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Citation: 2019 FPSLREB 114

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

LISA LAYBOLT

Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

Indexed as
Laybolt v. Treasury Board (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Kieran Dyer, counsel

Decided on the basis of written submissions,
filed July 10 and August 12, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Lisa Laybolt, works with the Canadian Coast Guard, Atlantic Fleet, Department of Fisheries and Oceans (the employer). At the time of these events she held an indeterminate storekeeper position in St. John's, Newfoundland.

[2] When the grievor took her vacation in 2010, the employer failed to record it, resulting in her being mistakenly credited with a full year's extra vacation leave, to which she was not entitled. Unaware of the error, the employer continued to approve the grievor's subsequent leave requests based on the inflated balances in her leave bank that were carried over into subsequent fiscal years. Upon discovering its error, in 2013, the employer sought to recover the extra leave hours that had been taken.

[3] The grievor challenges the employer's decision to recover the extra leave. Arguing that she had relied in good faith on the employer's approval of her leave requests, she submits that recovering it after a three-year delay was unreasonable.

[4] I find that in the circumstances of this case, it was not unreasonable for the employer to recover the extra leave. Accordingly, I have dismissed the grievance.

II. Background

[5] The employer uses the MariTime system to document fleet employees' leave balances and requests. Leave requests are submitted through timekeeping records. Each employee has a personal timekeeping record book with numbered sheets. Each sheet has three carbonless sheets for keeping copies of submitted requests.

[6] The grievor carried over 3 vacation hours to the 2010-2011 fiscal year. On March 17, 2010, she submitted a leave request for April 15, 2010, to May 6, 2010, which was a total of 252 hours of vacation leave (her full 2010-2011 fiscal year vacation-leave entitlement). On March 18, 2010, the employer approved the request and on April 1, 2010, the grievor's vacation entitlement was credited with 252 hours. She took her scheduled leave from April 15 – May 6, 2010.

[7] A 2013 audit required for routine administrative reasons revealed an error in the grievor's leave records. The vacation she took from April 15, 2010, to May 6, 2010 had never been entered into the MariTime system. As a result, her leave balance

contained an extra 252 hours. Lay-days are not accrued during vacation leave, however, because the grievor's vacation leave was not recorded, she was also automatically credited with an additional 21 lay-days for this period.

[8] ln the fall of 2013, Darryl Landry, Deputy Marine Superintendent, met with the grievor and her union representative to advise her of the audit result. The employer informed her that there had been an error and that the overused leave had to be recovered. It gave her copies of the leave information and asked her to review it against her leave records and to advise of any discrepancies.

[9] On April 23, 2014, Mr. Landry, Shannon Pittman (who was taking over as the deputy marine superintendent), and Noreen Madore (the MariTime clerk) met with the grievor and her union representative. Mr. Landry reviewed the over-usage of leave situation. The grievor indicated that she had reviewed the information provided to her and confirmed that all leave had been taken as reported via the time sheets and approved by management.

[10] A July, 2014 final audit showed that leave over-usage was 19.964 lay days and 221.381 vacation hours as follows: 10.381 hours in 2010-2011, 198 hours in 2011-2012, and 13 hours in 2012-2013. The employer had approved each of those leave requests.

[11] On February 23, 2015, the grievor filed a grievance. It was denied at the first level on April 2, 2015, and was partially allowed at the second level on June 16, 2015, when the employer agreed that the over-usage of lay-days would not be recovered. On January 6, 2016, the employer and the grievor agreed to this recovery plan: 1.381 hours of leave would be recovered immediately, and an additional 55 hours would be recovered in each of the following 4 fiscal years, beginning in 2016-2017.

[12] On January 22, 2016, the grievance was denied at the final level, and on March 1, 2016, it was referred to the Public Service Labour Relations and Employment Board (PSLREB) now named the Federal Public Sector Labour Relations and Employment Board (the Board).

III. Issue

[13] The issue before the Board is whether the employer's decision to recover the extra 252 hours of vacation leave credits was reasonable.

IV. Union submission

[14] The union submits three 2009 decisions for consideration. These decisions were issued by the former Public Service Labour Relations Board (PSLRB) and all three involve annual leave recoveries. They are *Lachapelle v. Canada Revenue Agency*, 2009 PSLRB 173, which involved a recovery after 15 years, *Lafrance-Legault v. Canada Revenue Agency*, 2009 PSLRB 162, which dealt with a recovery after 14 years, and *Turgeon v. Canada Revenue Agency*, 2009 PSLRB 172, which concerned a recovery after 3 years.

[15] The union notes that in those three decisions, the adjudicator found that the employer had been able to verify the credits each time leave was approved. Therefore, its administrative errors did not relieve it of its duty of care to manage employees' files. Even in *Turgeon*, in which the recovery period went back only three years, the adjudicator ruled that the three-year delay was unreasonable because the employer had misled the grievor with respect to the status of her leave bank.

[16] The adjudicator also found that the *Financial Administration Act* (R.S.C., 1985, c. F-11) allowed for management discretion in recovering overpayments and that under the collective agreement, the employer could grant leave with pay for other reasons. Accordingly, the adjudicator concluded that the employer in those cases was not required to recover overpayments and had both the discretion and a process by which it could refrain from doing so.

[17] The union submits that the same reasoning should apply to this case. The employer's administrative error of not entering the grievor's leave in the MariTime system caused this situation. And, as in the cited cases, the employer was able to verify the balance of leave credits each time a request was submitted. Yet, it approved all the grievor's subsequent requests. The union argues that the employer's administrative error did not relieve it of its duty of care, and that it was unreasonable and unjust to claw back the vacation leave after three years had passed.

V. Employer submission

[18] The employer submits that the union's case rests entirely on the three cited decisions, namely, *Turgeon*, *Lafrance-Legault*, and *Lachapelle*. All three were part of a group of 12 grievances dealt with by the same adjudicator by way of expedited adjudication. An introductory note to each of those decisions states that they "cannot

constitute a precedent". Therefore, the employer submits that the Board should not rely on them, and it refers to *Burgess v. Treasury Board (Department of Fisheries and Oceans)*, 2017 FPSLREB 20.

[19] Beyond not having any precedential value, the employer also says that those decisions are distinguishable. In *Lafrance-Legault,* and *Lachapelle*, the delay was much longer than in the case at hand, and the length of time was an important basis for the decision. The delays of 14 and 15 years, respectively, were found to be unreasonable as these lengthy periods resulted in the grievors being unable to dispute the claims against them. The employer notes that unlike in the cases cited by the union, the grievor in this case had a timekeeping record and had the opportunity to compare her record to the employer's once the mistake was discovered.

[20] The employer also challenges the union's assertion that the adjudicator held that the three-year delay in *Turgeon* was unreasonable because the employer had misled the grievor about the status of her leave bank. The employer states that the adjudicator in *Turgeon* commented on the three-year delay as follows: "… the time is not as excessive as in the other grievances dealt with under this same expedited process …". The employer argues that in *Turgeon*, it was not the delay but rather the financial hardship to the grievor caused by the employer's recovery that was found to be unreasonable.

[21] The employer also notes that the employer in *Paquet v. Treasury Board (Department of Public Works and Government Services - Translation Bureau)*, 2016 PSLREB 30 was allowed to recover leave that was discovered after 9 years (although due to a limitation period, only the last 6 years were recovered). The employer submits that this further bolsters its position that the 3-year delay in this case was not unreasonable. As well, the employer in *Paquet* did not notify the grievor until 10 months after the error was discovered and continued to authorize further leave during this time. The employer was allowed to recover the leave that was authorized before the error was discovered but not the leave authorized after that. In this case, all the leave was authorized and taken before the error came to light in the fall of 2013, and the employer promptly notified the grievor when it was discovered.

[22] The employer argues that employees share with it the responsibility of leave management. Finding otherwise would place an unreasonable burden on the employer.

It would allow employees who are, or who should be aware of an over-allocation of leave credits, to take advantage of any error it made in good faith.

[23] In *Paquet*, the former Board distinguished *Murchison v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 93, in which the grievor had specifically inquired about her leave balance, and the employer had reassured her that it was correct. The former Board noted that unlike in *Murchison*, the grievor (Ms. Paquet) knew how many annual leave credits were granted to her each year and had never specifically inquired or been told that her balance was correct.

[24] The employer states that there is no evidence in this case that the grievor was told that her inflated leave balance was correct. She had a copy of her timekeeping record. Therefore, as in *Paquet*, she knew or ought to have known her appropriate leave balance and should have alerted the employer to the error recorded in the MariTime system. She should not benefit from an error of which she should have been aware but failed to bring to the employer's attention.

[25] Similarly, in *Prichard v. Treasury Board (National Defence)*, PSSRB File No. 166-02-14277 (19840724), [1984] C.P.S.S.R.B. No. 121 (QL), the grievor was accidentally credited with 225.5 days of sick leave although he was entitled to only 15 such days per fiscal year. The former Public Service Staff Relations Board (PSSRB) found that he should have realized that he had been over-credited.

[26] Finally, in *Veilleux v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 152, the PSLRB considered the case of several employees who had been overpaid for leave between 2002 and 2006. The delay discovering the error was due to one of the employer's representatives being behind on his work schedule. The PSLRB found that even though the employer had not been diligent in compiling the hours of leave, the grievors also had not met their responsibility to inform management of the overpayment.

VI. Reasons for decision

A. Precedential value of expedited adjudication decisions

[27] The employer objects to the three decisions submitted by the union, citing the *Burgess* decision in that respect. I agree that the case law relied on by the union has no

precedential value. The following was clearly written as a note to each of those decisions:

> …
>
> ***Note:*** *The parties have agreed to deal with the grievance by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.*
>
> …
>
> [Emphasis in the original]

[28] In the *Burgess* case, the Board was asked to consider a decision that had been issued after an expedited hearing, and commented as follows:

> …
>
> ***19*** *… Additionally, and more importantly, the decision was made via an expedited hearing. The following note was added to the cover page of* Boudreau:
>
> > **Note**: The parties have agreed to deal with the grievance by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.
>
> ***20*** *So, does that decision constitute a precedent?*
>
> ***21*** *After considering that note and carefully examining the relevant provisions of the collective agreement and the parties' arguments, I find that* Boudreau *cannot constitute a precedent because it arose from an expedited hearing that the parties agreed to use to resolve the dispute quickly. Therefore, no full adversarial hearing on the issue took place. Thus, my view is that the weight of such a decision cannot be greater than that of a decision made following a full adversarial hearing.*
>
> ***22*** *I also note that with respect to its own decisions, the Board is not required to respect the principle of* stare decisis*, meaning "to stand on decided cases", although it strives to be as consistent as possible and it recognizes that any change to an earlier decision must be firmly justified and subject to rigorous review.*
>
> ***23*** *Therefore, I have decided to not consider that decision.*
>
> …
>
> [Emphasis in the original]

[29] I agree with the Board's comments in *Burgess*. The three cases submitted by the union are prefaced with the identical note setting out the parties' agreement to an expedited process. In my view, it is important to respect that agreement and to not apply precedential weight to them. Given the increases over the last few decades in the

length and complexity of grievance adjudication hearings and the resulting wait times, alternative dispute resolution processes such as expedited adjudication are to be encouraged and used whenever appropriate. According such decisions precedential value, despite the parties' explicit agreement not to, could negatively impact parties' willingness to engage in such efforts. Therefore, I find that those decisions have no precedential value.

B. Promissory estoppel and shared responsibility

[30] The employer submits that the grievor cannot argue promissory estoppel and detrimental reliance on the employer's leave approvals, if she knew or should have known, that her leave balance was inflated. According to the employer, employees must share the responsibility for managing leave requests and for ensuring that they have sufficient credits to cover them.

[31] In *Veilleux* and *Paquet*, this conclusion was based on the fact that the employees had access to records by which they could have made themselves aware of their leave balances, but instead took the extra leave.

[32] In *Murchison*, the PSLRB found that the employer's recovery of extra leave credits was unreasonable, where the grievor had questioned her leave balance several times and was assured by the employer that it was correct:

> *[69] Given the absence of anything in the law or the collective agreement dealing with the issue, general management rights prevail and those rights give the employer some discretion to correct errors. However, discretion must be exercised reasonably and the recovery of a debt caused by the negligence of the employer and allowed to balloon over the years, despite inquiries by the grievor regarding her entitlements, is an unreasonable exercise of discretion. In the case of the grievor, detrimental reliance can be found in the fact that the grievor took the leave that she believed she was entitled to.*

[33] In *Prichard*, the finding of employee responsibility was based on the glaring nature of the error. The employee either knew, or certainly should have known that he was taking sick days to which he was not entitled:

> …
>
> *The grievor should have realized that the 225.5 days of sick leave credited to him for 1977-78 was an error. He knew that he was*

> *entitled to only fifteen days sick leave a fiscal year. He was also aware that he took some days of sick leave over the years. Furthermore, he was informed every year of the sick leave days to his credit. In 1976-77 he had 22.5 sick leave days. An increase to 225.5 in one year is obviously extraordinary and questionable especially when he was knowledgeable of his entitlement to only 15 days of sick leave credits per fiscal year.*
>
> …

[34] In my view, it is important to note that while there is some shared responsibility for leave management, the onus must primarily remain with the employer to properly maintain and verify employee records. The employer made the initial mistake, was able to verify the records at all times and approved each of the grievor's subsequent leave requests over a period of three years. In my view, the employer failed to meet its duty of care to the grievor in these respects.

[35] Having said that, however, the grievor took her entire annual leave entitlement right at the start of the 2010-2011 fiscal year, but the 252 hours remained in her leave balance. This was not quite as glaring as the "obviously extraordinary and questionable" error described in *Prichard*, but it was a large discrepancy. Unlike the grievor in *Murchsion*, it is not clear that the grievor relied to her detriment on the employer's subsequent leave approvals. It is clear that she did not question or seek to verify her leave balance and was never told by the employer that it was correct. In my view, employees are not obliged to question every mistake that may appear on their leave records. However, on these facts, the grievor should have known that there was a significant error and should have taken steps to verify her leave balance.

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

(The Order appears on the next page)

VII. Order

[37] The grievance is dismissed.

November 29, 2019.

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