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File: 566-34-09778

Citation: 2020 FPSLREB 100

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

AKUDI DANSOU

Grievor

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Dansou v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Farhad Shayegh, counsel

For the Respondent: Marie-France Boyer, counsel

Decided on the basis of written submissions
filed August 5, 18, and 25, 2020.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] On May 13, 2014, Akudi Dansou ("the grievor") referred a grievance about the recovery of an overpayment to adjudication before the Public Service Labour Relations Board.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed in force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the Public Service Labour Relations Board and the 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. 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

[3] On June 19, 2017, under the *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), the Public Service Labour Relations and Employment Board became the Federal Public Sector Labour Relations and Employment Board ("the Board"), and the *Public Service Labour Relations Act* became the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

II. Summary of the evidence

[4] For this hearing, the parties agreed to proceed on the basis of written submissions. They agreed to the following joint statement of facts:

> [Translation]
>
> *A. Background*
>
> *1. The grievor has worked for the public service since February 5, 2007.*
>
> *2. On February 5, 2007, she began her employment with the Canada Revenue Agency (**"the CRA"** or **"the Employer"**) at the CR-02 group and level.*

3. On November 1, 2007, CR positions were converted to SP positions.

4. The grievor occupied positions in the SP group until November 3, 2013.

5. The grievor has been a tax auditor at the AU-01 group and level since November 4, 2013.

6. The grievor worked in Montreal, Quebec, since she was hired by the CRA.

B. The conversion and the overpayment

7. On April 22, 2013, the Employer informed the grievor for the first time that as of November 1, 2007, when her position was converted from CR to SP, she received payments in excess of what she should have received.

8. In the April 22, 2013, email, the Employer explained that normally, CR-02 positions had to be converted to SP-01, but the grievor's position was an exception to that rule. Therefore, her position was correctly converted from CR-02 to SP-02.

9. However, the conversion affected the calculation date of the grievor's pay scale progression. Thus, she received overpayments, and the consequences of that administrative error were spaced over several years. The employer stated that the amounts to be recovered due to that error were as follows:

> *a. $64.07 for February 5 to 21, 2007, because the grievor was not entitled to the 4% payment that she received;*
>
> *b. $281.05 for February 4 to May 21, 2008, because the grievor received the salary at level 2 when she was entitled to level 1;*
>
> *c. $662.76 for February 28 to October 31, 2009, because the grievor received the salary at level 3 when she was entitled to level 2; and*
>
> *d. $472.86 for February 1 to July 18, 2010, because the grievor received the salary at level 4 when she was entitled to level 3.*

10. Consequently, the Employer stated that it had to recover a total amount of $1480.73.

11. In the April 22, 2013, email, the Employer also informed the grievor that it corrected payment errors that were connected with her position at the SP-04 and SP-05 group and levels and that therefore she would be entitled to a total gross payment of $2271.89.

12. Specifically, the Employer informed the grievor that she would receive two payments:

a. one gross payment of $2235.02 ($1113.44 net) on April 26, 2013, for payment errors at the SP-04 and the SP-05 group and levels; and

b. one gross payment of $36.87 on May 1, 2013, for overtime hours.

13. The Employer then informed the grievor that the recovery of the $1480.73 would take place on May 8, 2013, and that it would come out of a single paycheque. In this case, the gross payment of $2271.89 scheduled for April 26, 2013, was greater than the gross recovery amount of $1480.73 that was scheduled for May 8, 2013. Also, the Employer stated that the payment exceeded the recovery amount by $791.15.

14. On May 2, 2013, the Employer informed the grievor that her May 8, 2013, paycheque would reflect the corrected SP-05 salary of $54 645. The Employer also confirmed that the $1480.73 recovery would be withdrawn from her May 8, 2013, paycheque and that her net pay would be $376.94.

15. Consequently, on May 8, 2013, the grievor's net pay was $376.94.

C. The dispute

16. On May 13, 2013, the grievor grieved the Employer's decision to recover the $1480.73 following an error made during the November 1, 2007, conversion of CR positions to SP.

17. The responses to the grievance at the three levels are included in the appendix to this statement [they are not included in this decision].

18. On May 13, 2014, the grievor's grievance was referred to the FPSLREB [at that time, it was the Public Service Labour Relations Board].

D. The collective agreements

19. On November 1, 2007, when the CR positions were converted to SP, the collective agreement that applied to the grievor was the "Agreement between the Canada Revenue Agency and the Public Service Alliance of Canada: Program Delivery and Administrative Services", which expired October 31, 2007, and remained in force until December 3, 2007.

20. On May 8, 2013, when the overpayment was recovered, the collective agreement that applied to the grievor was the "Agreement between the Canada Revenue Agency and the Public Service Alliance of Canada: Program Delivery and Administrative

> *Services", which expired October 31, 2012, and remained in force until the new collective agreement was signed on October 25, 2016.*
>
> [Emphasis in the original]

III. Summary of the arguments

A. For the grievor

[5] The grievor relied on two arguments to dispute the overpayment recovery: the recovery action was unreasonable, and alternatively, if the Board found that the recovery was reasonable, the recovery was largely time barred by the limitation period that applied in the province of Quebec, where she worked and lived.

[6] It is not in dispute that on behalf of the Receiver General for Canada, the Canada Revenue Agency ("the respondent" or "the CRA") has the authority to recover salary overpayments under s. 155(3) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). However, that discretionary power must be exercised reasonably.

[7] The grievor cited issue estoppel. After four years, she expected that the salary she was paid was the one she was entitled to, and she cited *Lapointe v. Treasury Board (Human Resources and Skills Development)*, 2011 PSLRB 57. In that decision, which concerned a similar situation, the adjudicator stated that the employer had a duty of vigilance to ensure that the salary it paid its employees was indeed the amount owed.

[8] In addition, it was not reasonable to recover the full amount owing in a lump sum, which caused financial difficulties for the grievor. The respondent made no effort to minimize the adverse consequences that resulted from its administrative error, which it admitted it had made. In her written submissions, the grievor submitted a document that described her financial difficulties at the time of the overpayment recovery.

[9] In the alternative, if the Board deemed that s. 155(3) of the *FAA* applied in this case, in the grievor's view, the recovery was largely time barred. As indicated in the joint statement of facts, the overpayments spanned several years, from 2007 to 2010, while the recovery took place in 2013.

[10] Section 32 of the *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50; *CLPA*) sets out the application of provincial limitation rules in the event of proceedings

to which the Crown is a party. Section 2925 of the *Civil Code of Québec*, CQLR, c. CCQ-1991 (*CCQ*), provides a limitation period of three years. Consequently, the respondent could not recover the overpayments beyond 2010, and the recovery action was performed in 2013. In that case, the amount to be recovered, if appropriate, would have been $472.86 instead of $1480.73.

[11] The grievor claimed reimbursement for the amount recovered, plus interest.

B. For the respondent

[12] The respondent argued that the Board had no jurisdiction to hear the grievance at adjudication because the collective agreement did not refer to overpayments and repayments.

[13] It asserted its right to deduct the overpayment under s. 155(3) of the *FAA* and the CRA's *Guidelines for the Recovery of Salary Overpayments* ("the *Guidelines*"); those guidelines are not part of the collective agreement.

[14] Alternatively, the respondent argued that the grievor had not established a violation of the collective agreement. It cited several Board decisions, which confirmed its authority to recover overpayments.

[15] The respondent rejected the grievor's arguments.

[16] According to the respondent, there is no estoppel in this case because the conditions for estoppel were not met. Specifically, there was no promise by the respondent, and the grievor did not show that she was harmed by the fact that she relied on such a promise. The error that the respondent made when it calculated the compensation was not a promise, and the grievor's disappointment about having to repay the overpayment did not constitute harm. *Lapointe* should be distinguished; I will return to that decision in my analysis.

[17] The respondent did not act unreasonably; quite the contrary. It paid the grievor an amount that was owing to her due to a salary correction, before it proceeded with the recovery. The gross amount paid was $2271.89, while the recovery amount was $1480.73, a difference of $791.15 in the grievor's favour. Therefore, she did not suffer any financial loss.

[18] The grievor talked about her financial difficulties, but she did not communicate that information to the respondent at the time of the payment recovery, nor did she ask for changes to the repayment terms. Therefore, the respondent could not be held responsible for this matter.

[19] The respondent argued that the limitation set out in the *CCQ* did not apply in this case. It recognized that the Crown was a party in this proceeding, but it contested the fact that the origin of the dispute was located in Quebec; thus, the Quebec limitation rules did not apply. The grievor argued that because her place of work and her residence are located in Montreal, the origin was located in Quebec. According to the respondent, a federal employee's pay is not determined by the province in which they live; it is determined at the federal level. The same compensation applies across Canada. The respondent relied on *Markevich v. Canada*, 2003 SCC 9, and on *Gardner v. Canada (Border Services Agency)*, 2009 FC 1156, which I will come back to in my analysis.

[20] The respondent was entitled to proceed with the recovery of the overpayment, and the grievor did not dispute that right. According to the respondent, as the grievor's arguments were invalid, the grievance should be dismissed.

C. The grievor's reply

[21] In her reply to the respondent's arguments on jurisdiction, the grievor repeated that the recovery was unreasonable, and she discussed the case law on the limitation cited by the respondent. I will come back to these issues in my analysis.

IV. Analysis

[22] I will address the different arguments raised by the parties in turn.

A. The Board's jurisdiction

[23] The respondent argued that the Board does not have jurisdiction because nothing in the collective agreement deals with overpayments. It is understood that the Board has jurisdiction only if the issue is related to the collective agreement, under s. 209(1)(a) of the *Act*.

[24] The respondent's position is somewhat contradictory. While the collective agreement does not deal with overpayments, the respondent relied on clause 64.02

and Appendix A-1 of the collective agreement to argue that the grievor was not entitled to an overpayment; she was entitled only to her fair compensation.

[25] Obviously, the collective agreement does not provide for entitlements to overpayments, but it provides exhaustively for employee compensation. As the grievance is reflected in the remuneration part of the collective agreement, the Board has jurisdiction because "the essential character of the dispute", within the meaning of *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, is related to the collective agreement conditions.

[26] In addition, in another contradiction, the respondent also supported its arguments by citing the Board's case law, in which the Board never hesitates to rule on overpayment issues.

[27] Consequently, I believe that I have jurisdiction to decide the matter.

B. Limitation

[28] I agree with the respondent's reasoning that the six-year limitation period applies in this case. Since the pay level calculation dated to November 1, 2007, the employer had a deadline of November 1, 2013, to recover the overpayment.

[29] The grievor cited an arbitrator's decision, which ruled on an overpayment issue at the Canada Post Corporation (*Syndicat des travailleurs et travailleuses des postes v. Société canadienne des postes*, 2010 CanLII 46539 (CA SA)). In that decision, the limitation period set out in the *CCQ* was accepted, despite the fact that the Canada Post Corporation is a federal entity and the dispute fell under the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*). The arbitrator noted that as neither the relevant collective agreement nor the *CLC* provided for a limitation period, provincial law applied, on a suppletive basis. The adjudicator did not mention s. 32 of the *CLPA*, which reads as follows:

> ***32*** *Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause or action arose.*

[30] The parties agreed that s. 32 of the *CLPA* applied in this case. Therefore, the issue is to locate the "cause of action", which involves pay and the calculation of the salary level. The calculation is performed by the CRA, which conducts its operations across Canada. It is headquartered in Ottawa. The pay calculation is carried out based on the collective agreement, which applies across the country.

[31] The grievor argued that the cause of action arose in the province of Quebec, where she works and lives. In my view, the cause of action in this case, i.e., the overpayment, arose elsewhere than in the province, given the centralized nature of the pay system (the email that provided details for the recovery came from the compensation service located in Ottawa) and the general application of the collective agreement throughout Canada.

[32] In the *Markevich* ruling, the Supreme Court of Canada had to decide which limitation period should be applied in the case of a repayment to the CRA. The taxpayer was a resident of British Columbia and asked that the provincial limitation period be recognized, while the CRA argued for the federal limitation period set out in s. 32 of the *CLPA*. The Supreme Court wrote the following:

> …
>
> *[39] … The debt is owed to the federal Crown, which is not located in any particular province and does not assume a provincial locale in its assessment of taxes. Consequently, on a plain reading of s. 32, the cause of action in this case arose "otherwise than in a province".*
>
> *[40] A purposive reading of s. 32 supports this finding. If the cause of action were found to arise in a province, the limitation period applicable to the federal Crown's collection of tax debts could vary considerably depending upon the province in which the income was earned and its limitation periods. In addition to the administrative difficulties that potentially arise from having to determine the specific portions of tax debts that arise in different provinces, the differential application of limitation periods to Canadian taxpayers could impair the equitable collection of taxes. Disparities amongst provincial limitation periods could foreseeably lead to more stringent tax collection in some provinces and more lenient collection in others. The Court can only presume that in providing for a limitation period of six years to apply to proceedings in respect of a cause of action arising otherwise than in a province, Parliament intended for limitation provisions to apply uniformly throughout the country with regard to proceedings of the kind at issue in this appeal.*

…

[33] The reasoning in the *Markevich* ruling, which provided uniformity in the application of tax debts, seems to apply in this case as well, contrary to what the grievor argued. It would seem to be iniquitous and contrary to harmonious labour relations if the overpayment recovery limitation period varied from province to province. In the absence of a stipulation to the contrary in the collective agreement or in law (e.g., workers' compensation, which is expressly delegated to provincial authorities for federal employees), it seems preferable to me to adopt the reasoning in *Markevich* and provide a uniform approach for overpayment recovery.

[34] The respondent cited *Paquet v. Treasury Board (Department of Public Works and Government Services (Translation Bureau))*, 2016 PSLREB 30, and *Gardner v. Canada (Border Services Agency)*, 2009 FC 1156, to confirm this interpretation of s. 32 of the *CLPA*. But I note that these decisions did not seek to interpret s. 32 of the *CLPA*.

[35] I find that the recovery was not time barred, except for the amount of $64.07, for a 4% payment to which the grievor would not have been entitled, for February 5 to 21, 2007. The April 22, 2013, email, which outlines the recovery, explains it as follows:

> [Translation]
>
> *You were paid 4% in error from February 5 to 21, 2007, when you were hired as a (+3); therefore, you were entitled to annual leave and not 4% for that period.*
>
> ***Recovery** of 4% of 32 142.00 for that period = 1601.68 = **($64.07)***
>
> [Emphasis in the original]

[36] This debt is time barred. If the February 2007 paycheque was incorrect, the recovery should have taken place in February 2013 at the latest. A recovery in April 2013 was too late. Consequently, the grievor should be reimbursed the $64.07. However, I have no jurisdiction to award interest on that amount because s. 226(2)(c) of the *Act* expressly provides the circumstances in which the Board may award interest as part of adjudicating a grievance: "… termination, demotion, suspension or financial penalty …". The issue in this case is not covered.

C. Estoppel

[37] The grievor argued that there was estoppel because for years she relied on the respondent's pay calculations. According to her, the respondent could not then change her pay due to its error.

[38] Much more than the facts in this case would be required to support a theory of estoppel. The grievor cited *Lapointe*, and the respondent correctly distinguished between the different elements of that decision and this case.

[39] In *Lapointe*, Mr. Lapointe was paid at a higher rate than what he was entitled to for 4 years. When the employer noticed the error, it established a claim of $9666., which Mr. Lapointe had to repay at a rate of 10% from his salary for 65 pay periods.

[40] Mr. Lapointe demonstrated that paying back the overpayment caused him serious financial difficulty. He also established that one of his colleagues questioned the compensation service because he thought that his pay was too high, but he was reassured that it was correct. Mr. Lapointe and his colleague were the only two employees in their area affected by the calculation error.

[41] The adjudicator found that there had been estoppel in that case. The employees had relied on the employer, which was notified of a potential overpayment and followed up on it only four years later. On the basis of that promise (that the salary was correct), Mr. Lapointe incurred expenses that he could not sustain as a result of the decrease in his income. Therefore, both elements of estoppel were combined; i.e., a promise that brings about a change in behaviour in the person to whom the promise is made, and the resulting harm.

[42] These elements were not present in the grievor's situation. There was no promise but there was an error, which went unnoticed from November 2007 to April 2013. Above all, there was no harm due to the error as the grievor suffered no loss because the salary correction to a higher amount compensated for the overpayment recovery. While Mr. Lapointe saw his salary decrease for years, the grievor paid the recovery amount in May 2013, after she received a higher amount of salary adjustment.

D. The reasonable nature of the overpayment

[43] While the grievor did not dispute the legality of reimbursing the overpayment under s. 155(3) of the *FAA*, she did dispute its reasonable nature.

[44] The grievor submitted a document that outlined her financial difficulties at the time of the recovery. There was no evidence that the employer was informed about this at that time. There is no indication that the grievor tried to have changes made to the terms of the recovery. She argued that she did not know that that was possible. She could have asked for information from her union.

[45] In addition, I accept the respondent's argument that the grievor did not suffer any financial loss. It appears that it recalculated the salary to which she was entitled. If an error for the 2008 to 2010 pay levels forced the recovery, an error for the salary for higher classifications resulted in an additional amount of pay. In April and May 2008, despite a sharply reduced pay on May 8, 2008, due to the recovery, the grievor still gained an additional $791.00 more than she expected to receive. I cannot find that the recovery was unreasonable. The respondent corrected two errors, and the balance was positive for the grievor.

E. Conclusion

[46] The *FAA* provides for the recovery of a salary overpayment. In this case, the recovery was legitimate (nor is this in dispute), it was not time barred (except for the February 2007 amount), and issue estoppel did not apply. As well, given the fact that the recovery coincided with the payment of an additional and higher amount to correct the grievor's salary, it was not unreasonable.

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

(The Order appears on the next page)

V. Order

[48] The grievance is allowed in part.

[49] The employer was not entitled to recover the amount of $64.07 for February 5 to 21, 2007, which was time barred.

[50] As for the rest, the grievance is denied. The employer was entitled to recover the overpayment in the amount of $1416.66.

[51] The employer will have to pay $64.07 (gross amount) to the grievor within 30 days of this decision.

November 10, 2020.

FPSLREB Translation

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