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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

EKARINA SANTAWIRYA

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Santawirya v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Jean-Michel Corbeil, counsel

For the Employer: John Craig, counsel

For the Public Service Commission: Lesa Brown, counsel
Alexandra Pullano, student-at-law

Decided on the basis of written submissions,
filed August 8 and September 7, 2018.

I. Determination of remedy following adjudication

[1] On July 9, 2018, I rendered a decision on a grievance in *Santawirya v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 58 ("the Decision"), allowing a discrimination grievance but reserving on the remedy, pending further submissions. Because of the nature of the remedy that was contemplated, I felt it necessary to obtain the submissions not only of the parties but also of the Public Service Commission (PSC).

[2] Accordingly, the PSC was requested to provide submissions within 30 days of the Decision, which it did on August 8, 2018. Both the employer, the Treasury Board, and the grievor, Ekarina Santawirya, provided further submissions on September 7, 2018.

[3] For the reasons that follow, the grievor is deemed to have been laid off as of the date of this decision. By operation of s. 41(4) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) and s. 11 of the *Public Service Employment Regulations* (SOR/2005-334; PSER), she will be entitled to priority status for a period of 12 months.

II. Summary of the Decision

[4] The grievor was hired under an employment equity program at Industry Canada in 2000. She requires ergonomic accommodation at work because of a disability. In 2012, she was informed that her services would no longer be required, in the context of government-wide expenditure reductions.

[5] The WFAD is a protocol that has been integrated into the collective agreements between the Treasury Board and the different bargaining agents including the collective agreement that covered the grievor's employment at that time. Its objective is to maximize opportunities for indeterminate employees affected by work force adjustment situations, primarily by ensuring that, wherever possible, alternative employment opportunities are provided to them through several options. She chose the option that kept her in her position for a year with priority status on appointments within the public service, then provided for another year of priority status after she was laid off.

[6] During this second year, the grievor applied for an AS-01 position at the Canada Border Services Agency (CBSA). She was screened out, and in the Decision, I found that

that action had been discriminatory. Because of it, she lost an opportunity to be considered for a position for which she might have been qualified.

[7] In terms of remedy, in addition to compensation for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), which I granted, the grievor asked for an appointment to the AS-01 position for which she had not been assessed.

[8] It is clear that the Board does not have jurisdiction to appoint anyone to a position; this is the PSC's exclusive right under the *PSEA*. But in the alternative, the grievor is seeking to effectively be reinstated on the priority list for a period of 12 months.

III. Summary of the arguments

A. For the Public Service Commission

[9] The PSC maintains an inventory of persons with priority entitlement, which is granted under the *PSEA*. The period of entitlement is established under the *PSER*.

[10] The PSC submits that the Board does not have jurisdiction to grant an additional priority entitlement. Since the grievor's entitlement expired in October 2014, she no longer meets the requirements in the *PSEA* and the *PSER*. In addition, neither of them provides any authority to extend a priority entitlement.

[11] The PSC cites *Agnaou v. Canada (Attorney General)*, 2015 FC 523, for the following statement, at paragraph 48: "The PSEA does not provide for any extension of the period during which the priority entitlement is valid."

[12] The PSC's view is that since the legislation is silent on the possibility of extending the entitlement period, the conclusion must be that Parliament did not intend to allow for it. As stated in the PSC's submissions, "… it must be assumed that the legislature intended for these entitlement periods to be unalterable."

[13] The *PSEA*, at s. 41(4), provides for the PSC to determine the period during which a laid-off person will be given priority for appointment. The PSC has set that period at one year, at s. 11 of the *PSER*. The PSC adds that the PSC's Guide on Priority Entitlements expressly states that the PSC sets the start dates and durations of priority entitlements and that they cannot be altered.

[14] Despite the broad remedial powers granted to the Board under ss. 226 and 228 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*, which was formerly named the *Public Service Labour Relations Act* or *PSLRA*), the PSC argues that the Board does not have "… the power to rewrite federal statutes and regulations in order to remedy a grievance." Since the mechanism to extend an entitlement period does not exist in the *PSEA*, the Board cannot create it.

[15] The Board recognized in the Decision that it did not have the authority to make appointments in the core public service, as the PSC has that exclusive authority. The same constraint applies to extending priority entitlement.

B. <u>For the grievor</u>

[16] The grievor submits that the Board has the authority to grant a 12-month extension to the priority entitlement.

[17] The grievor agrees that priority entitlement flows from the *PSEA* and that the PSC has the authority to set the entitlement period in its regulations, the *PSER*, which it did, at s. 11. The grievor notes that the PSC made the *PSER*, as the *PSEA* grants it authority under s. 22(1) to "… make any regulations that it considers necessary to give effect to the provisions of this Act relating to matters under its jurisdiction."

[18] The grievor points to the Board's broad authority under the *FPSLRA*, at s. 228(2), to make the order that it considers "appropriate in the circumstances". She also argues that by virtue of s. 226(2)(a) of the FPSLRA, that allows the Board to interpet and apply the *CHRA*, the Board has the power to grant a remedy under s. 53(2)(b) of the *CHRA*, which reads as follows:

> ***53(2)(b)*** *… that the person* [who engaged in a discriminatory action] *make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice ….*

[19] According to the grievor, the Board's remedial authority is not constrained by law, as the PSC claims. Given the Board's broad powers, a limit to the power to modify the application of priority entitlement would have to be stated expressly. Varying the period provided for under s. 11 of the *PSER* is part of the Board's power to make the order it considers necessary. Parliament has limited the Board's authority, for instance

by excluding the *CHRA*'s equal-pay provisions from the employment-related legislation that the Board may interpret and apply. In the absence of any such limitation on the Board to extend a priority entitlement period, a limit should not be inferred.

[20] The PSC made an analogy with the Board's lack of authority to make an appointment to the federal public service. However, the grievor submits this has nothing to do with the present case.

[21] The *PSEA* grants exclusive authority to the PSC to make appointments to and within the public service. However, the remedy proposed in this case is simply to put the grievor in the position she would have been in, with the opportunity to apply for a job during her entitlement period, were it not for the discriminatory treatment she suffered. She had a right to the priority entitlement period. If she was deprived of that right, nothing precludes the Board from re-establishing it. This does not usurp any exclusive authority of the PSC or contradict any legislation.

[22] The main point is that there must be a useful remedy when someone is denied the use of a benefit granted by law. By extending the priority entitlement period, the Board will not grant anything the grievor was not originally entitled to, but it will restore an opportunity denied though discriminatory conduct.

C. <u>For the employer</u>

[23] Priority is a status provided by statute, not given by the Board. If the Board extended a priority, doing so would run counter to the legislative scheme. Moreover, as a remedy, even if it were possible under the *PSEA*, it would be inappropriate, as it has nothing to do with the issue, which is discrimination. The CBSA did not put an end to the priority entitlement; it expired on its own by the operation of the *PSEA* and *PSER*. Therefore, a remedy extending the entitlement would be unrelated to the blamed conduct.

[24] The employer agrees with the PSC's submissions. Neither the PSC nor the Board has the authority to extend a priority entitlement, as such authority does not exist in the *PSEA*. Extending the entitlement or ordering a new period of entitlement would bypass and disrupt the statutory regime.

[25] The employer cites *Stringer v. Canada (Attorney General)*, 2013 FC 735, in which the Federal Court overturned a ruling by the former Public Service Labour Relations

Board in which it had ordered the payment of interest on compensation granted under the *CHRA*. Since the *PSLRA* provided a specific context for paying interest and specified the *CHRA* provisions under which an adjudicator could award damages, the adjudicator had no authority to grant interest given that the interest clause in the *CHRA* had not been added to the *PSLRA*, as had the compensation clauses. Therefore, the Board cannot rely on s. 53(2)(b) of the *CHRA*, as argued by the grievor, to provide a remedy.

[26] Interpreting the *FPSLRA* as allowing the Board to create entitlements not found in the *PSEA* would go against the principle of legislative coherence. In addition, the specific provisions of the *PSEA* constitute an exception to the general and broad remedial power found in s. 228 of the *FPSLRA*.

[27] The employer argues that granting the remedy would lead to an absurd result, as the grievor would be granted three years of priority entitlement, as opposed to the customary two years.

[28] Finally, the employer restates its initial objection that the grievor was no longer an employee at the time of the events giving rise to the grievance, since she had been laid off, and since s. 64(4) of the *PSEA* states that an employee ceases to be an employee once laid off.

[29] Should other remedies be contemplated, the employer requests the opportunity to make full submissions.

IV. Analysis

[30] I will deal with the employer's objection that the grievor was no longer an employee by stating only that I believe that the matter was fully resolved in the decision rendered by Vice Chairman Olsen in *Santawirya v. Deputy Head (Canada Border Services Agency)*, 2017 FPSLREB 10. The grievor's right to the priority entitlement continued after the layoff by virtue of the WFAD and her former status as an employee. I do not consider that her rights were extinguished because she ceased to be an employee at that point. This decision is about a remedy for a right denied.

[31] The parties have acknowledged that in deciding a grievance, the Board must make the order that it considers appropriate in the circumstances (s. 228(2) of the *FPSLRA*). According to s. 226(2)(a) of the *FPSLRA*, the Board may interpret and apply

the *CHRA* other than its provisions relating to the right to equal pay for work of equal value, in relation to any matter referred to adjudication. Since the application of the *CHRA* has also been raised in this case, the grievor submits that the Board also has the power to make the appropriate decision under s. 53(2)(b) of the *CHRA*.

[32] I do not believe it is necessary to pronounce on the application of s. 53(2)(b) in this case. An argument could be made that since under s. 226(1)(b) of the FPSLRA, the Board is granted explicit authority to order remedies under ss. 53(2)(e) and 53(3) of the CHRA, the other remedies set out in the CHRA are not available to it. In *Stringer*, the Federal Court stated that the adjudicator could not grant interest on a human rights compensation award, as the power to award interest granted to the Canadian Human Rights Tribunal under s. 53(4) of the *CHRA* had not specifically been given to an adjudicator under the *PSLRA*.

[33] However, in the same decision, the Federal Court ruled that it had been an error for the adjudicator not to consider a systemic remedy of the sort contemplated in s. 53(2)(a) of the *CHRA*, despite the fact that this provision is not mentioned explicitly in the *PSLRA* either. It may be that the Court was implying that the power to make such an award is sourced in the authority granted directly to the Board under s. 228(2) of the *FPSLRA*. In the circumstances and given this possible contradiction regarding the *CHRA*-derived remedial powers, I prefer to rely on the Board's authority under s. 228(2).

[34] What, then, is the appropriate remedy in the circumstances?

[35] My starting point is the grievor's claim that she was deprived of an opportunity to apply for a position while she enjoyed priority status. In the Decision, I found that claim substantiated.

[36] Since a loss of opportunity occurred, it would seem that the appropriate remedy would be to restore the opportunity. The PSC and the employer object that since the *PSEA*, which created the system of entitlement, is silent on the issue of extending a priority entitlement period, it cannot be done.

[37] Under the *FPSLRA*, the Board's remedial powers are not defined. The legislation is also silent with respect to any number of other remedies it may grant in other contexts, such as damages, lost wages, and other remedies not found in the *FPSLRA*

(see *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2011 PSLRB 137; *Canada (Attorney General) v. Robitaille*, 2011 FC 1218; and *Amos v. Canada (Attorney General)*, 2011 FCA 38).

[38] In *Canada (Attorney General) v. O'Leary*, 2008 FC 212, the adjudicator ruled that Mr. O'Leary had been dismissed without cause and had suffered discrimination. Mr. O'Leary had a disability that could not be accommodated in the remote location where his position was situated. The adjudicator ordered the employer to pay Mr. O'Leary's salary and benefits until an equivalent position in a suitable location could be found for him. The employer argued that the adjudicator's order that it pay indefinite compensation or make an offer of appointment to another equivalent position was a usurpation of the PSC's exclusive authority to make appointments. The Federal Court disagreed and ruled that the adjudicator had made an order that was "jurisdictionally permissible" and "in these circumstances … reasonable and fair."

[39] The PSC and the employer argue that in the same way that the Board cannot order an appointment, an authority exclusively reserved to the PSC in the core public service, the Board cannot order the reinstatement of priority entitlement.

[40] An employee cannot claim the right to an appointment. By contrast, priority entitlement is a statutory right that is granted under defined conditions under the *PSEA*. It is also a condition that has been included in the WFAD to enable employees who lose their positions through no fault of their own to maintain their employment in the federal public service. If this right is denied, and an employee can bring a substantiated grievance to the Board, I cannot see that the Board does not have an obligation to correct the situation to ensure that to the extent possible, the right may be enjoyed, especially when this denial of the right is due to a discriminatory practice within the meaning of the *CHRA*. The Board's remedial power is intended to place grievors, to the extent possible, in the position they would have been but for the wrong they suffered.

[41] In these circumstances, the appropriate remedy is to reset the layoff date and thereby reinstate the grievor's priority entitlement under s. 41(4) of the *PSEA*, which would thereby provide her with another 12 months of priority entitlement. I see nothing in the *PSEA* that precludes the Board from granting this remedy nor would it be a "rewriting" the *PSEA*. Twelve months is the period provided for in the *PSER*, and

I believe it is a reasonable period for the grievor to have a full opportunity to apply to positions for which she may be qualified.

[42] The PSC cited *Agnaou* for the single sentence that states that the *PSEA* "… does not provide for any extension of the period during which the priority entitlement is valid" (at paragraph 48).

[43] However, the period during which the priority entitlement is valid with this remedy will remain the same. The layoff date that triggers that period will be reset. The intent is to redress the employer's discriminatory practice that deprived the grievor of an employment opportunity.

[44] Furthermore, I note that the PSC did not delve into the *Agnaou* decision itself. Mr. Agnaou brought a judicial review application of the PSC's decision not to grant him any remedy, although it had acknowledged that errors had been made when he was not assessed for a position he had applied to in an external appointment process during his priority entitlement period. Given that the PSC took the position that it had no legal authority to extend the period, it simply mandated that the two responsible managers take further training, with no effective remedy for Mr. Agnaou. The Federal Court allowed Mr. Agnaou's application and stated the following:

…

> *[53] Although corrective action taken by the Commission is reviewable on a standard of reasonableness, this does not mean that the Commission has unlimited discretion in that regard. Corrective action taken by the Commission must respect the spirit of the preamble of the PSEA, namely, the safeguarding of the principle of merit and of the integrity of the public service appointment process. Achieving such an objective requires that corrective action be taken to remedy errors made, such as in this case, that affected the appointment process in that a priority candidacy was not assessed. A decision with respect to corrective action would be found to be unreasonable where the remedy imposed bore no relation to the breach found (Royal Oak Mines Inc v Canada (Labour Relations Board),* [1996] 1 SCR 369 at para 60*).*
>
> *[54] The Court is of the view that the Commission's order in this case is not reasonable in that it tends not to safeguard the integrity of the public service appointment process. Indeed, the order issued by the Commission provides no remedy at all to Mr. Agnaou, despite the finding of a breach in the appointment process ….*

…

> *[56] In this case, Mr. Agnaou was deprived of the opportunity to have his candidacy seriously assessed ….*
>
> …
>
> *[58] In short, the Court concludes that Mr. Agnaou was deprived of his priority entitlement and that the Commission must take corrective action that has a logical connection to the breach found in its Investigation Report and provide Mr. Agnaou with some sort of meaningful remedy.*
>
> …
>
> [Emphasis added]

[45] The Court allowed Mr. Agnaou's application for judicial review and referred the matter back to the PSC to determine a new corrective action, in accordance with the judgment's reasons.

[46] In the search for a "meaningful remedy" in this case, I can think of no remedy more appropriate in the circumstances than allowing the grievor another chance at employment in the public service by modifying her layoff date, which will by operation of the *PSEA*'s and *PSER*'s provisions result in her returning on priority status for a period of 12 months. The purpose of a remedy is to place the person harmed, to the extent possible, in the position she or he would have been were it not for the wrong committed. The grievor lost a serious employment opportunity due to a discriminatory practice; she should have the possibility to have that opportunity again. Her layoff will be deemed to begin as of the date of this decision, thereby entitling her to the benefit offered by s. 41(4) of the *PSEA*.

[47] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[48] The grievor is deemed to have been laid off under s. 64(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 as of the date of this decision. She is therefore entitled to the benefit offered by s. 41(4) of the same Act for the period provided for in s. 11 of the *Public Service Employment Regulations*, SOR/2005-334.

October 19, 2018.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board