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File: 166-34-31028

Citation: 2003 PSSRB 17



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

STÉPHANE NADEAU

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Norm Wickstrom, The Professional Institute of
the Public Service of Canada

For the Employer: Richard Fader, Counsel

(Decided without an oral hearing)

DECISION

[1] This decision pertains to a grievance filed by Stéphane Nadeau on March 2, 2001. Mr. Nadeau is a member of the Computer Systems group, and was an acting CS, level 3, employee at the time the grievance was filed.

[2] Mr. Nadeau claims that when he was promoted from a CR-04 to a CS-01 on September 10, 1990, the calculation employed to determine the appropriate CS-01 rate of pay was incorrect. Mr. Nadeau claims that this incorrect calculation was due to pay equity adjustments finalized pursuant to awards of the Canadian Human Rights Tribunal.

[3] The employer, Canada Customs and Revenue Agency (CCRA), replied to the Public Service Staff Relations Board (the Board), after the grievance was referred to adjudication, by way of a letter dated February 11, 2002. The CCRA stated that the matter could not be referred to the Board on the basis that (in part):

Pay equity is a matter that is under the responsibility of the Canadian Human Rights Commission.

[4] The bargaining agent, in this case the Professional Institute of the Public Service of Canada (PIPSC), replied on February 26, 2002. The reply states, in part:

With respect to Mr. Tremblay's specific concerns first, while pay equity itself may be the responsibility of the Canadian Human Rights Commission, the effect of that Commission's intervention was to amend rates of pay contained in affected Collective Agreements, and interpretations respecting administration of those agreements are within the jurisdiction of the PSSRB.

Secondly, as Mr. Tremblay correctly points out, while Stéphane Nadeau ceased to be a member of the Public Service Alliance of Canada upon his promotion on 10 September 1990, and the Professional Institute of the Public Service of Canada was not signatory to the agreement to which Mr. Tremblay refers, I contend that this does not exclude Stéphane Nadeau from any consideration flowing from the remedy prescribed by the CHRC, particularly as the remedy amends Collective Agreements.

[5] On March 22, 2002, the Board wrote to the parties and stated that the matter would be determined on the basis of written submissions. The PIPSC submitted its written arguments on April 22, 2002, and, pursuant to additional comments from the Board on May 17, 2002, additional arguments were submitted on June 12, 2002. The

employer replied on July 9, 2002. The PIPSC replied to that submission on July 24, 2002. All of these submissions are on file with the Board.

[6] While these written submissions were being made, the Chairperson of the Board rendered a decision on a separate matter concerning a reference under section 99 of the *Public Service Staff Relations Act* (PSSRA). This decision dealt with a contention by the Public Service Alliance of Canada (PSAC) as follows (see paragraph 6 of 2001 PSSRB 81, 169-2-628):

The PSAC now contends that all benefits, perquisites and allowances contained in various relevant collective agreements for the complainant groups and which were tied to rates of pay found to be discriminatory by the CHRT must now be adjusted on an events basis for the whole of the retroactive period unless otherwise agreed to by the parties. This would require the employer to go back to its pay records to recalculate every benefit payment previously made on the basis of wage rates now found to have been discriminatory.

[7] The employer in that case argued the Board had no jurisdiction to decide the issue as it was a Canadian Human Rights Tribunal decision that resolved pay equity issues.

[8] At paragraph 26 of Chairperson Tarte's decision, he wrote:

[26] The imprecision of the language used in the Consent Order can give rise to differing views and interpretations. I do not believe that this Board should attempt to correct the ambiguity contained in the order of the CHRT. Unless the parties agree on this issue, the matter must go back to the Federal Court and eventually to the CHRT.

[9] The PSAC applied for judicial review of this decision to the Federal Court of Appeal. Mr. Justice Sexton dismissed the application in his November 13, 2002 decision (2002 FCA 447). In doing so, Justice Sexton wrote, at paragraphs 13 and 14:

[13] In order to succeed it was incumbent upon the applicant to satisfy Chairperson Tarte that the consent order gave effect to an agreement that the specified benefits and allowances be paid so as to give rise to an obligation under the collective agreement. In our view, Chairperson Tarte was on solid grounds when he held that the consent order was not clear on this issue and that accordingly, the existence of the alleged obligation had not been established.

[14] We agree that it is far from clear that the Memorandum of Agreement and the content order can be said to give rise to any such obligation and this was sufficient for Chairperson Tarte to reach the conclusions which he did.

[10] On December 30, 2002, the Board wrote to the parties and asked them to comment on the decision of the Federal Court of Appeal insofar as it was applicable to the instant reference. The employer made its written submission on January 13, 2003, and the PIPSC made its written submission on January 15, 2003. The employer submitted its rebuttal on January 24, 2003, and the PIPSC's rebuttal was also dated January 24, 2003. All written submissions are on file with the Board.

[11] The claim of Mr. Nadeau is that when he was promoted from a CR-04 to a CS-01 on September 10, 1990, the rate of pay he received upon promotion was based on the pay he actually received as a CR-04 at that time. His rate of pay was \$25,881. and he also received \$994. as an interim pay equity payment (see PIPSC's letter of April 22, 2002, paragraph 2). As stated in paragraph 6 of the April 22, 2002 submission of the PIPSC, on July 29, 1998, the Canadian Human Rights Tribunal (CHRT) released a decision entitled "Human Rights Tribunal Between Public Service Alliance of Canada, complainant, and Canadian Human Rights Commission, Commission, and Treasury Board, Respondent, Decision of the Tribunal - Phase II" and identified as "T.D. 7/98." This decision contained a Tribunal order for wage adjustment to complainant groups, which included the Clerical and Regulatory group.

[12] The effect of this Tribunal decision was to provide an additional pay equity payment to CR-04 employees of \$2,411. retroactive to the time period when Mr. Nadeau occupied his CR-04 position. Mr. Nadeau claims this additional payment should be taken into account now, and a recalculation of his CS-01 pay rate should be made based on a rate of pay of \$25,881., plus a pay equity adjustment of \$994. and a further pay equity adjustment of \$2,411. All subsequent moves to other positions would also have to be made based on this readjusted rate, according to the grievor's submission.

[13] On November 16, 1999, the CHRT issued a consent order (Tab 4 of employer's written submission dated July 9, 2002). This consent order incorporated an agreement which the Public Service Alliance of Canada and Treasury Board entered into as being the final resolution of all remaining issues concerning the original and subsequent pay

equity complaints. This consent order was filed in the Federal Court of Canada pursuant to section 57 of the *Canadian Human Rights Act* (CHRA).

[14] Section 9.5 of the consent order reads:

Overtime, Acting and Promotion Situations

9.5 The parties agree that for overtime, acting and promotion situations, a 5% lump sum of the total pay equity adjustment will cover the retroactive period from March 8, 1985 to March 31, 1994. For the period from April 1, 1994 to July 29, 1998, the re-calculation for those items will be on an event basis.

[15] In its written submission, the PIPSC stated it was not a signatory to the consent order; however, Mr. Nadeau should not be excluded from having any remedy contained therein flow to him.

[16] The employer's submission is that the consent order does apply in this situation, and that, as stated in its July 9, 2002 submission:

31. Adjudicators lack jurisdiction under section 92 of the PSSRA to interpret and apply consent orders of the CHRT as they do not form part of a collective agreement. In this case, the Consent Order is filed with the Federal Court and fully enforceable as an order of the Court. The proper forum for the grievor's complaint, is before either the Federal Court or the CHRT.

Consent Order, CHRT file no.: T257/2590, received and filed in the Federal Court of Canada pursuant to section 57 of the Canadian Human Rights Act, on December 10, 1999, at tab 3

Decision

[17] I find I must concur with the employer's jurisdictional objection. In the Federal Court of Appeal decision Mr. Justice Sexton wrote, at paragraph 13 (*supra*):

In order to succeed it was incumbent upon the applicant to satisfy Chairperson Tarte that the consent order gave effect to an agreement that the specified benefits and allowances be paid so as to give rise to an obligation under the collective agreement ...

[18] In the instant case for the period Mr. Nadeau seeks a recalculation of salary, section 9.5 of the consent order provided for "... a 5% lump sum of the total pay equity

adjustment ..." This does not amend the collective agreement applicable to the grievor. Consequently, I find that I have no jurisdiction to decide this matter under subsection 92(1) of the Public Service Staff Relations Act.

[19] Finally, I make the following comment in obiter. The employer stated that Mr. Nadeau was entitled to receive a 5% lump sum payment in lieu of a recalculation for the promotion. In its letter to the Board dated January 24, 2003, the PIPSC states:

5. Contrary to the assertion of Counsel for the Treasury Board, the Consent Order covers only promotion situations for those still members of the affected groups. Contrary to the assertion of Counsel for the Treasury Board, the grievor did not receive a 5% lump sum payment in lieu of a recalculation of his salary on promotion from the Clerical and Regulatory group to the Computer Services group.

[20] This would seem to me to be a relatively simple problem to resolve. Either the payment was received or it wasn't. I would encourage the parties to meet directly to attempt to resolve this, and I would offer the services of our mediation office, if necessary.

[21] On the basis of the foregoing, I find I have no jurisdiction to decide this matter. For all these reasons, the grievance is denied.

**Joseph W. Potter,
Vice-Chairperson.**

OTTAWA, February 27, 2003.

