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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

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN (UCCO-SACC-CSN)

Bargaining Agent

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) v. Treasury Board (Correctional Service of Canada)

In the matter of a policy grievance referred to adjudication under section 221 of the *Federal Public Sector Labour Relations Act*

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

For the Bargaining Agent: François Ouellette, union advisor

For the Employer: Marc Séguin, counsel

Decided on the basis of written submissions filed July 25 and August 9 and 14, 2019.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Policy grievance referred to adjudication

[1] On November 7, 2014, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN), the bargaining agent representing the correctional officers who work for the Correctional Service of Canada (CSC), referred a policy grievance to adjudication before the Public Service Labour Relations and Employment Board (which became the Federal Public Sector Labour Relations and Employment Board ("the Board") on June 19, 2017).

[2] The issue in the grievance is severance pay for correctional officers who served in the Canadian Armed Forces (CAF). The bargaining agent maintains that the severance pay reduction for correctional officers who received severance pay from the CAF should depend on the amount paid for the years of military service. The employer maintains that instead, the reduction should depend on the length of the military service.

[3] The Board's hearing of the grievance began in November 2018 before Board Member Stephan Bertrand. He passed away on May 24, 2019, and the file was assigned to me. The parties agreed to proceed by written submissions based on the joint statement of facts presented at the November 2018 hearing and the arguments that they sent to the Board in July and August 2019.

II. Summary of the evidence

[4] The summary of the evidence is based on the joint statement of facts and the documentary evidence filed by the parties at the November 2018 hearing.

[5] The grievance, which the bargaining agent filed on August 25, 2014, followed a Treasury Board ("the employer") interpretation of a provision of the collective agreement that was binding on the bargaining agent and the employer and that covered the Correctional Services (CX) group (it expired on May 31, 2014). The grievance has to do with clause 33.02, which provides for a reduction in the severance pay that an employee is entitled to on retirement if the employee has already received severance pay for a certain period. Severance pay is defined as follows (see clause 33.01(d)(ii) of the collective agreement):

… a severance payment in respect of the employee's complete period of continuous employment, comprised of one (1) week's pay for each complete year of continuous employment …, to a maximum of thirty (30) weeks' pay.	[…] *une indemnité de départ à l'égard de la période complète d'emploi continu de l'employé-e à raison d'une (1) semaine de rémunération pour chaque année complète d'emploi continu* […] *jusqu'à concurrence de trente (30) semaines de rémunération.*

[6] On November 5, 2014, the parties signed a collective agreement that ended cumulating severance pay. In other words, all employees covered by the collective agreement were entitled to the severance pay calculated on November 5, 2014. It is sometimes called severance pay or the termination benefit; the terms are synonymous, and in the context of the collective agreement, fictitious, since the employees were still on staff. All employees received a notice establishing the amount of their severance pay. This was the context in which many correctional officers saw the calculation of their years of continuous service and therefore the amount of severance owed.

[7] The provision at issue reads as follows:

33.02 *Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit. Under no circumstances shall the maximum severance pay provided under this article be pyramided….*	**33.02** *Les indemnités de départ payables à l'employée-e en vertu du présent article sont réduites de manière à tenir compte de toute période d'emploi continu pour laquelle il a déjà reçu une forme quelconque d'indemnité de cessation d'emploi. En aucun cas doit-il y avoir cumul des indemnités de départ maximales prévues à l'article 33….*

[8] The parties do not agree on the interpretation of clause 33.02 of the collective agreement. According to the employer, the period of continuous employment is reduced by the period in which an employee would already have received severance pay. According to the bargaining agent, the amount owed is reduced by the amount already received.

[9] This is an issue for correctional officers who served in the military. They received severance pay on leaving the CAF. When they retire from the CSC, the calculation of the amount of severance pay raises the following issue: should the time for which they received severance pay from the CAF be subtracted, or should it be the amount they received?

[10] It is a delicate issue because the answer has financial consequences. While according to the collective agreement, employees are entitled to one week of pay for each year of continuous service, in the CAF, the severance pay amount is established as follows:

- up to 9 years of service: no severance pay;
- between 9 and 20 years of service: a half-week of pay per year of service; and
- after 20 years of service: one week of pay per year of service.

[11] It is clear that for a correctional officer who has between 9 and 20 years in the CAF, the CAF severance pay is half what the officer would be entitled to at the CSC for the same number of years.

[12] Paragraph 10 of the joint statement of facts summarizes well the parties' respective positions. It reads as follows:

> [Translation]
>
> *The UCCO-SACC-CSN is of the view that severance pay should be calculated by subtracting the amount paid as severance on leaving the Canadian Armed Forces; the employer, for its part, is of the view that the period for which the correctional officers were entitled to severance pay under the correctional officers' (CX) collective agreement should be reduced by the period during which they were entitled to severance pay because they were servicepeople in the Canadian Armed Forces.*

[13] The parties agreed that the following documents were part of their joint evidence:

- the collective agreement between the Treasury Board and the UCCO-SACC-CSN for the CX Group that expired on May 31, 2014, in both official languages;
- administrative orders (CAF);
- *Severance Pay/Rehab Leave Administrative Directive* (CAF);
- *Directive on Terms and Conditions of Employment* (Treasury Board Secretariat);
- *Defence Administrative Orders and Directives* (DAOD), chapter 204;

- a July 29, 2014, letter from Karine Renoux to Michel Bouchard stating the employer's position with respect to interpreting clause 33.02 of the collective agreement; and

- the employer's response to the policy grievance, dated March 2, 2015.

[14] It is understood that according to the *Directive on Terms and Conditions of Employment*, continuous employment includes any period of CAF service.

III. Summary of the arguments

A. For the bargaining agent

[15] According to the bargaining agent, the only issue is the interpretation of clause 33.02 of the collective agreement.

[16] According to the bargaining agent, the employer's interpretation is based on the absurd premise of subtracting time from an amount by interpreting clause 33.02 of the collective agreement too literally. That leads to absurd results, as illustrated by the following three situations.

[17] First, an employee who served 8 years in the CAF would receive no severance pay. Working another 17 years at the CSC for a total of 25 years of continuous service would entitle the employee to 25 weeks of severance pay.

[18] Next, an employee who accumulated 10 years of military service and then worked 15 years at the CSC would be entitled to 5 weeks of severance pay from the CAF and 15 weeks of severance pay on leaving the CSC, for a total of 20 weeks of severance pay.

[19] Finally, an employee who served 20 years in the CAF and then worked 5 years at the CSC would be entitled to 20 weeks of severance pay from the CAF and 5 weeks' pay for the CSC position, for a total of 25 weeks of severance pay.

[20] The severance amounts for 25 years of continuous employment are disparate if the employer's interpretation is accepted. The bargaining agent's proposal ensures that all employees receive what they are entitled to under the collective agreement, namely, one week of pay for each year of continuous employment, while not being allowed to increase the amount by receiving more than one week of pay per year of service.

Therefore, the periods for which a severance amount has already been paid must be considered before retiring. This does not mean subtracting the years (which the clause does not provide for) but rather the amount paid.

[21] Continuing the earlier example of the 3 employees who all have 25 years of continuous employment but who followed different paths, the union's interpretation assures each of them 25 weeks of severance pay, with the amount received from the CAF subtracted from the total amount of the severance payment, if necessary.

[22] When interpreting a collective agreement provision, the parties' intent, as reflected in the whole of the collective agreement, must be considered. Clause 33.02 of the collective agreement forms part of the broader context of article 33, which provides one week of pay for each year of continuous service. The article also provides, with an increase in the years of continuous service, more generous amounts in the case of a layoff. In other words, the intent is to benefit, not penalize, employees who have more years of continuous service. That intent is obvious, not only with respect to the severance pay provided in article 33 but also in other collective agreement provisions; for example, there is the annual leave provision, which leave increases with the number of years of employment.

[23] The intent of clause 33.02 of the collective agreement is made explicit by its last sentence, which aims to prevent pyramiding severance payments due to holding different positions.

[24] The bargaining agent cited *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)*, [2004] A.G.A.A. No. 44 (QL), in which the arbitrator provided the following parameters to interpret a collective agreement validly:

- the interpretation should be plausible, meaning reasonable;
- the interpretation should address the issue raised within the bounds provided by the collective agreement; and
- the interpretation should be acceptable, meaning within bounds that are acceptable to the parties and fair and reasonable from a legal perspective.

[25] According to the bargaining agent, the interpretation that the employer advocates does not meet those criteria because it leads to unfair and unreasonable results. It does not respect the parties' intention to grant one week of pay for each year of continuous service; employees with between 9 and 20 years of military service would not be entitled to it. In addition, it means that those with fewer years of service could receive more severance pay.

[26] The clause at issue has already been the subject of two decisions, with contradictory results; see *Martin v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-28191 (19981029), and *Burzynski v. Treasury Board (Canadian International Development Agency)*, 2008 PSLRB 60. The bargaining agent advocates for the outcome in *Martin*. I will return to these decisions in my analysis.

[27] In conclusion, the bargaining agent maintains that to give full effect to article 33 of the collective agreement, which grants one week of pay per year of service, its interpretation of clause 33.02 must be recognized.

B. For the employer

[28] According to the employer, the anomalies raised by the bargaining agent can be attributed not to the collective agreement but to the CAF's particular severance pay scheme. Since that scheme is not part of the collective agreement, it should not affect its interpretation.

[29] The employer maintains that clause 33.02 of the collective agreement is clear. The amount of severance pay should be reduced by any period for which an employee received any kind of severance benefit; the period must be subtracted from the total period of continuous employment.

[30] According to the employer, it would be erroneous to rely on *Martin*, as the bargaining agent wishes, as that decision is specifically based on the principle of issue estoppel, which does not apply in this case.

[31] Instead, according to the employer, the adjudicator's reasoning in *Burzynski* must be applied in this case. In that decision, the adjudicator subtracted the time in the CAF from the total time of continuous employment.

[32] *Burzynski* was subject to judicial review in the Federal Court (*Canada (Attorney General) v. Burzynski*, 2009 FC 522). The judge in that case dismissed the judicial review application after finding that the adjudicator's decision was reasonable. As a result, according to the employer, the Board should respect *Burzynski*.

IV. Analysis

[33] From the outset, the odd wording of clause 33.02, which subtracts a period from an amount, must be emphasized. I have some difficulty with the employer's argument, which maintains that the text is clear. I think that the French text is somewhat clearer, and it is interesting to note that both *Martin* and *Burzynski*, which interpreted the clause, are based on the English text.

[34] The English text states the following: "*Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment…*". In contrast, the French text states the following: "*Les indemnités de départ payables à l'employé-e en vertu du présent article sont réduites de manière à tenir compte de toute période d'emploi continu …*". In the French, an amount is not reduced by subtracting a period but instead by considering it. In my view, the French version is more in line with the interpretation advocated by the bargaining agent, namely, the amount paid must be subtracted. Considering the period for which severance has already been paid means that the period and its particulars must be considered, specifically the amount paid for that period.

[35] The parties submitted *Martin* and *Burzynski* to me as authorities. The bargaining agent maintains that *Martin* is the correct decision, while the employer maintains that it is *Burzynski*. First, it is appropriate to summarize the conclusions of each decision. They deal with the same issue, which is interpreting the wording of clauses similar to clause 33.02 (in the context of employees who have retired from the CAF). The clause is found in other Treasury Board collective agreements, always with the odd wording about subtracting time from an amount payable.

[36] In *Martin*, the employee had been in the CAF for 19 years. He received an offer to work at Transport Canada. Because he did not have 20 years in the CAF, the calculation of his severance pay from the CAF was a half-week of salary multiplied by 19. When he retired from Transport Canada, he asked it several times whether he would be entitled to severance pay that would compensate him for the other half-week,

so that he would be entitled to one week of salary per year of continuous employment. Each time, he was assured that it would be so.

[37] In her analysis, the adjudicator first considered the operation of the provision, like clause 33.02 of the collective agreement in this case, which provided that the period for which a severance benefit was paid must be subtracted from the total amount owed as severance pay at retirement. She concluded that it was absurd to deduct time from an amount, that the purpose of the clause was to prevent double compensation, and that it would be unfair and contrary to the parties' intent to penalize the employee because he had 19 years instead of 20 in the CAF. Alternatively, she added that in any case, the employer's commitment to pay the severance by subtracting the amount and not the time bound the employer, based on the principle of issue estoppel.

[38] Estoppel does not apply in this case, but the absurdity remains, as described in *Martin*, in that an employee who leaves after 8 years of military service is in a better financial situation than one who leaves after 9 years, given the same period of public service employment. An employee who leaves after 19 years could ultimately receive less than an employee who leaves after 20 years but works in the public service for several years fewer after that.

[39] The same issue is addressed in *Burzynski*, but the adjudicator arrived at the opposite result. Essentially, according to him, it was unfair to make the employer pay the severance that the CAF did not pay for a given period, as the adjudicator writes in paragraph 20 as follows:

> *… In other words, the employer would be required to "top up" the severance pay paid by the Forces to the amount that the grievor would have earned had he worked for that period of time in the public service rather than the Forces.*

[40] Mr. Burzynski served almost 11 years in the CAF and then worked for just over 27 years in the public service, for a total of 38 years of continuous employment. The employer limited the years of service to 30 (30 is the maximum number of weeks of severance pay) and then subtracted the 11 years of CAF service for which Mr. Burzynski had received one half-week of pay per year of service. The adjudicator stated that the number of years in the CAF should have been subtracted but from 38,

not 30, since the text of the Act did not provide a maximum number of years of employment, only of weeks of severance.

[41] The Attorney General of Canada applied for judicial review of the decision (on the issue of 30 weeks compared to 38), but it was dismissed. The Federal Court simply stated that the decision in that respect had been reasonable. The calculation, namely, whether the amount paid should be deducted or the time, was not at issue before the Federal Court. Thus, I do not see that its decision settles the issue before me.

[42] Finally, I agree with the adjudicator's reasoning in *Martin* from the standpoint of an interpretation that takes into account the overall context, namely, the purpose of article 33 and the whole of the collective agreement, as illustrated by the following, quoted from pages 17 and 18 of that decision:

> *In interpreting and applying clause 18.02, one has to be mindful of its purpose. I agree with counsel for the grievor that the purpose of clause 18.02 is to prevent double payment of severance pay and pyramiding. I am mindful of this purpose in interpreting clause 18.02. I note that the interpretation proposed by counsel for the grievor does not offend this purpose and in fact is in keeping with this purpose.*
>
> *A literal reading of clause 18.02 suggests that "severance benefits… be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit by … the Canadian Forces, …".*
>
> *Although each word of clause 18.02 is not in and of itself ambiguous, a literal application of these words is unfeasible, both at the conceptual level and at the practical level.* ***How does one subtract time****, i.e. "a period of continuous employment" from* ***money****, i.e. "severance benefits"? The wording of this sentence contains an inherent illogicality and an absurdity which requires the reader to seek the intent of the parties. As well, it contains a latent ambiguity which becomes apparent when one attempts to apply it.*
>
> *Firstly, the intent of the parties is that employees receive "one (1) week's pay for each complete year of continuous employment" as well as "two (2) weeks' pay for the first year of continuous employment". This intent emerges from paragraph 18.01(a) and this intent must be respected in interpreting and applying the language of clause 18.02 which, as I have said, contains a premise not founded on logic.*
>
> *The intent of the parties (one week's pay per year of continuous employment) and the purpose of clause 18.02 (to prevent double payment of severance pay and pyramiding) can both be respected*

> *by applying an interpretation of clause 18.02 which is founded on a logical premise, that is, that* ***pay is deducted from pay*** *and cannot be deducted from* ***time****. Therefore, the grievor's severance pay should have been calculated by reducing the amount of severance pay owed to him and calculated on the basis of his continuous employment by the amount of severance pay which he received upon leaving the military. This result is in keeping both with the intent of the parties and the purpose of clause 18.02.*
>
> *The interpretation proposed by the employer would create classes of employees: employees of 19 years' service who did not take any severance pay upon leaving the military and joining Transport Canada would receive one week's pay for each year of continuous employment including the 19 years spent in the military but employees such as the grievor with the same number of years in the military would not be credited the same number of years as continuous employment for the reason that they have already accepted severance pay for a number of those years. The interpretation proposed by the employer would also entitle employees who have spent nine years and less in the military to more severance pay upon leaving Transport Canada than employees who have spent between 10 and less than 20 years in the military if these employees accept some severance pay upon leaving the military. I do not believe that this was the intention of the parties.*
>
> *It is true that if the grievor had simply left the military without joining Transport Canada, he would only have been entitled to the severance pay which he received and which was calculated on the basis of his having been in the military between 10 and less than 20 years. This was the military scheme on severance pay. However, by going to work for Transport Canada, the severance pay scheme devised in the collective agreement was fully applicable to the grievor and his severance pay should have been calculated on the basis that he was entitled to one week's pay for each year of continuous employment minus the severance pay he had already received from the military.*
>
> [Emphasis in the original]

[43] According to the adjudicator in *Burzynski*, the employer is not required to make up the difference between the amount paid on leaving the CAF and the amount an employee is entitled to on retirement from the public service. In my view, this ignores the definition of continuous employment according to the *Directive on Terms and Conditions of Employment*, which includes "… immediately prior service in the Canadian Forces". In other words, an employee's continuous service includes the years in the CAF, and the employee is entitled to one week of severance per year of service. The meaning of clause 33.02 of the collective agreement is to prevent pyramiding severance and not to deprive an employee of severance for the years worked, each of which is worth one week of pay.

[44] Logically, an amount, not time, can be deducted from an amount to be paid. The amount involves a period, which in my view is the meaning that should be given to clause 33.02, "… by any period of continuous employment in respect of which the employee was already granted any type of termination benefit." The period is accounted for by considering the amount paid for it. Nevertheless, the fact remains that an employee is entitled to one week per year of continuous service and that, for the purposes of the definition, continuous service includes years in the CAF.

[45] Accepting the employer's interpretation leads to too many unjust absurdities. I agree with the adjudicator's interpretation in *Martin*, which is that the parties' intent could not have been to penalize employees whose years of service include some with the CAF. Clearly, the intent of clause 33.02 of the collective agreement is to avoid double compensation, a goal that is attained by subtracting the amount received from the severance payable. If only the period is considered, the absurd situations that the bargaining agent described in its arguments are risked in which employees who spent between 9 and 20 years in the CAF are penalized but not those with less than 9 or more than 20 years.

[46] I cannot believe that the same period of continuous employment does not always lead to the same severance pay calculation. This does not preclude considering the period for which an amount might already have been paid by subtracting that amount. To me, any other result seems contrary to the parties' intent; they negotiated a clause to reward each year of continuous employment.

[47] The adjudicator's perspective in *Burzynski* was that the employer is not required to compensate for the CAF's less-generous severance pay scheme. In contrast, as the bargaining agent emphasized, this reasoning also leads to an absurdity. That adjudicator's concern appeared to be that in the case of an employee with 10 years of CAF service, subtracting the amount paid and not the period spent in the CAF means that the employee receives severance that is paid half by the CAF and half by the employer. Instead, the text of clause 33.02 of the collective agreement indicates that the period is subtracted for which any type of severance was received. It is important to understand that if no severance was paid, as for an employee with only 8 years of CAF service, the employer would be responsible for 100% of the severance pay for those 8 years. *Burzynski* does not seem to account for that reality, which contradicts

its conclusion that the employer does not have to be responsible for the severance of those who were in the CAF.

[48] In any case, the issue is not whether the employer must compensate for a less-generous scheme; it is interpreting the collective agreement. An employee covered by a collective agreement is entitled to the benefits it provides. The severance pay calculation must be made by considering the number of years of continuous service, including those in the CAF. I do not see in clause 33.02 of the collective agreement the possibility of subtracting years; instead, they must be considered for the purposes of the calculation. Since subtracting an amount achieves a fairer result, which respects the parties' intention to grant one week of pay per year of service, I believe that this interpretation must be preferred.

[49] As a corrective measure, the bargaining agent requested that I make both a declaration and an order to adjust the payments owed to employees in that situation. Both requests are granted.

[50] The bargaining agent also asked me to order the employer to pay interest at the legal rate. To facilitate the calculation and to make the interest amounts uniform, I select the official bank rate set by the Bank of Canada. Under clause 33.06 of the collective agreement, within six months of the collective agreement being signed, employees were to advise the employer of the option chosen for the payment of the amount due. Interest began to accrue as of that date.

[51] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[52] The grievance is allowed.

[53] In accordance with clause 33.02 of the collective agreement, the amount paid as severance pay must be reduced by the amount already paid as severance pay.

[54] Within 90 days of this decision, the employer must determine the calculation of the amounts owed those employees whose severance pay was not calculated according to the preceding paragraph and must pay those amounts to those employees.

[55] The employer must add simple interest to the amounts owed, calculated at the annual rate based on the Bank of Canada's official rate (monthly data). Interest began to accrue on May 5, 2014.

[56] I remain seized of this case for 90 days after the date of this decision, solely with respect to the calculation of the amounts owed.

December 5, 2019.

FPSLREB Translation

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