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File: 166-2-28934

Citation: 2000 PSSRB 68



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

GILLES GASCON *et al.*

Grievors

and

TREASURY BOARD  
(Solicitor General - Correctional Service)

Employer

*Before:* Jean-Pierre Tessier, Board Member

*For the Grievors:* Alfred La Bissonnière, Public Service Alliance of Canada

*For the Employer:* Nadia Hudon, Counsel

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Heard in Montréal, Quebec,  
March 17, 2000.



The Facts

[1] On September 30, 1997, Gilles Gascon and 45 other grievors (list appended) filed the following grievance:

[Translation]

...

*On September 5, 1997, Denis Cloutier, Director of the Regional Reception Centre, refused to establish a single overtime call list for correctional officers I and II (CX-01 and CX-02) although they (CX-01 and CX-02) are part of the same bargaining unit, namely, Unit 60100. I consider this decision to be contrary to the provisions of article 21, and specifically, clause 21.11, of my collective agreement (CX-NS/S).*

...

[2] The grievors asked that the employer [translation] "... establish a single overtime call list ... as per article 21 [of the specific agreement of the Correctional Group (Supervisory and Non-Supervisory) between the Treasury Board and the Public Service Alliance of Canada (Codes 601/89, 651/89)], and more specifically, clause 21.11 ...".

[3] One week prior to the hearing, the employer filed three preliminary motions and objected to my jurisdiction as an adjudicator to determine the case. The Board informed the parties that these issues were to be raised at the start of the hearing.

[4] At the outset, the grievors filed the collective agreement in evidence (Exhibit U-1), along with a memorandum dated September 5, 1997, signed by Denis Cloutier, Director, Regional Reception Centre (Exhibit U-2). They also referred me to the reply provided by the employer at the final level of the grievance procedure (exhibit in the file).

[5] The employer then raised its preliminary motions and the parties presented their arguments. The parties then made the request, which I granted, that the hearing be adjourned while I render a written decision on the employer's motions.

Preliminary Issues

[6] An initial letter, dated March 9, 2000, contains the employer's motions. The employer first requested that the Board exercise its authority pursuant to section 27 of the *Public Service Staff Relations Act* (Act) to rescind the grievance's referral to an adjudicator. Secondly, the employer requested that the Board exercise its authority under section 84 of the *PSSRB Regulations and Rules of Procedure, 1993* (Regulations) to dismiss the grievance. Thirdly, the employer requested that the grievance be heard pursuant to section 99 of the Act as a policy grievance. The three motions alleged that the facts contained in the grievance cannot be grieved pursuant to section 91 of the Act and cannot be referred to adjudication under paragraph 92(1)(a). The employer was of the view that the grievance does not relate to the application, in respect of the grievors, of a provision of the collective agreement.

[7] In a letter dated March 10, 2000, the employer reiterated its objection to the referral of the grievance to adjudication and objected to my jurisdiction as an adjudicator to determine its motions.

[8] For their part, the grievors argued that the grievance should not be subjected to the requirements of strict formalism and that the grievance alleges that the employer has been allocating overtime in violation of clause 21.11 of the collective agreement. They added that the vast majority of them are employees at the CX-1 level who believe they have been treated unfairly as a result of an inequitable distribution of overtime because two call lists are being used.

Reasons for decision

[9] I will begin with the employer's objection to my jurisdiction as an adjudicator to determine its motions. The Board informed the parties in advance that jurisdictional issues should be raised at the outset. The employer did in fact present its motions at the start of the hearing and the parties presented their arguments. The parties then asked that I render a written decision on the employer's motions. I am therefore rendering this decision at the request of the parties, which I am doing in my capacity as a member of the Board. I note in this regard the principle established in *Frève v. Canada (Attorney General)* (Federal Court file T-1611-99), where Tremblay-Lamer J. explained that the person designated to hear a grievance may, when there are

preliminary objections, decide the dispute in his or her capacity as a member of the Board.

[Translation]

...

*[3] Like the parties in this instance, it is my view that when Ms. Galipeau ruled on the application to extend the time limit, she was serving as the Board.*

...

[10] The employer's first motion is based on section 27 of the Act, which reads as follows:

*27. (1) Subject to subsection (2), the Board may review, rescind, amend, alter or vary any decision or order made by it, or may re-hear any application before making an order in respect thereof.*

*(2) Any rights acquired by virtue of any decision or order that is reviewed, rescinded, amended, altered or varied pursuant to subsection (1) shall not be altered or extinguished with effect from a day earlier than the day on which the review, rescission, amendment, alteration or variation is made.*

[11] The employer requests that the Board exercise its authority pursuant to this section and rescind the referral of the grievance to an adjudicator. In this instance, the Board referred the grievance to adjudication pursuant to paragraph 95(2)(c) of the Act. Section 95 provides as follows:

*95. (1) Where a grievance has been referred to adjudication, the aggrieved employee shall, in the manner prescribed, give notice to the Board and shall specify in the notice whether an adjudicator is named in any applicable collective agreement or is otherwise selected by the parties or, if no adjudicator is so named or selected, whether the employee requests the establishment of a board of adjudication.*

*(2) Where a grievance has been referred to adjudication and the aggrieved employee has notified the Board as required by subsection (1), the Board shall, in the manner and within the time prescribed,*

*(a) where the grievance is one arising out of a collective agreement and an adjudicator is named therein, refer the matter to the adjudicator so named;*

*(a.1) where the parties have selected an adjudicator, refer the matter to the adjudicator so selected;*

*(b) where the establishment of a board of adjudication has been requested by the aggrieved employee and no objection thereto has been made by the employer within such time as may be prescribed, establish the board and refer the matter to it; and*

*(c) in any other case, refer the matter to an adjudicator selected by it.*

...

[12] In *Doyon v. P.S.S.R.B.*, [1979] 2 F.C. 190, at page 191, the Federal Court acknowledged that "... under section 92 *et seq.*, the Board plays an administrative role in the reference of grievances to adjudication." Subsection 95(2) of the Act requires the Board to refer a grievance to an adjudicator when the aggrieved employee files with the Board the notice provided for in subsection 95(1). In so doing, the Board is not required to make any decision that is likely to prejudice the rights of any party; it is not acting within a process that is judicial or quasi-judicial in nature. Consequently, taking the action provided for in subsection 95(2) would not result in a "decision or order" of the Board within the meaning given to this expression by subsection 27(1). It is my opinion that section 27 does not provide for a review of the referral of a grievance to adjudication. Therefore, the employer's first motion is dismissed.

[13] The employer's second motion is based on subsection 84(1) of the Regulations. Section 84 reads as follows:

*84. (1) Subject to subsection (2), but notwithstanding any other provision of these Regulations, the Board may dismiss a grievance on the ground that it is not a grievance that may be referred to adjudication pursuant to section 92 of the Act.*

*(2) The Board, in considering whether a grievance should be dismissed pursuant to subsection (1), shall*

*(a) request that the parties submit written arguments within the time and in the manner specified by the Board; or*

*(b) hold a hearing.*

...

[14] This procedure is appropriate when the file raises serious doubts as to whether the grievance constitutes a grievance that may be referred to adjudication pursuant to section 92 of the Act. Section 92 stipulates:

*92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to:*

*(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*

*(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*

*(i) disciplinary action resulting in suspension or a financial penalty, or*

*(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*

*(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*

*and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subsection to subsection (2), refer the grievance to adjudication.*

...

*(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.*

...

[15] Based solely on the file before me, there is an arguable case that this grievance is eligible for referral to adjudication. The grievance alleges that the employer's refusal to establish a single call list for the allocation of overtime violates clause 21.11 of the collective agreement. There cannot, therefore, be any serious doubt that the grievance relates to the interpretation or application by the employer, in respect of the grievors, of a provision of the collective agreement. In these circumstances, it is inappropriate to

apply the procedure set out in section 84 of the Regulations to dismiss the grievance. Therefore, I cannot allow the second motion of the employer.

[16] The employer brought its third motion pursuant to section 99 of the Act, which provides as follows:

*99. (1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board.*

*(1.1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, the bargaining agent may, in the prescribed manner and with the agreement of the employer, refer the matter to the Board.*

...

[17] The employer requests that the grievance be heard pursuant to this section. In the circumstances, it is the responsibility of the grievors' bargaining agent and not the employer to refer the grievance to the Board under section 99. However, the bargaining agent has not made any such request. Further, as I have already mentioned, there is, based solely on the file before me, an arguable case that this grievance could be referred to adjudication pursuant to section 92 of the Act.

[18] The employer argues that the grievance does not reveal any specific fact, any violation of the collective agreement which would cause personal prejudice to the grievors or any corrective action applicable to them. This in itself would not deny the grievors the right to refer their grievance to adjudication, but rather relates to the burden of proof, which rests with them, and the nature of the corrective action that the adjudicator can grant. I therefore dismiss the employer's third motion.



[19] Should the employer consider that the wording of the grievance does not enable it to properly prepare for adjudication, it may request that the Board order the grievors to clarify their grievance. Such a request could be presented pursuant to section 3 of the Regulations, which reads as follows:

*3. (1) The Board may, on its own initiative or that of a party, request that information contained in any document filed by any other party be made more complete and specific.*

*(2) The Board, after giving a party the opportunity to reply to a request referred to in subsection (1), may strike from the document the information that is incomplete or insufficiently specific.*

[20] However, the file before me shows that the employer knows what is being alleged against it. In its reply at the final level of the grievance procedure, the employer admits that the grievance relates to clause 21.11 of the collective agreement and adamantly claims that it has complied with the principle of equitable allocation of overtime.

[21] Since all motions brought by the employer have been dismissed, I order that the grievance be rescheduled for hearing.

Jean-Pierre Tessier  
Board Member

OTTAWA, July 20, 2000

Certified True Translation

Maryse Bernier

[APPENDIX]

Gilles Gascon et al.

File: 166-2-28934

P. Archambault  
André Auger  
Pierre Beauregard  
Luc Bélisle  
Guy Bolduc  
Normand Bordeleau  
Gilbert Boulé  
P.A. Charest  
S. Charlebois  
Christian Charron  
Jean Desrosiers  
Odilon Dupuis  
Gilles Gascon  
Michel Gauvreau  
Florian Gendron  
Serge Geoffroy  
Alain Gervais  
S. Gosselin  
G. Goulet  
Rénald Guay  
F. Héroux  
Yvan Jolin  
N. Lafrenière  
G.M. Landry  
Jean-Guy Langevin  
Sylvio Langlois  
M. Léveillé  
Claude Mayer  
Robert McClure  
P. Méthot  
A. Nadeau  
Ricardo Ordines  
Robert Ortisu  
Gratien Paquet  
Marcel Pelletier  
S. Pelletier  
Serge Picard  
D. Poissonnier  
Thierry Poissonnier  
Gérald Renaud  
Réjean Renaud  
René Rivest  
Alain Rochette  
Daniel St-Laurent  
Jean Thémens  
R. Vaillancourt