacks work when there is no position or no duties to assign to him or her. Such lack of work is normally associated with the description of the position the employee held and the duties he or she performed.

[38] The facts adduced in evidence clearly show that, because Ms. Girard was not appointed to a position in the Public Service, one necessarily assumes that no position corresponding with the one she held before her leave of absence was available during the employment priority period that she was granted.

[39] Although it pre-dates the addition of subsection 30(4) of the *PSEA*, the *Management Manual* clearly indicates entitlement to severance pay in cases where the employer does not make an appointment during the employment priority year. It is indicated at page 2 of the Manual:

…

> *… If there is no position available, at the end of the period of statutory priority, there must be a legal termination of employment through either voluntary resignation or lay-off.*

…

[40] At the hearing, the parties admitted that this type of termination of employment confers entitlement to severance pay.

[41] Accordingly, absent an appointment during the employment priority period, the employer considers an employee to be "lacking work" and must take steps to terminate the employment in order to meet the criteria for a "lay-off".

[42] Similarly, the *Unpaid Leave Policy* grants entitlement to severance pay according to the same specifications as the *Management Manual* for employees who became eligible for employment priority prior to June 1, 1993, that is, before subsection 30(4) of the *PSEA* came into effect.

[43] The addition of subsection 30(4) to the *PSEA* and its application do not in any way change the notion of "lack of work" set out in the collective agreement.

[44] This amendment to the *PSEA* cannot affect the interpretation of the term "lack of work" in the collective agreement, since the fact that an individual "ceases to be an employee" is not an impediment to the application to the notion of "lay-off" when the employer terminates the employment of an employee pursuant to section 29 of the *PSEA*. Similarly, the fact that an individual "ceases to be an employee" pursuant to section 30 of the *PSEA* can have no impact on the definition of "lay-off" or the interpretation of the term "lack of work" in the collective agreement. The loss of employment resulting from the fact that an individual "ceases to be an employee" by operation of subsection 30(4) of the *PSEA* presents all the elements of the definition of "lay-off" set out in the collective agreement and falls within the ordinary meaning given to "lack of work", which characterizes a lay-off.

[45] Accordingly, Ms. Girard is entitled to severance pay as provided in clause 19 of the collective agreement.

[46] The grievance is allowed and I remain seized, should the parties be unable to agree on the amount owing to Ms. Girard.

[47] I wish to point out that I find unfair that the employer refuses to grant Ms. Girard severance pay when it had assured her at the time it accepted her leave of absence that, should there be no appointment, the situation would be considered to be a lay-off conferring entitlement to severance pay. Ms. Girard's testimony was uncontradicted in this regard.

**Léo-Paul Guindon**
**Board Member**

OTTAWA, December 13, 2000

Certified true translation

Maryse Bernier