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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ERIN BROUSE

Grievor

and

TREASURY BOARD
(Citizenship and Immigration Canada)

Employer

Before: Yvon Tarte, Chairperson

For the Grievor: Ron Cochrane, Professional Association of Foreign Service Officers

For the Employer: Neil McGraw, counsel

Heard at Ottawa, Ontario,
6 January 2003.

Introduction

[1] This decision deals with the interpretation of two clauses contained in the collective agreement entered into between the Treasury Board and the Professional Association of Foreign Service Officers (Exhibit G-1). The clauses in question deal with maternity leave and pay.

[2] The collective agreement:

> *23.01 Maternity Leave without Pay*
>
> *(a) An employee who becomes pregnant shall, upon request, be granted maternity leave without pay for a period beginning before, on or after the termination date of pregnancy and ending not later than seventeen (17) weeks after the termination date of pregnancy.*
>
> *. . .*
>
> *(g) Leave granted under this clause shall be counted for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave. Time spent on such leave shall be counted for pay increment purposes.*
>
> *. . .*
>
> *42.05 Foreign Service Developmental Pay Structure*
>
> ****
>
> *(a) The Foreign Service Development Pay Structure applies to new recruits.*
>
> *(b) The developmental pay structure comprises the four rates of pay specified in Appendix "A". Recruits are expected to progress to the second, third and fourth rates in the developmental pay structure at months 18, 36 and 48, respectively, from the date of appointment into the developmental pay structure. Progression through the pay structure is governed by the Foreign Service Developmental Pay Plan, which does not form part of this Agreement.*
>
> *. . .*

***APPENDIX "A"*

FOREIGN SERVICE GROUP
PAY RANGES
(in dollars)

A) Effective July 1, 1999
B) Effective July 1, 2000
C) Effective August 1, 2000 – Restructure

. . .

Developmental Pay Structure

From:	*$*	*36201*	*40074*	*44421*	*47514*
To:	*A*	*38605*	*42788*	*48765*	*50670*

The evidence

[3] Because of an assignment outside the country, Ms. Brouse was unable to attend these proceedings. The parties submitted an agreed statement of facts which reads:

- *Ms. Erin Brouse began her employment with Citizenship and Immigration Canada in the Foreign Service Development Program (FSDP) September 21, 1998.*

- *Employees in the FSDP are assigned to the Foreign Service occupational group and are members of a bargaining unit covered by the FS Collective Agreement.*

- *The developmental pay structure for employees in the FSDP is identified at Appendix "A" of the FS Collective Agreement. It provides for pay increases at the employee's 18, 36 and 48 month anniversary commencing from the date of appointment into the developmental pay structure.*

- *On September 21, 2001, Ms. Brouse completed 36 months of employment in the FSDP.*

- *Her pay was not adjusted effective on that date.*

- *On October 15, 2001, Ms. Brouse inquired about the reasons for not receiving her pay increase.*

- *On October 16, 2001, she was advised by e-mail that because she had taken 135 days of*

> *Maternity Leave (15 July 2000 to 22 January 2001), the pay increase would be delayed in accordance with the rules of the FSDP pay plan.*
>
> - *On October 18, 2001, Ms. Brouse filed her grievance alleging a violation of the FS Collective Agreement.*
> - *At the time of filing her grievance, Ms. Brouse was the Second Secretary (Immigration) New Delhi, India.*
> - *Ms. Brouse has now been cross-posted to Beijing, China.*
> - *Parties reserve the right to call evidence and make add. argu. not inconsistent with the above.*

[4] The Bargaining Agent called one witness to discuss what was said during collective bargaining leading up to the implementation of the Foreign Service Development Program (FSDP) in 1997. The purpose of this testimony would be to help clear up the ambiguity and conflict between the various clauses of the collective agreement.

[5] The employer objected to this evidence, stating that the words of the collective agreement were clear and should be interpreted without the use of extrinsic evidence.

[6] I agreed to reserve on the employer's objection and hear the evidence of Peter Cenne who now works as the Director of Collective Bargaining at the Canada Customs and Revenue Agency. From November 1990 to July 1998, Mr. Cenne was the Executive Director of the Professional Association of Foreign Service Officers (PAFSO). As such, he was involved in the collective bargaining that led to the introduction of the FSDP.

[7] Mr. Cenne testified that during discussions leading to the agreement on clause 42.05 of the collective agreement, the parties agreed that the pay plan referred to in the clause would not form part of the collective agreement and that its content, which had not been drafted at that time, would not affect existing negotiated employee rights. Mr. Cenne also indicated that it was the Bargaining Agent's understanding that the pay plan referred to in clause 42.05 would contain such things as competency profiles and assessment tools to govern progress within the FSDP pay structure.

Arguments

For the Bargaining Agent

[8] Appendix "A" of the collective agreement establishes a FDSP pay structure containing four increments.

[9] Subclause 23.01(g) of the collective agreement clearly states that time spent on maternity leave shall be counted for pay increment purposes.

[10] It is clear from the testimony of Mr. Cenne that the parties never intended that the FSD pay plan would contradict existing provisions of the collective agreement. Had that been the intention, subclause 23.01(g) would have been modified to state that it was subject to subclause 42.05(b).

[11] The grievance must be allowed.

For the Employer

[12] Every clause of the collective agreement must be read in context.

[13] Subclause 42.05(b) clearly states that pay structures and progression within the developmental pay structures will be governed by the FSDP pay plan.

[14] Although the FSDP pay plan, as a whole, does not form part of the collective agreement, its content related to progression with the pay structure is incorporated by reference by subclause 42.05(b).

[15] The employer has sole discretion and authority to decide issues of staffing. Determining what happens to an employee on leave without pay is a staffing issue. The employer therefore has the sole authority to decide in this case.

[16] It makes sense in a developmental program to have an element of time in determining advancement within the program. Nothing in the collective agreement limits the criteria for advancement that can be incorporated into the pay plan.

[17] Under the pay plan developed by the employer (Exhibit E-1), leave without pay, beyond sixty days, "will not be calculated into the extension of the anniversary dates for developmental pay increases".

[18] The employer's interpretation is correct and the grievance should be denied.

Reply of the Bargaining Agent

[19] Although the employer may have the right to extend the probationary period of employees who are absent during their progression in the FSDP, it cannot extend the period of pay increments since that has been negotiated.

Reasons for decisions

[20] I have come to the conclusion that this grievance must be allowed.

[21] Generally, extrinsic evidence will not be used to interpret the provisions of a collective agreement when the language in question is clear. In such cases, an adjudicator must look at the clause or clauses at issue and provide the interpretation that best represents the stated intention of the parties in the context of the collective agreement as a whole. This general rule does not preclude the use of dictionaries, prior decisions of tribunals and courts and legal texts.

[22] When the language of a collective agreement is ambiguous, however, extrinsic evidence may be used to ascertain the true intention of the parties to the agreement. The question then becomes, when is there ambiguity? Certainly ambiguity does not necessarily exist simply because the parties disagree on the meaning of certain language.

[23] Are adjudicators interpreting a collective agreement bound by rigid common law rules of contract interpretation? I think not. The softening of such rules is essential in a labour relations setting where the relationship between the parties to the contract is a continuing one, which must be based on trust, cooperation and consultation.

[24] I fully endorse the words of arbitrator Hope in *Noranda Mines Limited (Babine Division) and United Steelworkers of America, Local 898*, [1982] 1 W.L.A.C., 246 at 254 and 257, when he says:

> *Inflexible principles of contractual interpretation do not reflect the realism of the atmosphere in which collective agreements are negotiated or the very real limitation imposed on parties in seeking to extract and define all of the nuances of their relationship in a written document.*
>
> *. . .*

> *That standard may be less rigorous than the ambiguity test in the common law of contract but it is not an invitation to revisit continuously the negotiations giving rise to the agreement in any case of dispute over the proper interpretation of the language.*
>
> *The "bona fide doubt" spoken about in University of British Columbia, supra, is not the bona fide doubt of the parties but the bona fide doubt of the arbitrator arising from his reading of the collective agreement. Sanctity of contract plays an important role in collective bargaining relationships as it does in any other contractual relationship, and parties should not find themselves deprived of the fruits of their bargain on the assertion by the other party that something different was intended or sought in the collective bargaining process.*
>
> . . .
>
> *The task of an arbitrator in addressing issues of disputed interpretation is first to examine the language to see if it creates of itself, or in the context in which it appears in the collective agreement, a bona fide doubt about the proper meaning of the language.*

[25] In this particular case the conflicting language contained in subclause 42.05(b) creates of itself and in the context of the collective agreement, in particular subclause 23.01(g), a serious doubt as to the proper meaning of the language. On the one hand, the FSDP pay plan (Exhibit E-1), does not form part of the collective agreement with which in some respects it is in conflict while, on the other hand, the parties have indicated that this document will govern progression through the FSDP.

[26] Given this serious conflict and the doubt it creates, I believe that the extrinsic evidence presented by Mr. Cenne is not only useful but required in the circumstances.

[27] This extrinsic evidence although objected to was not contradicted by the employer. Given the tenor of that evidence, I must conclude that the parties never intended to abrogate any of the existing employee rights at the time they negotiated subclause 42.05(b).

[28] Subclause 23.01(g) is clear. Maternity leave must be counted for pay increment purposes which include the developmental pay structure found in Appendix "A" of the collective agreement. Mr. Cenne's testimony clearly supports the view that the parties understood that the "yet to be drafted" FSDP pay plan would not alter those rights.

[29] The employer may certainly extend the period required to complete the FSDP successfully if a participant is absent for an extended period of time, but it cannot in maternity leave situations delay the normal progression from one pay increment to the next.

[30] The grievance of Ms. Brouse is therefore allowed.

Yvon Tarte,
Chairperson

OTTAWA, February 13, 2003.