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File: 525-02-40445

Citation: 2020 FPSLREB 77

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

SABRINA SANDHU

Applicant

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Sandhu v. Deputy Head (Correctional Service of Canada)

In the matter of a request for the Board to exercise its powers under section 43 of the *Federal Public Sector Labour Relations Act*

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

For the Applicant: Charlie Arsenault-Jacques, union advisor

For the Respondent: Erin Saso, labour relations analyst

Decided on the basis of written submissions,
filed May 21, 2019; July 2, 2019 and September 4, 2019.

REASONS FOR DECISION

I. Application before the Board

A. For the applicant

[1] On April 13, 2019, Sabrina Sandhu ("the applicant") applied to the Federal Public Sector Labour Relations and Employment Board ("the Board"), to request that it review one of its decisions, pursuant to s. 43 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which reads in part as follows:

> ***43(1)*** *Subject to subsection (2) the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.…*

[2] The Board issued the decision in question on August 13, 2018, with respect to several grievances filed by the applicant, in *Sandhu v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 63. The Board allowed the grievances relating to her termination of employment. The other ones were dismissed.

[3] By way of remedy, the Board ordered the following relief:

> …
>
> *[232] Ms. Sandhu shall be reinstated to a correctional officer position classified at the CX-02 group and level, with pay and without loss of benefits, starting from December 2, 2013. …*
>
> *[233] Within 60 days of this decision, the deputy head shall reinstate Ms. Sandhu's salary at the CX-02 group and level and her benefits starting from December 2, 2013.*
>
> *[234] Within 60 days of this decision, the deputy head shall compensate Ms. Sandhu for her salary at the CX-02 group and level and her benefits starting from December 2, 2013, less the customary deductions, and less any employment income earned by Ms. Sandhu from December 2, 2013, to the date of her reinstatement.*
>
> …

[4] The applicant states that after the Board's decision was issued, her bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN , and the respondent had many discussions to determine what she would be paid.

[5] Ultimately, the parties resolved most of the issues. However, an issue with the payment of missed overtime opportunities, lieu time, and shift-differential premiums remained unresolved.

[6] The applicant seeks clarification as to whether the expression "… the deputy head shall compensate Ms. Sandhu for her salary at the CX-02 group and level …" in the Board's order includes missed overtime opportunities, shift-differential premiums, and lieu hours.

[7] In June 2019, the term of the Board member who constituted the panel that heard the reference to adjudication of the grievances and issued the decision ended. The applicant's s. 43 application was consequently referred to me to address.

B. For the respondent

[8] The respondent's position is that there is no compelling reason for the Board to reconsider its decision and that this application should be dismissed.

[9] The respondent asserts that according to the jurisprudence, a review of a decision under s. 43(1) must observe the following:

- it must not be a relitigation of the merits of the case;
- it must be based on a material change in circumstances;
- it must consider only new evidence or arguments that could not reasonably have been presented at the original hearing;
- it must ensure that there is a compelling reason for a reconsideration; and
- it must be used judiciously, infrequently, and carefully.

[10] The respondent argues that in this application, no indication was given that circumstances changed or that new evidence or arguments arose that would have a determining effect on the outcome of the original decision and that could not have been raised with the Board at the original hearing. This case does not involve new facts that could not have been known at the hearing or subsequent developments that comprise compelling reasons for a review.

[11] In other cases in which missed overtime was granted as part of a remedy following a reinstatement, the Board specifically listed as much in its orders.

C. Applicant's response

[12] The applicant argues that in support of its position, the respondent cites many cases, none of which is in fact remotely similar to the one at hand. Therefore, it is impossible to draw any conclusions from them.

[13] The applicant asserts that she is not trying to relitigate or appeal an issue and that there is no debate as to the outcome of the initial Board hearing.

[14] She argues that there is disagreement as to the interpretation of the Board's order and that she seeks clarification from the Board. She states that the Board did not retain jurisdiction to deal with difficulties in implementing its order; nor did it remain seized of the file for a time after the decision was rendered. In these circumstances, there are compelling reasons to grant this application.

[15] The jurisprudence clearly states that if shift premiums would have been paid, they are to be included in the calculation of salary. Similarly, lost overtime opportunities are to be included as well. There is no reason to conclude that the Board's award did not include everything that the grievor would have earned had she worked the period in question.

II. Reasons

[16] It should be noted that this is not the first application to the Board that relates to the enforcement of the award. In October 2018, the applicant requested that the Board file a certified copy of it with the Federal Court, in accordance with s. 234(1) of the *Act*. She argued that she had exhausted all avenues to secure the implementation of the Board's decision.

[17] On December 17, 2018, the Board issued a decision in which it ruled as follows:

> …
>
> *The Board is satisfied based on the information provided by Ms. Guzina that the Board's order in 2018 FPSLREB 63 has been complied with and filing the order in the Federal Court would serve no useful purpose.*
>
> …

[18] The Board then denied the applicant's request that it file a certified copy of its order in the Federal Court.

[19] In *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 172-02-76 (19730605), [1973] C.P.S.S.R.B. No. 7 (QL), the Public Service Staff Relations Board (PSSRB) outlined the circumstances in which it would exercise the powers given to it by s. 25 of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), which was the predecessor to s. 43 of the Act. In substance, the sections do not differ.

[20] At pages 5 to 7 of its decision, the PSSRB reasoned as follows:

> *9 … there must be some potent error on the face of the decision respecting its application to the situation with which it deals or some new matter which came to the attention of the parties or party after the original hearing.*
>
> *10. The first of such possibilities envisaged might apply to clerical or technical errors in the decision or order. It would include such things as clerical or typing errors… In these situations the authority can be said to be clarifying its language or intent.*
>
> *11. The second reason for the Board undertaking a review of its decisions or orders relates more to the merits of the case than to the manner in which the decision is expressed. In such cases it must be made to appear to the Board that there is some compelling reason for the Board undertaking a review of its decision… Thus, generally speaking, before the Board will undertake a review of its decisions or orders where the requested review is on the merits of the case, the party requesting the review has upon him an onus to present substantial reasons why the case should be reviewed. It may be that there has been new evidence brought to the attention of the party seeking the application but even in such instances, the party must demonstrate to the Board that the new evidence was either not available for consideration at the time of the first decision or, if the evidence was available, that it could not have been discovered by the exercise of diligence in the preparation and presentation of its case. In any event, it must be shown that the evidence which the party now seeks to bring before the Board is of such a nature that it would be practically conclusive and not merely corroborative of the issue, that is, the fact or documents sought to be introduced is essential to the case and its existence or authenticity is not in serious dispute.*
>
> *12 There may of course be other reasons why the Board should undertake the review of one of its decisions or orders but again in such instances there is cast upon the applicant a heavy onus to show some special consideration which warrants the review.…*

[21] As the Federal Court of Appeal also noted in *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376, at para. 8, a request for reconsideration is neither an appeal nor a request for redetermination. Rather, it is a limited exception to the finality of the

Board's decision which enables the decision-maker to revisit the decision in the light of fresh evidence or a new argument.

[22] Indeed, the applicant acknowledged in her submissions that s.43 cannot be used as an appeal mechanism or an alternative to judicial review, and that there must be a finality to the proceedings. Section 43 is not intended to be used to relitigate an issue already decided.

III. Conclusion

[23] In her application for the Board to interpret the original award, the applicant seeks more than a mere correction of a clerical or technical error.

[24] On the other hand, the applicant is not alleging that there is new evidence that would have had a determining effect on the outcome of the original decision and that could not have been raised with the Board at the hearing. Nor is there an allegation that there are new facts that could not have been known as of the hearing.

[25] Rather, as the applicant herself states in her application, she is seeking a "clarification" about the award.

[26] This does not satisfy the criteria to justify a review under section 43 of the *Act* and in my view, the applicant has not met her heavy onus to demonstrate some special consideration or compelling reason to warrant a review.

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

(The Order appears on the next page)

IV. Order

[28] The application is dismissed.

July 24, 2020.

David P. Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board