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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

ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Association of Justice Counsel v. Treasury Board

In the matter of a policy grievance referred to adjudication

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Kathleen Terroux, counsel

For the Employer: Christine Langill, counsel

Decided on the basis of written submissions,
filed April 17, May 6 and 16, and September 20, 2019.

I. Introduction

[1] This policy grievance raises a simple question: When an employee wishes to grieve their termination for a rejection on probation, does the relevant collective agreement **require** that the grievance be heard directly at the final level?

[2] The story behind the policy grievance is that in June of 2017, the Public Prosecution Service of Canada (PPSC) terminated the employment of an employee on probation. When the employee grieved, the Association of Justice Counsel ("the AJC" or "the bargaining agent") took the position that the grievance should proceed directly to the third and final level of the grievance process, citing clause 24.18 of the Law Practitioners (LP) collective agreement.

[3] The PPSC took the position that clause 24.18 does not cover rejection-on-probation grievances and refused to proceed directly to the final level. However, it did offer to bypass the first level and start hearing the grievance at the second level of the process.

[4] The AJC then filed this policy grievance under s. 220 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, ss. 2; "the *Act*") on July 26, 2017. It was denied on December 7, 2017, and the AJC referred it to adjudication on March 2, 2018.

[5] After consulting with the parties, the Federal Public Sector Labour Relations and Employment Board ("the Board") determined that it would hear the case via written submissions. After receiving the parties' initial submissions, the Board requested additional submissions on one point, covered in section V of this decision.

[6] This decision concerns only the collective agreement policy issue. It does not address the case that gave rise to the dispute.

[7] The core issue in the case concerns the wording of clause 24.18. It provides that, where the employer demotes or terminates a lawyer pursuant to paragraph 12(1)(c), (d), or (e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*), the grievance procedure set forth in the collective agreement shall apply, except that grievance may be presented at the final level only.

[8] The position of the Treasury Board ("the employer") is that the clause in question does not cover terminations following rejections on probation, as those take place under s. 62 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), not under the *FAA*.

[9] The bargaining agent seeks an interpretation of clause 24.18 that would include grievances about terminations for rejection on probation. Its goal is to oblige the employer to hear such grievances only at the third and final level. Its arguments draw on the wording and purpose of clause 24.18 as well as on the principle that the employer will exercise its management rights reasonably, fairly and in good faith, as spelled out in clause 5.02.

[10] The employer stands by its decision at the final level and focuses its arguments on the precise wording of clause 24.18 and the distinction between terminations effected under the *FAA* and the *PSEA*.

[11] The burden of proof was with the bargaining agent. It made a number of arguments as to why it makes sense for such grievances to be heard only at the final level. However, the AJC did not establish that the collective agreement has been violated. For the reasons that follow, and noting in particular the clear and specific wording found in clause 24.18, the grievance is dismissed.

II. Summary of the evidence

[12] The parties submitted an agreed statement of facts supported by five exhibits. The employer submitted one additional document attached to its arguments. The bargaining agent submitted two documents attached to its arguments.

[13] When the grievance was filed, the LP collective agreement in effect was signed on June 21, 2011, with an expiry date of May 9, 2014. However, the parties also submitted the current collective agreement, signed on November 7, 2018, with an expiry date of May 9, 2018. The parties agreed that the language in clauses 5.02 and 24.18 is the same in both agreements.

[14] Clause 5.02 is part of the management rights article. It reads as follows:

> ***5.02*** *The Employer will act reasonably, fairly and in good faith in administering this Agreement.*

[15] Clause 24.18 is part of the grievance procedure article of the collective agreement. It reads as follows:

> ***24.18*** *Where the Employer demotes or terminates a lawyer pursuant to paragraph 12(1)(c), (d) or (e) of the Financial Administration Act, the grievance procedure set forth in this Agreement shall apply, except that grievance may be presented at the final level only.*

[16] The relevant provisions of s. 12 (1) of the *FAA* read as follows:

> ***12 (1)*** *Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> …
>
> ***(c)*** *establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties;*
>
> ***(d)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;*
>
> ***(e)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct ….*
>
> …

[17] The employer denied the grievance on the basis that "[t]ermination of employment while an employee is on probation is clearly governed by section 62 of the *PSEA*. It is not a termination under the *FAA*."

[18] The relevant provisions of s. 62 of the *PSEA* reads as follows:

> ***Termination of employment***
>
> ***62 (1)*** *While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> ***(a)*** *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act, or*

> ***(b)*** *the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,*
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> …

III. Issues

[19] After reviewing the arguments of both parties, I set out the issues as follows:

1. Does a termination for rejection on probation fall under the provisions of the *FAA* that are listed in clause 24.18?
2. If not, should clause 24.18 still be interpreted as including grievances on rejection on probation considering the collective agreement as a whole and clause 5.02 in particular?

IV. Arguments and analysis

A. Issue 1: Does a termination for rejection on probation fall under the provisions of the *FAA* that are listed in clause 24.18?

[20] At the beginning stages of the policy grievance process, the AJC took the position that a termination for rejection on probation falls under the ambit of the *FAA* and is therefore clearly captured by clause 24.18. This position is evident in the initial exchanges between the bargaining agent and the PPSC on the grievance situation.

[21] This position is also evident in the employer's reply to the policy grievance, which stated the following to the AJC: "In your submissions you argued that termination of employment while an employee is on probation falls under paragraph 12(1)(e) of the *FAA* and that, therefore, article 24.18 would apply."

[22] Section 12(1)(e) allows deputy heads to terminate employees "… for reasons other than breaches of discipline or misconduct …".

[23] The employer rejected AJC's interpretation, stating as follows:

> … *Termination of employment while an employee is on probation is clearly governed by section 62 of the PSEA. It is not a termination under the FAA. This has been the conclusion of the FPSLREB, its predecessors and the Federal Court in many decisions over the years.*

[24] In its written arguments before the Board, the AJC did not seek to directly argue that a rejection on probation falls under the *FAA*. In fact, it conceded that the LP collective agreement is silent on terminations for rejection on probation.

[25] However, it did not go as far as directly answering this first issue; nor did it concede the employer's position on it. In fact, the AJC kept this issue alive by arguing that most of the case law around the relationship between the *FAA* and the *PSEA* has dealt only with the question of the Board's jurisdiction to hear rejection-on-probation grievances and not the treatment of grievances pursuant to s. 208 of the *Act*. It cited *Kagimbi v. Canada (Attorney General)*, 2014 FC 400, as an example of a case in which the Federal Court addresses only the question of adjudicator jurisdiction over rejection-on-probation grievances, not the internal grievance question. By arguing that the case law can be distinguished from the issues in this grievance, it appeared to maintain its original position.

[26] Given that, and the fact the employer's submissions addressed it head on at some length, I will still answer this first issue.

[27] For the employer, rejection on probation is covered clearly and squarely by s. 62 of the *PSEA*, which gives deputy heads the right to terminate the employment of an employee during the probationary period. It does not fall under s. 12(1)(e) of the *FAA*, which provides deputy heads in the core public administration with the power to terminate the employment of employees "… for reason other than breaches of discipline or misconduct …", which covers terminations for incapacity or abandonment.

[28] In other words, terminations under the *FAA* and *PSEA* are distinct from each other.

[29] The employer argued that the AJC's proposed interpretation of s. 12(1)(e) would require reading that section in isolation from the rest of the *FAA* and ignoring the statutory scheme of the *PSEA*. Citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10, and *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at paras. 45 and 46, the employer argued that the Supreme Court of Canada has made it clear primarily that one provision cannot be read in isolation from the

legislation as a whole and secondarily that it cannot be read in isolation from other pieces of legislation.

[30] The principle cited by the employer is that statutory interpretation requires the presumption against redundancy. If s. 12(1)(e) of the *FAA* were to be read as including rejections on probation, it would require an interpretation that s. 62 of the *PSEA* is superfluous.

[31] The employer cited numerous cases before this Board that establish that terminations for rejection on probation must first be considered under s. 62 of the *PSEA*. A grievor must establish that his or her rejection was based on a contrived reliance on the *PSEA* or that it was a sham or camouflage. The adjudicator in *Premakanthan v. Deputy Head (Treasury Board)*, 2012 PSLRB 67 at paras. 44 and 45, does a good job of referencing most of the cases cited by the employer, and it is not necessary to cite each one individually in this decision.

[32] In its reply arguments, the bargaining agent did not rebut the employer's arguments on the distinction between the *FAA* and the *PSEA*.

[33] I find the employer's arguments on this issue convincing, and the bargaining agent did not mount any significant argument to counter the employer on this point. Terminations for rejection on probation take place under s. 62 of the *PSEA*, not under the provisions of ss. 12(1)(e) of the *FAA*. Therefore, the resulting grievances are **not directly** covered by the wording in clause 24.18.

B. Issue 2: If not, should clause 24.18 still be interpreted as including grievances on rejection on probation considering the collective agreement as a whole and clause 5.02 in particular?

[34] Nevertheless, the AJC's position is that clause 24.18 should still be **interpreted** as including grievances on rejection on probation.

[35] Citing Brown and Beatty (in *Canadian Labour Arbitration*, Fourth Edition, at paras. 4:2100 and 4:2150), the bargaining agent stated that the words of the collective agreement must be read "… in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties."

[36] For the AJC, the purpose of clause 24.18 is that lawyers who have been terminated and therefore are no longer present in the workplace should not be required to return to the workplace several times to proceed through all three steps of the grievance process. Compelling a grievor to return three times to argue his or her case prolongs the termination's negative impact.

[37] The bargaining agent argued that there are benefits to a single-step grievance process for the employer as well, given the potential security issues involved in a terminated employee returning to the workplace.

[38] The plain-language meaning of the word "termination" is the act of dismissing someone from employment, which clearly happens as a result of a rejection on probation. Therefore, according to the AJC, clause 24.18 should be read as applying to all forms of termination, including rejection on probation.

[39] The bargaining agent also cited as follows the wording of clause 24.17, suggesting that it provides context for the wording of clause 24.18:

> ***24.17*** *Where it appears that the nature of the grievance is such that a decision cannot be given below a particular level of authority, any or all the levels except the final level may be eliminated by agreement of the Employer and the lawyer, and, where applicable, the Association.*

[40] In the AJC's view, clause 24.17 indicates that the parties have agreed that levels of the grievance process can be eliminated if the person hearing a grievance lacks the authority to decide it. It argued that only the deputy head or a delegate would be able to reverse a termination for rejection on probation. Therefore, requiring a grievor to go through the first and second steps is an absurd and unfair result that is contrary to the reading of article 24 and the collective agreement as a whole.

[41] To reinforce this argument, the AJC cited clause 5.02, which requires the employer to act "reasonably, fairly and in good faith" in administering the collective agreement. In the AJC's view, forcing lawyers who have been terminated to go through three internal grievance steps is unreasonable and unfair.

[42] The case of *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 ("*AJC 1*"), was cited as an authority from the Supreme Court of Canada on the

application of clause 5.02. In that case, the employer had placed employees in a standby situation without paying them. The adjudicator found that the employer's unilateral imposition of unpaid standby was unreasonable and a violation of clause 5.02, in spite of the fact that no provision in the collective agreement provided for standby pay. The Supreme Court upheld that finding.

[43] In short, the AJC's view is that it is absurd to treat rejection on probation differently from other terminations, and to interpret clause 24.18 to include them would not ignore the purpose of the statutory schemes that set them apart. For the purposes of the internal grievance process, the economic and mental health impacts on grievors are the same, and forcing them to go through three steps just prolongs their distress.

[44] For the employer, the predominant principle governing collective agreement interpretation is that the agreement's language communicates the parties' common intention. It cited the same Brown-and-Beatty principles espoused by the AJC, including those about reading clauses in the context of the agreement as a whole and ensuring that a strict reading of the words does not lead to an absurd result.

[45] However, following the former Public Service Labour Relations Board's decision in *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2013 PSLRB 88, the employer argued that in this case, the words in clause 24.18 are clear. It lists only clauses in the *FAA*. Had the parties intended there to be only one step for grievances concerning rejections on probation, they would have indicated it by listing s. 62 of the *PSEA* in the clause. Reading in terminations under s. 62 of the *PSEA* to the clause would be contrary to the plain wording of the collective agreement and would require amending it. Adjudicators are prohibited from amending collective agreements by virtue of s. 229 of the *Act*.

[46] According to the employer, requiring employees to follow the three-step grievance process, even for rejections on probation, is not an absurd result. The benefits of a three-step process should not be discounted. In fact, the limited circumstances under which the Board can take jurisdiction over terminations under s. 62 of the *PSEA* means that the full process provides a grievor with the primary forum

to have his or her case heard. In any case, the bargaining agent did not supply evidence that participating in it produces hardship or creates security issues.

[47] The employer also cited the PPSC's delegation-of-authority instrument, which delegates rejection during the probationary period down to level five (of six) managers, and stated that all six levels of authority can hear a labour relations grievance at the first level. It argued that a manager who decides to reject someone on probation could reverse that decision at step 1 of the grievance process.

[48] For the employer, clause 24.17 does not provide context for interpreting clause 24.18. Instead, it is evidence that the parties agreed to provide opportunities for flexibility in the process, subject of course to mutual agreement.

[49] For its position, the employer also cited *Association of Justice Counsel v. Treasury Board*, 2016 PSLREB 48 ("*AJC 2*"), in which the AJC filed a policy grievance about the policy grievance process. In *AJC 2*, the bargaining agent argued that the decision maker in the policy grievance process should be obliged to participate in the hearing of the grievance. The adjudicator disagreed, finding that neither the wording of the grievance procedure article, the wording of clause 5.02, nor the concept of procedural fairness allowed that requirement to be read into the collective agreement. The grievance process, while key to the integrity of labour relations, allows the parties to use a variety of mechanisms, including the three steps and oral hearings or written submissions, to try to resolve issues.

[50] In my view, when it comes to collective agreement interpretation in a case like this, the first principle that the Board must apply is to consider the clear and ordinary meaning of the words in a collective agreement. Additional interpretation principles factor in only if there is ambiguity, if the plain and ordinary wording produces an absurd or a repugnant result, or if the plain and ordinary words conflict with other parts of the collective agreement.

[51] The wording of clause 24.18 is clear, specific and unambiguous. It clearly references as follows only terminations that occur under the *FAA*:

> ***24.18*** *Where the Employer demotes or terminates a lawyer pursuant to paragraph 12(1)(c), (d) or (e) of the Financial Administration Act, the grievance procedure set forth in this*

> *agreement shall apply, except that grievance may be presented at the final level only.*

[52] I understand why a grievor might prefer to have his or her rejection-on-probation grievance heard only at the final level, but the bargaining agent has not demonstrated that having to go through the three levels of the process is an absurd result. Neither has it demonstrated a violation of clause 5.02.

[53] The bargaining agent did try to counter the employer's argument that first-level managers have the delegated authority to terminate an employee on probation and therefore to rescind that termination. It disputed that argument by noting that the delegation-of-authority documents cited by the employer suggest managers within the bargaining unit could terminate employment during a probationary period. While that introduces some doubt about whether the employer would actually delegate such authority down that far, this is not the kind of evidence that would be required to prove a violation of the collective agreement.

[54] In any case, I agree with the employer that in such cases, a grievor and his or her bargaining agent could use the provisions of clause 24.17 to argue that the grievance should skip a level or in fact skip two levels and go right to the third and final level. While clause 24.17 requires agreement between the employer and the grievor, it does provide a means of achieving the result the AJC seeks: a shorter process. As noted, in the case that led to the filing of this policy grievance, the evidence shows that the parties did in fact skip step 1 and that they proceeded directly to step 2.

[55] I will note that the AJC also argued that the Board has the authority to "imply" the inclusion of a termination for rejection on probation in clause 24.18 and that doing so is necessary to give effect to the AJC collective agreement, would not create administrative problems for the employer, and would streamline the grievance process.

[56] On the latter two points the AJC's arguments may well be valid. I heard no evidence that requiring that these grievances to be heard at the final level only would create an administrative problem, and it is logical to argue that going direct to the final level could streamline the process.

[57] However I am not convinced that reading clause 24.18 to include rejection-on-probation grievances is **necessary** to give effect to the collective agreement. The provisions of the collective agreement still provide a grievor with the means to challenge their rejection on probation.

[58] The AJC also argued that implying the inclusion would be consistent with the test set out in *Perelmuter v. Office of the Superintendent of Financial Institutions*, 2013 PSLRB 15 at para. 15, quoting from *McKellar General Hospital v. Ontario Nurses' Assn.* (1986), 24 L.A.C. (3d) 97 at 107, as follows:

> *[15] … the power to declare the existence of an implied term could be exercised only in a case in which both the following conditions were met:*
>
> (1) if it is necessary to imply a term in order to give "business or collective agreement efficacy" to the contract, in other words, in order to make the collective agreement work; and
>
> (2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion.

[59] Despite the validity of the arguments on the first condition, clearly the second condition quoted in *Perelmuter* is not met. If the employer "would have agreed without hesitation" to inserting terminations for rejection on probation into clause 24.18, then it could have allowed the policy grievance or it could have agreed to skip right to the final level using the flexibility offered in clause 24.17. It did not. Instead, it rejected the policy grievance at the final level and demonstrated significant effort before this Board to deny that clause 24.18 applies to rejections on probation.

[60] Therefore, I find that there is no basis for me to imply that the wording of clause 24.18 be read to include rejection-on-probation grievances.

V. The Federal Public Sector Labour Relations Regulations

[61] In their initial arguments, neither party made mention of the difference between the wording of the collective agreement at clause 24.18, and the wording found in the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79 ("the *Regulations*") at s. 71, which reads as follows:

> ***Circumstances in which a level may be eliminated***

> ***71*** *An individual grievance may be presented directly at the final level of the individual grievance process without it having been presented at a lower level if the individual grievance relates to classification, a demotion or a termination of employment.*

[62] Consequently, the Board invited the parties to make additional submissions on s. 71 of the *Regulations* as well as the impact of s. 237 (2) of the *Act*.

[63] The AJC was of the view that s. 71 of the *Regulations* is not inconsistent with clause 24.18 of the collective agreement. Both provisions reflect a variance in process that allows terminations of employment to proceed directly to the third and final level of the individual grievance process.

[64] The employer argued that s. 71 of the *Regulations* is not prescriptive ("shall") but permissive ("may") and therefore the wording of the section does not support what is being sought by the AJC, which is a requirement that certain grievances must go directly to the final level. It suggested that various factors would need to be weighed in order to determine if s. 71 requires a certain grievance to go directly to the final level. The employer submitted that s. 71 is inconsistent with the collective agreement. The parties have already built flexibility into the grievance process and have explicitly addressed in what circumstances an individual grievance may go directly to the final level.

[65] I find it noteworthy that the wording in s. 71 speaks generally of grievances regarding the "termination of employment". Unlike the wording of the collective agreement, the wording of the *Regulations* is not restricted to terminations under the *FAA*. Without the qualifying language found in the collective agreement, a plain language interpretation of "termination of employment" would arguably include terminations that take place for whatever reason, including those under the *PSEA*.

[66] While s. 71 of the *Regulations* uses the word "may," so does clause 24.18. It is the employee who is presenting the grievance, and both s. 71 and clause 24.18 provide an opportunity for them to present their grievance at the final level only. I find no language in either 24.18 or s. 71 that gives the employer any influence over that decision. In contrast, 24.17 requires agreement between the employer and lawyer and, where applicable, the bargaining agent, to eliminate levels.

[67] However, I find that s. 71 of the *Regulations* does not govern the treatment of individual termination grievances under the AJC collective agreement because of the wording of s. 237 (2) of the *Act*, which reads as follows:

> ***Application of regulations***
>
> *(2) Regulations made under subsection (1) respecting individual, group or policy grievances do not apply in respect of employees included in a bargaining unit for which a bargaining agent has been certified by the Board to the extent that the regulations are inconsistent with any provisions contained in a collective agreement entered into by the bargaining agent and the employer applicable to those employees.*

[68] In my view, because section 24.18 of the the collective agreement between the parties contains specific language regarding which termination grievances may proceed directly to the final level, it is inconsistent with s. 71 of the *Regulations* and therefore s. 71 does not apply to the individual termination grievances filed by employees governed by that collective agreement.

[69] Given s. 237 (2) of the *Act*, the fact the parties chose to negotiate the specific collective agreement language found at clause 24.18 indicates a clear intent on the part of the parties not to be governed by s. 71 of the *Regulations* when it comes to termination grievances. Therefore, it is on the language found at clause 24.18 that the analysis of this policy grievance must rest.

VI. Conclusions

[70] The answer to both issues raised in this grievance is "no". The wording of clause 24.18, read in its entire context with the scheme of the *FAA* and the *PSEA*, does not include terminations for rejection on probation, and I find no basis upon which to read in or imply that such terminations are covered by that clause.

[71] The bargaining agent put forward a number of reasonable arguments as to why a grievance about a rejection on probation ought to be heard at the final level. Those arguments might have a place in discussions with the employer about why it should use its discretion under clause 24.17 to hear a particular grievance on this subject at the final level. Those arguments might also have some traction in the collective bargaining context, were the bargaining agent to propose an amendment to clause 24.18 to include terminations of employment under s. 62 of the *PSEA*.

[72] However, its arguments as to why it might be fairer and more efficient to jump right to the final step of the grievance process fall short of the standard required to convince me that the collective agreement has been violated.

[73] This does not imply that rejection-on-probation grievances **must** go through all three steps. As noted, clause 24.17 provides a specific mechanism by which the parties can agree to go directly to the final level. Furthermore, I have found nothing in the collective agreement that prevents the parties from mutually agreeing to skip levels, as they did in the individual grievance that gave rise to this policy grievance.

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

(The Order appears on the next page)

VII. Order

[75] The grievance is dismissed.

September 25, 2019.

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