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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

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

PARKS CANADA AGENCY

Employer

Indexed as
Public Service Alliance of Canada v. Parks Canada Agency

In the matter of a policy grievance referred to adjudication

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

For the Applicant: Amanda Montague-Reinholdt, counsel

For the Respondent: Nour Rashid, counsel

Heard at Ottawa, Ontario,

March 21 and 22, 2019.

I. Policy grievance referred to adjudication

[1] On November 6, 2013, the Public Service Alliance of Canada (PSAC or "the bargaining agent") referred a policy grievance to the Public Service Labour Relations Board (PSLRB) relating to the interpretation and application of a "Memorandum of Understanding" (MOU) between it and the Parks Canada Agency (PCA or "the employer"). The PSAC is the certified bargaining agent for the bargaining unit that comprises all employees of the PCA.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the PSLRB and the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB to the Federal Public Sector Labour Relations and Employment Board ("the Board").

[4] On April 23, 2013, the bargaining agent and the employer signed a collective agreement that replaced the former collective agreement that had expired on August 4, 2011. This policy grievance concerns the employer's recovery of a terminable allowance that had been paid under the terms of the former collective agreement but that had been eliminated in the new collective agreement. While the parties were negotiating, the employer continued to pay the allowance, as the terms and conditions of the former agreement continued to apply. The new agreement specifically dealt with the terminable allowance; as per the employer's proposal, it was to be eliminated and replaced by a restructuring of the wage scale.

[5] The employer argues that the language of the proposal allows it to recover the monies paid for the allowance retroactively to the effective date of the wage restructure, since that restructure was meant to replace the allowance. The bargaining agent argues that to recover monies paid, there has to be clear and specific direction in the collective agreement for it.

[6] For the reasons that follow, I find that the employer was entitled to recover the monies paid for the terminable allowance after August 4, 2011. The parties made a bargain, and the recovery flows from that bargain. Consequently, the grievance is dismissed.

II. Summary of the evidence

[7] The bargaining agent called Kevin King, national president of the Union of National Employees (UNE), a PSAC component. The UNE represents the members of the PCA bargaining unit.

[8] Mr. King explained the particular nature of the bargaining unit at the PCA. While in the core public service (departments, mainly) bargaining units are generally formed to correspond to occupational groups, the bargaining unit at the PCA, a separate agency, includes several occupational groups that in the core public service are represented by different bargaining agents. Mr. King gave an overview of the four types of employees found in the bargaining unit: administrative, operational, technical, and professional.

[9] The professional group includes employees who are qualified architects, engineers, scientists, etc. Within this group, one also finds the computer specialists, who are in the Computer Systems (CS) occupational group.

[10] Negotiations between the PSAC and the PCA concern the overall terms and conditions that apply to all PCA employees. There are also a number of side agreements, each an MOU, which apply to specific groups.

[11] The collective agreement between the PSAC and the PCA that expired on August 4, 2011, contained an MOU between the parties that was termed Appendix “H”. It provided for a terminable allowance to be paid to CS-position incumbents (classified CS-1 through CS-5).

[12] Mr. King explained that the terminable allowance was a recruitment and retention measure designed to counter the attractiveness for computer specialists to work either in the core public service, where the salary grid was more advantageous, or in the private sector, where wages were often higher than in the public sector.

[13] Appendix "H" clearly states that the terminable allowance does not form part of an employee's salary and that the appendix expires with the collective agreement, on August 4, 2011.

[14] From the start of the negotiations that led to the collective agreement that was signed on April 23, 2013 and expired on August 4, 2014, the employer said that it wanted to eliminate the terminable allowance and replace it with an increase to the base salary of all CS levels, which was to be added before any annual increment provided in the collective agreement. The bargaining agent agreed with this suggestion, finding it advantageous for its members.

[15] The proposal to eliminate Appendix H was submitted at the bargaining table on October 20 and November 23, 2011. It reads as follows:

> ***The Agency proposes to eliminate the Appendix H and the associated CS Terminable Allowance payable to incumbents of positions at the CS-01 through CS-05 levels for the performance of CS duties***
>
> ***The Agency proposes to provide a one-time increase to the current CS annual wages by the following amount:***
>
> [A table appears, showing a fixed amount set for each classification level.]
>
> ***Therefore, the Agency proposes to restructure the CS pay grid, effective August 5th, 2011 and prior to any economic increase, as follows:***
>
> [A table appears, showing the salary grid for each classification, with the added amount effective August 5, 2011.]
>
> *[Emphasis in the original]*

[16] In the collective agreement that expired on August 4, 2014, this proposal is reflected in the salary grid. Each salary step has five effective dates, detailed as follows:

> *$) Effective August 5, 2010*

> *X) Effective August 5, 2011 - Restructure* [including the one-time increase to the base salary]
>
> *A) Effective August 5, 2011* [adding economic increase]
>
> *B) Effective August 5, 2012* [adding economic increase]
>
> *C) Effective August 5, 2013* [adding economic increase]

[17] On November 23, 2012, the bargaining agent and the employer signed a "Memorandum of Settlement" (MOS); the relevant provisions read as follows:

> *Having reached a tentative agreement on November 23, 2012, for the renewal of the collective agreement for the Parks Canada Bargaining unit, the Parks Canada representatives agree to recommend the approval of this settlement. The Public Service Alliance of Canada representatives agree to recommend ratification to its [sic] membership of the terms of settlement as follows:*
>
> > *1. The collective agreement between the parties, which expired on August 4, 2011, will be replaced by a collective agreement, the provisions of which shall, unless otherwise expressly stipulated, become effective on the date it is signed and continue in effect until August 4, 2014.*
> >
> > …

[18] The employer called Luc Presseau, who was its negotiator in the 2010 to 2013 bargaining round that concluded with the collective agreement that expired on August 4, 2014, and was signed on April 23, 2013.

[19] Mr. Presseau confirmed that recovering the terminable allowance was never discussed at the bargaining table. According to him, the bargaining agent had readily agreed that it was preferable to improve the wage grid by granting a one-time increase rather than to continue with the terminable allowance. As he explained, the terminable allowance was not part of salary and therefore was not included in the calculation of wage increases or pension benefits. For example, when a federal public sector employee obtains a promotional transfer, the calculation of his or her new salary is based on the pre-promotion salary. Since the terminable allowance was not part of the salary, it was not part of the calculation, and thus, the promotional increase might have been less than would have been the case had the terminable allowance been part of the salary.

[20] Both witnesses agreed that eliminating the terminable allowance and replacing it with a set increase to base salary was proposed by the employer and accepted by the

bargaining agent without further discussion. Mr. King did not dispute Mr. Presseau's view that the new terms were advantageous to CS employees.

III. Summary of the arguments

A. For the bargaining agent

[21] The bargaining agent argues that the MOS that states the terms of settlement of the collective agreement created an ambiguity as to the date on which the terminable allowance would no longer be paid. It provides that the provisions of the collective agreement "… shall, unless otherwise expressly stipulated, become effective on the date it is signed and continue in effect until August 4, 2014."

[22] The bargaining agent's position is that the terminable allowance ended only when the collective agreement was signed, on April 23, 2013. The proposal had a set date only for the restructure, not for the elimination of the allowance.

[23] The bargaining agent argued the relevance of extrinsic evidence and the contextual approach. It also argued that benefits or wages cannot be reduced except with clear language. It cited *Board of School Trustees, School District No. 45 (West Vancouver) v. West Vancouver Municipal Employees' Association No. 395* (1983), 12 L.A.C. (3d) 38 ("*West Vancouver*"). In that case, the parties had agreed to an interim salary increase, pending a final settlement of the collective agreement. Both parties expected that the interim increase would be below the final settlement, but it turned out that it was above that settlement, which depended on the negotiations of other parties. The employees had to repay the difference between the interim salary and what was finally settled. The arbitrator allowed the union's grievance, stating that a rollback of the salaries could never have been in the contemplation of the parties.

[24] In *IUOE, Local 987 v. Yellowhead (Rural Municipality)* (2018), 138 C.L.A.S. 38 ("*Yellowhead*"), the issue was the retroactive application of benefits that were provided in a new collective agreement. The new agreement followed the merger of two bargaining units. It offered terms that in some cases were more advantageous and in some cases less advantageous than the employees had enjoyed under their previous collective agreements. The parties had specifically negotiated a letter of agreement addressing the retroactive application of the new collective agreement, as it had not been signed by its effective date.

[25] The union in *Yellowhead* argued that only beneficial benefits should be included in the retroactive application, while the employer's position was that all benefits were covered, including reduced benefits (e.g., vacation credits). The arbitrator interpreted the letter of agreement and concluded that there was nothing in the wording of the agreement that contemplated a downward adjustment of benefits.

B. For the employer

[26] According to the employer, the parties' intent was clear, and their written words reflect that intent. The terminable allowance was to end and be replaced by the one-time salary restructure. The bargaining agent never suggested anything else and never sought to add protection for the terminable allowance.

[27] It is also clear from the case law that the government is entitled to recover sums that constitute an overpayment. Since the terminable allowance was replaced by the one-time salary increase, employees cannot be entitled to both.

IV. Analysis

[28] I do not see the case law that the bargaining agent submitted as supporting its case. Contrary to *West Vancouver*, the employer did not take away benefits or pay. The parties agreed to substitute one remuneration measure for another; that is, to restructure the salary grid and do away with the terminable allowance. They also agreed on effective dates for the change to the grid. The bargaining agent argues that there was no agreement as to the date on which the terminable allowance would cease. On the contrary, there was an agreement, found in Appendix H of the collective agreement ending August 4, 2011: that exact date. Nothing further was put in writing or arose during collective bargaining to prolong that date. In *Yellowhead*, the decision turned on whether the retroactive entitlement to benefits negotiated by the parties could also be interpreted to apply to reduce benefits where applicable. In this case, no provision was made for the retroactive protection of the terminable allowance.

[29] The bargaining agent argued that there was ambiguity in the text of the proposal, which demanded a more contextual analysis. According to the bargaining agent, the proposal gives an effective date for the grid restructuring but not for the end of the terminable allowance.

[30] I do not see the employer's proposal as ambiguous. Its statements follow logically: the employer is removing one advantage and substituting another. The restructured grid replaced the terminable allowance. It was effective August 5, 2011, and therefore, the terminable allowance ceased on that day. Again, this is confirmed by the 2011 MOU (Appendix H) that states that it ends on August 4, 2011. Nor do I see any ambiguity in the MOS, which states that terms become effective on the date of signature "unless otherwise expressly stipulated". The salary grid with the restructure effective August 5, 2011, is expressly stipulated in the collective agreement.

[31] Despite the emphasis on the contextual approach, it was unclear to me exactly what context I was supposed to take into account. There was no extrinsic evidence that the terminable allowance was discussed other than the employer proposing to eliminate it and the bargaining agent agreeing to that proposal.

[32] My starting point is that the parties agreed to the change. The bargaining agent never opposed it and never requested that the terminable allowance be protected. It was still being paid after August 4, 2011, because the terms of the collective agreement that expired on that date were still in effect, pending the signing of a new agreement. It was a foreseeable consequence of the restructure date that it would coincide with the end of the terminable allowance. The restructure could not be implemented before April 23, 2013, as no new collective agreement had been signed. However, the new collective agreement was very clear about effective dates. It is unfortunate that employees have to repay monies they were paid under the former collective agreement, but the terms of the new collective agreement cannot be read otherwise.

[33] The effective dates were retroactive, for both the advantages they offered (a restructure and an economic increase) and the disadvantage they caused (the end of the terminable allowance, and therefore its repayment).

[34] Mr. Presseau said that interpreting the employer's proposal as meaning that the terminable allowance would cease on August 4, 2011, is reasonable.

[35] I agree.

[36] The proposal contains three sentences: the PCA proposes to eliminate the terminable allowance, the PCA proposes a one-time increase, and therefore, the grid

will be restructured effective August 5, 2011. The three sentences logically must be read together, and the "therefore" applies to both the elimination of the allowance and the restructuring of the salary grid.

[37] That interpretation is confirmed as follows by the ratification package provided to the members:

> *Prior to any increase effective August 5, 2011* [the pay increases are detailed in the heading before], *elimination of Appendix H and the associated Terminable Allowance replaced with a one-time increase to the current CS annual wages.*

[38] The clock was reset. The context of this reset was explained by both parties: the higher pay structure was seen as more advantageous to the CS group's members. The one-time increase would serve as the calculation for all salary increases from August 5, 2011, forward. The terminable allowance was no longer needed.

[39] However, the terminable allowance was paid until the new collective agreement was signed. It is unfortunate that it continued to be paid under the terms of the old collective agreement only to be taken back under the terms of the new one. But that is the clear consequence of what was written and agreed to. If the bargaining agent thought that despite the clear ending of the terminable allowance on August 4, 2011, and the restructuring of the grid on August 5, 2011, the CS employees should be allowed to keep both advantages, it needed to specify it in the terms. In this case, the silence of the MOS is attributable to the bargaining agent. The employer made clear its intention, and the bargaining agent agreed. A bargain was struck. Both parties need to live with the result that clearly flows from the bargain: one term was replaced by another as of August 5, 2011.

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

(The Order appears on the next page)

V. Order

[41] The grievance is dismissed.

September 3, 2019.

Marie-Claire Perrault,

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