Public Service Labour Relations Board

Date: December 10, 2012
File: 585-03-42

IN THE MATTER OF
THE PUBLIC SERVICE LABOUR RELATIONS ACT
and a Request for Arbitration affecting
the Professional Institute of the Public Service of Canada, as bargaining agent,
and the Canadian Nuclear Safety Commission, as employer,
in respect of the NUREG bargaining unit

BEFORE: Ian R. Mackenzie, Chairperson
Larry Robbins and Charles Jamieson, arbitration board members

For the bargaining agent: Jamie Dunn, Pascale Bernatchez, Pippa Gherson

For the employer: Carole Piette, counsel

Heard at Ottawa, Ontario, November 1, 2012

Introduction

[1] The Terms of Reference of this Arbitration Board were established by the Chair of the Public Service Labour Relations Board (the "PSLRB") on May 22, 2012 (2012 PSLRB 71).

[2] The initially scheduled dates for the hearing of this matter were used by the parties (with the assistance of the nominees and the chairperson) to come to an agreement on a number of matters in dispute. The hearing was reconvened on November 1, 2012 to address the issues still in dispute. The Board met in executive session on November 2, 2012.

Bargaining History

[3] The current collective agreement between the Professional Institute of the Public Service of Canada ("PIPSC" or "the bargaining agent") and the Canadian Nuclear

Safety Commission (“CNSC” or “the employer”) for the NUREG bargaining unit expired on March 31, 2011. The bargaining agent served notice to bargain on December 2, 2010. The parties met on June 16, October 3, October 21, and November 29-30, 2011. The parties met again on January 27 and February 6-9, 2012. The bargaining agent applied for arbitration on March 7, 2012.

The CNSC and the NUREG Bargaining Unit

[4] The CNSC’s purpose is to regulate the use of nuclear energy and materials to protect health, safety, security and the environment and to respect Canada’s international commitments on the peaceful use of nuclear energy. Under the *Nuclear Safety and Control Act*, CNSC’s mandate involves four major areas:

- regulation of the development, production and use of nuclear energy in Canada;
- regulation of the production, possession, use and transport of nuclear substances, and the production, possession and use of prescribed equipment and prescribed information;
- implementation of measures respecting international control of the development, production, transport and use of nuclear energy and substances, including measures respecting the non-proliferation of nuclear weapons and nuclear explosive devices; and
- dissemination of scientific, technical and regulatory information concerning the activities of the CNSC, and the effects on the environment, on the health and safety of persons, of the development, production, possession, transport and use of nuclear substances.

[5] There are approximately 850 employees at the CNSC. Approximately 755 of these employees are in a single bargaining unit. The majority of employees are located in Ottawa, with project teams at each of the five nuclear power reactor sites in Canada and at five regional office locations across the country.

[6] The bargaining unit is a relatively new one, as the original bargaining certificate was issued about eight years ago (June 14, 2004). That bargaining unit was for

employees classified at the RL 5 to 7 levels. The first collective agreement was awarded by an Arbitration Board in 2006.

[7] The RL 2 to RL 4 levels were certified in November of 2010. For these employees, this is their first collective agreement.

[8] The employer introduced a new classification system in the course of this round of collective bargaining (in April of 2011). The nomenclature changed from RL to REG and a new level (REG 8) was introduced. The bargaining certificate was amended accordingly on January 5, 2012. The changes in classification are discussed in more detail in the context of the pay proposals of the parties.

Issues in Dispute

[9] In reaching a determination on the issues in dispute, the Arbitration Board is governed by section 148 of the *Public Service Labour Relations Act* (*PSLRA*):

> 148. In the conduct of its proceedings and in making an arbitral award, the arbitration board must take into account the following factors, in addition to any other factors that it considers relevant:
>
> (a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
>
> (b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;
>
> (c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;
>
> (d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and

(e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

[10] The Arbitration Board has considered all of these factors in reaching its determination on the matters at issue.

Article 9 (Travel Time)

[11] The bargaining agent proposed changes to clauses 9.01 and 9.04 of the collective agreement. At the hearing, the bargaining agent withdrew its proposal under clause 9.01.

[12] The bargaining agent proposes the elimination of the three-hour cap on payment for stopovers while on travel status. The bargaining agent submitted that this is consistent with agreements in the core public service and the Canadian Food Inspection Agency.

[13] The employer submitted that this would increase travel costs for the employer.

[14] The Arbitration Board determines that the bargaining agent's proposal shall be included in the new collective agreement.

Article 17 (Severance Pay)

[15] The employer proposes the elimination of severance pay provisions for cases of voluntary resignation and retirement. Severance pay would continue to accumulate for reasons of death, lay-off and termination for incapacity or incompetence. Under the proposal, employees would have options of either cashing-out or freezing severance benefits accumulated up to the effective date of the new collective agreement or a combination of both options.

[16] The employer proposes that in the event that the requested elimination of severance pay provisions is awarded by this Arbitration Board, an additional salary increase of 0.25% in 2011 and 0.5% in 2013 should be awarded.

[17] The employer submitted that its severance pay proposal had been negotiated in federal public service agreements and awarded in recent arbitration awards.

[18] The bargaining agent submitted that the removal of the severance pay on resignation and retirement in other collective agreements had been accompanied by changes to collective agreements that had resulted in higher salary increases.

[19] The bargaining agent also proposed that the severance provisions on layoff be subject to calculation for partial years of service, in accordance with provisions in other public service collective agreements.

[20] The Arbitration Board determines that the employer's proposal, as amended by the Union proposal on the treatment of partial years of service in the event of layoffs (in parts a) i) and ii)) be included in the new collective agreement, with an effective date of April 1, 2013.

[21] The Arbitration Board also determines that the employer proposal of an additional 0.25% increase in 2011 and an additional 0.5% increase in 2013 shall be included in the new collective agreement (economic increases are addressed below).

[22] The Arbitration Board also determines that the severance payout shall be calculated after applying the relevant salary increases for April 1, 2013.

Article 26 (Employee Performance Review and Employee Files)

[23] The bargaining agent withdrew its proposal for Article 26.05.

[24] Article 26.06 states that an employee is entitled to a current job description, upon request. The bargaining agent proposed adding "and complete". The bargaining agent submitted that this language would allow employees to have a complete record of their duties to provide clarity. The bargaining agent submitted that since there had been an exhaustive job evaluation exercise at the CNSC there would be no additional administrative burden on the employer.

[25] The employer submitted that new job descriptions had been finalized and there was no demonstrated need for a change to the provision.

[26] The Federal Court of Appeal has noted the importance of a complete job description beyond the narrow purpose of classification, in *Currie v. Canada (Customs and Revenue Agency)*, 2006 FCA 194 (CanLII) (at paras. 25-26):

> Adjudicator Galipeau pointed out in *Breckenridge and The Library of Parliament*, [1996] C.P.S.S.R.B. No. 69 (QL), at paragraph 70, that:
>
> > The job description, or, to use the expression enshrined in the collective agreement, "the statement of duties and responsibilities", is the cornerstone of the employment relationship between these employees and the Library of Parliament. It is a fundamental, multipurpose document which is referred to with regard to classification, staffing, remuneration, discipline, performance evaluation, identification of language requirements, and career planning. It is erroneous to limit its scope solely to use with regard to classification. It must be sufficiently complete to lend itself to the other uses I have just mentioned.
>
> This view of the role of a work description suggests that it is a document which must reflect the realities of the employee's work situation since so many aspects of the employee's rights and obligations in the workplace are bound to his or her work description.

[27] A "current and complete" job description is a phrase used consistently in collective agreements in the federal public sector. The Arbitration Board has determined that the bargaining agent proposal shall be included in the new collective agreement.

Article 33.07 (Rate of Pay on Reclassification)

[28] The current collective agreement provision states that where an employee's position is reclassified to a level with a lower maximum rate of pay, the position is deemed to have retained the former classification for a three-year period from the date of reclassification. At the end of the three-year period, the employee's rate of pay is reduced by 3% per year. Both the employer and the bargaining agent had proposals for amending this article.

[29] The employer proposed that where an employee is reclassified to a level with a lower maximum rate of pay, the employee shall be paid as follows:

> Where the salary is within the salary band of the new classification: the rate of pay nearest but not less than the rate previously received.
>
> Where the salary exceeds the maximum of the range for the new classification: the existing rate of pay until such time as the maximum rate of pay for the employee's group and level is equal to or greater than the employee's salary or until the position is vacated. Any general economic increases will be paid as a lump sum payment.

[30] The bargaining agent's proposal was similar in many respects to the employer's. The main difference is that the bargaining agent proposed that economic increases be added to the protected salary.

[31] The employer submitted that its proposal was more in keeping with the language in the core public service.

[32] The Arbitration Board has determined that the employer proposal shall be included in the Award.

Article 34 (Variable Pay)

[33] The current variable pay provision in the collective agreement permits the employer to pay an employee a lump sum over and above the normal salary for the position if that employee has "scarce skills and qualifications where the inability to hire or retain such employees would have significant negative impact on the ability of the Employer to fulfill its mandate". The number of employees subject to such a variable pay plan cannot exceed 5% of the bargaining unit and must be renewed annually. The pay does not form part of the employee's base salary.

[34] The bargaining agent proposed that this Article be removed from the collective agreement. It submitted that variable pay is not viable in a unionized environment where rates of pay are negotiated.

[35] The employer stated that the variable pay program was necessary, as there are two individuals receiving variable pay. In addition, the flexibility of variable pay is needed given the sometimes very specific skill sets that are required to deliver the CNSC's mandate.

[36] The Arbitration Board that determined the first collective agreement for the NUREG group in 2006 made the following comment about the nature of the bargaining relationship at the time:

> Although the Board has attempted to reconcile the differences between the parties it has not always been able to do so. This is particularly evident in those areas where a choice had to be made between adopting traditional approaches to compensation in a unionized environment versus non-traditional approaches.

[37] Variable pay is a holdover from the period prior to unionization at the CNSC. The arbitration board in 2006 put some limits on the use of variable pay. Variable pay is not found in other collective agreements in the federal public sector. Market-related challenges in recruiting and retaining employees are normally addressed either through adjustments to salary ranges or, recently, through terminable allowances. Currently, there are only two employees in the bargaining unit that are receiving variable pay. The employer has not demonstrated an ongoing need to attract or retain "scarce skills and qualifications where the inability to hire or retain such employees would have significant negative impact on its ability to fulfill its mandate". There is therefore no demonstrated ongoing need for a variable pay provision.

[38] Accordingly, the Arbitration Board has determined that the variable pay provision should be removed from the collective agreement.

[39] However, it is appropriate to protect those employees currently receiving variable pay. The Arbitration Board has determined that those employees receiving variable pay on the date of this Award, shall remain covered by the variable pay plan, in accordance with the criteria set out in the Article.

New Article (Religious Observance)

[40] The bargaining agent proposed that a new article addressing accommodation for religious observances be included in the collective agreement. The bargaining agent submitted that the proposed article is consistent with similar provisions in other federal public service collective agreements and with the employer's obligations under the *Canadian Human Rights Act*.

[41] The employer submitted that there was no demonstrated need to include this provision in the collective agreement.

[42] The Arbitration Board declines to include this new article in the collective agreement.

New Article (Maternity Reassignment)

[43] The bargaining agent proposed that a new article addressing reassignment of pregnant or nursing employees.

[44] The employer submitted that the issue of reassignment is dealt with under the *Canada Labour Code* and there is no demonstrated need to include it in the collective agreement.

[45] The Arbitration Board declines to include this new article in the collective agreement.

New Article (Employees on Industrial Premises)

[46] The bargaining agent proposed a new article that would apply when there is a strike or lock-out at another employer’s premises:

> Employees whose normal duties are performed on the premises of another employer and who are prevented from performing their duties because of a strike or lock-out on that employer's premises, shall report the matter to the Employer and the Employer will consider measures designed to ensure that, so long as work is available, the employees

affected are not denied regular pay and benefits to which they would normally be entitled.

[47] The bargaining agent submitted that employees are on the sites of unionized workplaces on a regular basis. The bargaining agent provided a copy of a protocol recently developed by the employer in the context of specific disputes or threatened disputes at a number of nuclear facilities.

[48] The employer submitted that strikes and lock-outs have been well managed in the past and there was no demonstrated need to include this provision in the collective agreement.

[49] In reviewing the protocol used by the employer for recent labour disputes, the Arbitration Board notes that the employer practice is in keeping with the proposed language for the new article. The proposed article is a standard article in collective agreements in the core public service. There is clearly a demonstrated need for the article, given recent labour disputes in the nuclear industry.

[50] Accordingly, the Arbitration Board finds it appropriate to add the new article to the collective agreement.

New classification and pay bands

[51] The new classification system introduced by the employer in April of 2011 has renamed the group as REG. Where there were 7 levels in the previous classification plan, there are now 8 levels. The REG 8 level has less than ten employees and includes senior technical specialists and positions with some management responsibilities.

[52] At the former RL 7 level (now REG 7), there are three pay bands: Administration and Program Professional (APP), Science and Engineering (SE) and Technical Services (TS). The APP salary band (34 employees) is composed of positions that require skills to administer corporate programs. The SE salary band (154 employees) is composed of those positions that require scientific and engineering skills and includes project officers, environmental officers, inspectors and licensing officers. The TS salary

band (92 employees) is composed of positions that require skills and knowledge specific to areas such as plant thermal hydraulics, physics and fuel systems engineering and geoscientists.

[53] The TS pay band is approximately $10,000 above the other two pay bands. The employer is proposing that the new REG 7 pay band be at the same level as the pay band for the APP and SE pay bands and that employees currently at the TS pay band level be salary-protected.

[54] The employer is proposing that the employees at the REG 8 level be at a salary band that is the same as the current TS pay band.

[55] The employer retained a third party consultant that recommended a new job evaluation plan. The consultant concluded that the APP, SE and TS roles were generally comparable and that a pay difference between the TS positions and the other positions was not justified. The employer submitted that the consultant's report demonstrated that different pay levels within the REG 7 level are no longer needed because the jobs are generally comparable and pay differences are not justified "given current market practice". The employer submitted that external relativity information analyzed by the consultant showed that the APP and SE positions were at market rates and that the TS positions were above market rates.

[56] The bargaining agent is proposing that all employees in the current RL 7 level be placed at the TS pay band. The bargaining agent also disputed the comparator jobs being used by the employer to justify its pay proposal.

[57] The bargaining agent submitted that the new REG 8 pay line be established with the same ultimate step as the first level of management (MGT) and regress by 4.8% for 8 steps.

[58] The employer submitted that the bargaining agent's proposal imposes significant costs on the employer. It submitted that there was no sound analysis to support maintaining the TS pay band for those employees or to increase the salaries for those

currently in the SE and APP pay bands. In addition, the employer submitted that the bargaining agent's proposed pay band for the REG 7 would overlap with the current Executive salary bands.

[59] The bargaining agent made an alternative pay proposal. It proposed maintaining two pay lines for the REG 7 level (both levels subject to pay increment revisions, as set out in the next section). The bargaining agent stated that maintaining the two pay lines would eliminate the need for salary protection.

[60] The employer provided no documentation to support its position on external market relativity. The bargaining agent provided some of the background documentation prepared by the third party consultant. A review of the summary report prepared by the consultant shows that the general statement that the SE and APP positions are at market rates and that the TS are above market rates is an over-simplification of the external relativity for these positions.

[61] The employer did not provide the background data to support the conclusions in the consultant's report on external wage comparability. The consultant assessed external relativity based on the 50th percentile, although it noted that employers in the nuclear and power industry consistently pay employees with technical skills at the 75th percentile. The consultant concluded that SE employees were being paid at market rates. It also concluded that the pay rate for the TS employees was above market rates (by 12.6%). The pay rate for APP employees was 3.2% below market rates for a base salary comparison and 5.6% below market rates on a total cash compensation comparison.

[62] The report summarizes internal interviews it conducted. The consultant states:

> Many divisions report issues attracting and retaining employees for their SE positions as many candidates are either being drawn to available TS positions due to the difference in pay, or to industry as there is a shortage in the market for their skill sets.

[63] There has been little growth in the number of TS employees and the employer did not provide any evidence of an expected increase in the number of employees in this job category. It is difficult to come to a conclusion on whether the reduction in pay for TS positions would result in recruitment challenges for the employer.

[64] The bargaining agent drew the Arbitration Board's attention to an interest arbitration award issued in 2009 (*Independent Electricity System Operator v. The Society of Energy Professionals*). In that case, the employer was proposing a reduction in the performance pay plan from 1.5% of base salary payroll to 1.1%. The sole arbitrator, Michel Picher, noted (at page 8):

> With respect to the issue of the Performance Pay Plan, the Arbitrator has some difficulty with the position of the employer. While it is true that the changing economic conditions might well justify an adjustment in any aspect of the wage treatment of bargaining unit employees, the conservative nature of interest arbitration generally manifests a certain reluctance to awarding "breakthrough" measures or provisions. The conventional wisdom is that to the extent that interest arbitration seeks to replicate the outcome which might have resulted from free collective bargaining, it is somewhat questionable for boards of interest arbitration to fashion or strike down significant monetary or non-monetary hallmarks within the framework of a collective agreement. It is considered that such measures, if they are to be achieved, are best achieved through the give and take of bargaining between the parties rather than through the order of a third party.

[65] The employer's proposal is such a "breakthrough" measure, involving a significant reduction in the pay for the TS positions (although existing employees will be red-circled). The employer provided no examples of such provisions in recent public service collective agreements (as it did for its severance proposal).

[66] The bargaining agent proposal of bringing the SE and APP employees to the existing TS pay band level is also a "breakthrough" measure, resulting in a significant salary increase for employees.

[67] The Arbitration Board therefore determines that it is necessary to maintain the current separate pay line for the TS positions.

[68] The APP positions are, according to the consultant's report, at least 3.2% below market rates. In addition, the consultant noted that some divisions of the employer reported recruitment and retention issues for the SE employees. In assessing appropriate compensation the Arbitration Board, in accordance with section 148 of the *PSLRA* must have regard to recruitment and retention; the necessity of offering comparable compensation to those in similar occupations; maintaining appropriate relationships as between different classification levels within an occupation; and establishing compensation that is fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered.

[69] In light of these factors, the Arbitration Board has determined that the existing pay line for the APP and SE positions should be increased by 3.2%, effective April 1, 2011. This increase shall be applied prior to the economic increase of the same date.

[70] A REG 8 salary range therefore needs to be established by the Arbitration Board.

[71] The bargaining agent submitted that employees in the REG 8 level should be viewed as on a parallel career path with employees in the first level of the management cadre. The bargaining agent submitted that this was how positions in the ENG 6 level in the core public service are treated. The bargaining agent proposed that a pay line be established with the ultimate step of the MGT as the ultimate step for the REG 8 and regress by 4.8% for eight steps.

[72] The Arbitration Board has determined that the bargaining agent's proposal for the REG 8 salary range shall be included in the collective agreement, with an effective date of April 1, 2011.

Pay increments

[73] The bargaining agent proposed that the increments between steps in the REG 1 to 4 levels be increased to 4.8% to address the compression of the pay bands relative to the REG 5 to 8 pay bands.

[74] The employer submitted that the current increments were appropriate and within the range of increments in the core public service.

[75] The Arbitration Board declines to award the bargaining agent's proposal.

[76] The bargaining agent proposed "smoothing out" the increment step from the penultimate to the ultimate step in the REG 5 to 7 levels by eliminating the current maxima and adding new penultimate and ultimate steps at 4.8% increments.

[77] The employer submitted that there was no justification for adding an extra increment for these levels.

[78] The Arbitration Board declines to include the bargaining agent's proposal in the new collective agreement.

Economic increases

[79] The bargaining agent proposed a 3.3% increase (April 1, 2011); a 2.9% increase (April 1, 2012); and a 2.3% increase (April 1, 2013).

[80] The employer proposed salary increases of 1.5% per year (with an additional 0.25% in 2011 and 0.5% in 2013, if the severance pay proposal is accepted).

[81] The Arbitration Board determines that the annual increase in salaries shall be 1.5% in each year, with an additional 0.25% effective April 1, 2011 and an additional 0.5% effective April 1, 2013.

- Effective April 1, 2011: 1.75%
- Effective April 1, 2012: 1.5%
- Effective April 1, 2013: 2.0%

New (Memorandum of Understanding on Salary Protection)

[82] The employer proposed a memorandum on salary protection for the TS employees upon conversion to the new pay line. In light of the Arbitration Board's determination to maintain the current TS pay line, there is no need for salary protection and the Arbitration Board declines to award the employer's proposal.

Implementation

[83] The Arbitration Board shall remain seized of this matter for a period of three months from the date of this award, in the event that the parties encounter any difficulties in its implementation.

Ian R. Mackenzie

For the Arbitration Board

December 10, 2012