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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

BOB J.G. GRANT
GUY HÉNEAULT
DEBORAH H. MARTIN
JAMES WAYNE GREGORY
JACK WISNICKI
CAROLE LAFRENIÈRE
JAMES HENRY MAURSTAD
DENIS PAUL BRUNELLE
PAUL JOSEPH MARQUIS

Grievors

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Guy Giguère, Deputy Chairperson

For the Grievors: Greg Holbrook, Canadian Federal Pilots Association

For the Employer: Colleen Edwards, Counsel

Heard at Ottawa, Ontario,
November 26, 2001.

[1] The grievors are employed by Transport Canada and belong to the Aircraft Operations Group, Civil Aviation Inspectors sub-group (AO-CAI). A Recruitment and Retention Allowance (Allowance) is paid to employees holding positions in the AO group under the collective agreement (code 401/99), letter of agreement 99-4 between the Treasury Board and the Aircraft Operations Group Association now known as the Canadian Federal Pilots Association. The collective agreement provides for a different Allowance for the two groups (A & B) of employees. The Group A allowance is $4,200 and the Group B allowance is $1,800.

[2] The grievors explain, in their grievances, that the employer is paying to the Group B AO-CAI-05 employees a Group A Allowance contrary to the collective agreement. In an attachment to the majority of the grievances, the grievors explain the details of their grievances objecting to the fact that they are not provided an equal benefit. As a corrective measure, the grievors are requesting that all Group B employees, including themselves, be paid the Group A Allowance, retroactive to the effective date that the Group B AO-CAI-05 employees started receiving the higher Group A Allowance.

[3] The employer dismissed these grievances at the different levels of the grievance process stating that they are not properly grieved under the *Public Service Staff Relations Act* (PSSRA) or the collective agreement. The employer explained that the Group B AO-CAI-05 employees who received the Group A Allowance are excluded managers. The terms and conditions of employment of these managers are set unilaterally by the Treasury Board and not through the collective bargaining process. Consequently, the decision to pay all excluded AO-CAI-05 managers the Group A Recruitment and Retention Allowance is not contrary to the provisions of the collective agreement.

[4] These grievances were referred to adjudication. On November 26, 2001, both representatives advised me that no evidence would be presented and that they would be relying on the written submissions they had sent prior to the hearing. Therefore, no oral arguments would be necessary.

Employer's Submission

[5] On October 30, 2001, counsel for the employer, Ms. Edwards, wrote to the Board that the employer was objecting to an adjudicator's jurisdiction to hear these

grievances and asked that they be dismissed. Her submission was divided into the following three points:

(I) Jurisdiction of the Board

[6] Ms. Edwards explained that for a grievance to be valid, an employee must feel aggrieved by the interpretation or application of the collective agreement in respect of that employee. In the instant grievances, the employees are complaining that the Recruitment and Retention Allowance of Group A is being paid to managers in Group B who are excluded from the bargaining unit.

[7] Ms. Edwards stated that the grievors were not personally aggrieved by any action taken by the employer since these grievances do not concern a legitimate dispute relating to the interpretation or application of the collective agreement in relation to them as required by section 92 of the PSSRA.

(II) Issue Estoppel

[8] Ms. Edwards submitted that the issue of jurisdiction has already been decided by the adjudicator appointed under the PSSRA in the *Gregory* decision (Board file 166-2-29706). The Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46 (QL), explained that the principle of issue estoppel is that, once an issue is decided, it should not be relitigated to the benefit of the losing party and the harassment of the winner. The preconditions of issue estoppel are: (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[9] The issue in *Gregory* (*supra*) was whether Group B employees being paid the Group B Allowance could grieve and get a remedy on the basis that Group A employees were receiving a higher allowance. In the instant grievances, the grievors are attempting to relitigate the same issue.

[10] The decision in the *Gregory (supra)* case was final as no application for judicial review was filed. Ms. Edwards stated that the parties in the instant grievances are the same since they are Group B employees who filed the grievances with the support of

their bargaining agent as required by the PSSRA. Therefore, the Board should apply the concept of issue estoppel and decline to take jurisdiction.

(III) Persuasive Value of the *Gregory (supra)* Decision

[11] Ms. Edwards asserted that the decision in *Gregory (supra)* dealt with the same issue as the grievors are attempting to litigate again. In fact, evidence was led during the *Gregory* (*supra*) hearing that excluded managers who were in Group B were receiving the Group A Allowance. Relying on the decision of the adjudicator in *Archer* (Board files 166-2-13182 to 13187), Ms. Edwards argued that "a second adjudicator must give substantial weight to a prior decision, and particularly to one which has not been challenged by way of judicial proceedings. An adjudicator should not disturb a previous decision unless he/she is satisfied that the previous decision is manifestly wrong." If the bargaining agent believed that the *Gregory (supra)* decision was wrong, it should have brought an application for judicial review. Having not done so, it should not be permitted to litigate the same issue through different grievors. This is especially the case here as the evidence was led and arguments made at the *Gregory (supra)* hearing about the fact that there were managers who were receiving the higher allowance.

Grievor's Submission

On November 8, 2001, the representative of the grievors, Mr. Holbrook, wrote to the Board to reply to each point raised by the employer's submissions. His submissions were divided into the following three points.

(I) Jurisdiction of the Board

[12] Mr. Holbrook submitted that it is clear from the grievances that the employees feel aggrieved by the circumstances inflicted on them by the employer. These circumstances directly arise from the interpretation or application with regard to their personal situation of a provision of the collective agreement. The employer, in its submissions, seems to be recommending the bargaining table as a forum for the resolution of this dispute. However, the employer's bargaining representatives have refused to discuss the applicable portions of the collective agreement during almost a year of negotiations that are drawing to a close. The process for resolution of

grievances eventually rests with an adjudicator appointed under the PSSRA and that process remains to be accomplished.

(II) Issue Estoppel

[13] Mr. Holbrook agreed with Ms. Edwards that there are three conditions that must be met before it may be determined that issue estoppel should be applied. Mr. Holbrook indicated that the first condition had not been met as the issue in these grievances differs from that in *Gregory (supra).* The grievors submit that it is unfair for the employer, in applying the provisions of the collective agreement, to pay the higher Group A Allowance to some Group B personnel and to exclude others. The *Gregory* (*supra*) decision did not deal with the issue of the application of the collective agreement to all employees in Group B. The instant grievances, therefore, differ substantially from Mr. Gregory's grievance as a different question is being asked by the grievors.

[14] Mr. Holbrook agreed with the employer that the *Gregory (supra)* decision was not referred to judicial review and it stands as a final decision for that grievance. However, he does not agree with Ms. Edwards' submission that the parties in the instant grievances are the same as in the *Gregory (supra)* grievance. The PSSRA directs that employees must have the approval of their bargaining agent to present a grievance that relates to the interpretation of the collective agreement. Under the PSSRA, only an individual employee has the right to initiate a grievance. It is specifically precluded by the PSSRA for the bargaining agent to initiate a grievance on behalf of an individual or group of individuals. Therefore, it is unreasonable to assert that these grievances are represented by the same party by virtue of the fact that the grievors are members of the same bargaining unit. Mr. Holbrook concluded that since two of the three required conditions for the application of issue estoppel have not been met, issue estoppel should not be applied.

(III) Persuasive Value of the *Gregory (supra)* Decision

[15] Mr. Holbrook explained that the grievors are asking a different question than what was asked in the *Gregory (supra)* decision, and that the evidence for determination of this different question is not contained in the *Gregory (supra)* case. The instant grievances allege that the employer has implemented the Allowance in a manner that is inconsistent and contrary to contract provisions. The employer's

response relies on the assumption that at the time the provision of the Allowance to employees was initiated, the Group B employees receiving the Group A Allowance were not governed by the collective agreement. The employer has not submitted evidence to make its case regarding the applicability or non-applicability of the collective agreement for all Group B employees. Therefore, this is a different issue and this requires a determination by an adjudicator.

Reasons for Decision

[16] The employer objected to the jurisdiction of an adjudicator appointed under the PSSRA to hear these grievances. It is not necessary for me to make a determination on this. Assuming that I have jurisdiction, these grievances would nevertheless fail for the following reasons.

[17] The employees explained in their grievances that they feel aggrieved that the employer is not paying the Group A Allowance to them as it is to the Group B AO-CAI-05 employees. The employer's response to these grievances was that these AO-CAI-05's are managers and are excluded from the bargaining unit. Therefore the collective agreement does not apply to them. The employer further indicated that the terms and conditions of employment of those AO-CAI-05 managers are set unilaterally by the Treasury Board and not through the collective bargaining process.

[18] This response from the employer was not contradicted in the submissions that were received from the grievor's representative. Therefore, I have to conclude that the Group A Recruitment and Retention Allowance was only paid to Group B AO-CAI-05 excluded managers.

[19] It appears, in reading these grievances, that the grievors thought that the collective agreement applied to the Group B AO-CAI-05 managers. However, by reason of their exclusion from the bargaining unit the Group B AO-CAI-05 managers are not covered by the collective agreement. It follows that the employer is not applying differently the collective agreement to those Group B AO-CAI-05 excluded managers. As the grievors have been receiving the Group B Allowance, the employer is applying the collective agreement to them correctly.

[20] I therefore find that these grievances must fail as there is no dispute that the grievors are receiving exactly what they are entitled to under the collective agreement.

[21] For these reasons, these grievances must be dismissed.

Guy Giguère,
Deputy Chairperson

OTTAWA, February 22, 2002