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Federal Public Sector Labour Relations and Employment Board Act and *Public Service Employment Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JASON LYSAK

Complainant

and

COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE
Respondent

and

OTHER PARTIES

Indexed as
Lysak v. Commissioner of the Royal Canadian Mounted Police

In the matter of a complaint of abuse of authority - s. 77(1)(b) of the *Public Service Employment Act*

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Jonathan Caron, departmental representative

For the Public Service Commission: Claude Zaor, senior analyst

Decided on the basis of written submissions,
filed March 3, 9, and 15, August 11, and October 15, 2020.

REASONS FOR DECISION

I. Introduction

[1] Jason Lysak ("the complainant") filed a complaint of abuse of authority with the Federal Public Sector Labour Relations and Employment Board ("the Board") on October 9, 2019, about the appointment of a person ("the selected person") to a post garage manager position with the Royal Canadian Mounted Police (RCMP) in Winnipeg, Manitoba.

[2] Before filing his complaint, the complainant was on priority status within the federal public service and was seeking a position. He learned that the selected person was to fill the post garage manager position at the workplace at which the complainant used to be employed, the RCMP garage unit in Winnipeg. He had not seen any posting about it on the federal government's jobs website. After inquiring, he learned that no notice had been posted because the selected person was considered to have been deployed to the position.

[3] The complainant disagreed with this interpretation. He believed that the position was a promotion for the selected person.

[4] The respondent maintained that the selected person was deployed to the position. The Board has no jurisdiction to hear complaints about deployments, and for that reason, the respondent made a preliminary motion to dismiss the complaint.

[5] For the following reasons, I grant the motion to dismiss the complaint, as I find that the selected person was indeed deployed to the position and that consequently, the complainant had no right to make a complaint with the Board pursuant to s. 77(1)(b) of the *Public Service Employment Act* (*PSEA*).

II. The provisions of the *PSEA* and *Regulations* that are at issue

[6] Complaints cannot be made about deployments. Specifically, the Board does not have the authority to deal with complaints about deployments. Section 77(1) of the *PSEA* provides that a complaint can be made only when an appointment has been made or proposed. Deployments are not appointments under the *PSEA*. The former Public Service Staffing Tribunal addressed this point as follows in *Smith v. President of the Canada Border Services Agency*, 2007 PSST 29 at para. 9:

> *[9] A deployment is defined at subsection 2(1) of the* PSEA *as "the transfer of a person from one position to another in accordance with Part 3" which comprises sections 51 to 53 of the* PSEA. *Subsection 53(1) of the* PSEA *specifically provides that "a deployment is not an appointment within the meaning of this Act."* ***Therefore, a complaint cannot be filed against a deployment under section 77 of the* PSEA*, as a deployment is not an appointment.***
>
> [Emphasis added]

[7] Furthermore, when persons are promoted, they are not considered deployed. Section 51(5)(a) of the *PSEA* states that a deployment may not constitute a promotion within the meaning of the regulations of the Treasury Board, namely, the *Definition of Promotion Regulations* (SOR/2005-376; "the *Regulations*"). They provide as follows at s. 3:

> ***Promotion***
>
> ***3(1)*** *For the purposes of subsection 51(5) of the* Public Service Employment Act, **promotion** *means the assignment to an employee of the duties of a position for which the maximum rate of pay is more than the maximum rate applicable to the employee's substantive level immediately before the assignment of the duties, by an amount equal to or greater than*
>
> ***(a)*** *the smallest increment on the pay scale for the new position, if it has more than one rate of pay; or*
>
> ***(b)*** *4% of the maximum rate of pay for the previous position, if the new position has only one rate of pay.*
>
> ***(2)*** *An assignment described in subsection (1) does not include the assignment of an employee to the duties of another position in the same occupational group and subgroup and at the same or a lower level.*
>
> [Emphasis in the original]

[8] This definition is reiterated in simpler language on the Treasury Board of Canada Secretariat's website as follows:

> …
>
> ***Promotion (*promotion*)***
>
> *means the appointment where the maximum pay rate for the new position exceeds that for the substantive position by:*
>
> *a) an amount equal to the lowest pay increment for the new position where there is a scale of rates; or*

> *b) an amount equal to four per cent (4%) of the maximum rate of the new position (where there is only one rate) ….*
>
> *…*

[9] In the present case, the respondent's motion to dismiss the complaint raised a preliminary issue, which is whether the selected person's move to the post garage manager position was a promotion or a deployment. To determine whether it was a promotion, it is necessary to see if the pay rates for the person's new position exceed those of his former substantive position by the differences described in the *Regulations*. As shown, a promotion cannot be a deployment, which means it could be considered an appointment. While the Board has no jurisdiction to hear complaints about deployments, it has jurisdiction to hear complaints about appointments.

III. Motions to dismiss the complaint

A. The first motion

[10] The respondent first raised the question about the Board's jurisdiction on December 13, 2019, when it made a motion to dismiss the complaint. It alleged that the complaint relates to a deployment and not an appointment. The respondent argued that the complaint was about a voluntary, full-time indeterminate lower-level deployment of the selected person into the post garage manager position, which is classified at the AS-04 group and level. It took effect on October 28, 2019.

[11] The respondent stated that before the deployment, the selected person's substantive position was classified at the GL-VHE-10 B2 group and level and that it had certain supervisory duties that entitled him to a "supervisory differential percentage" in his remuneration. The respondent attached a printout to its motion that showed the position as being a demotion. It contended that according to the Treasury Board's *Directive on Terms and Conditions of Employment*, this staffing action was a deployment. As such, the respondent argued that the Board did not have jurisdiction to hear the complaint.

[12] The complainant opposed the motion and filed an organizational chart showing that the selected person's previous substantive position as lead-hand technician reported to the post garage manager. He argued that accordingly, when the selected person was placed in the manager position, he was promoted.

[13] On December 13, 2019, I denied the motion to dismiss the complaint. I found that the information before me was contradictory and that it was unclear if the selected person had been deployed. I concluded that I could not determine the issue at that time.

B. The second motion

[14] On March 3, 2020, the respondent filed its reply to the complainant's allegations. It included a second motion to dismiss the complaint, with additional details intended to "… clarify what appears to be conflicting information."

[15] The respondent explained that according to the "RCMP Corporate Organizational and Classification Unit", it is not unheard of for situations to arise in which a supervisor and subordinate classified at different groups and levels have similar rates of pay. There is nothing written in policy that restricts this type of reporting. The respondent pointed out that in this case, the GL-VHE-10 position that the selected person had been occupying had a supervisory coordinate of B2, meaning that he received supplemental remuneration called a "supervisory differential". Annex B of the relevant collective agreement states that the supervisory differential is calculated by multiplying the basic rate of pay by the supervisory differential percentage of 6.5% for the B2 coordinate. According to the respondent's detailed calculations, which it submitted on August 11, 2020, this results in a maximum annual salary for the GL-VHE-10 B2 classification of $74 398.68, which is more than the maximum annual salary for the new position at the AS-04 classification ($72 660.00). Consequently, the selected person's move to the AS-04 position would not be a promotion but rather a lower-level deployment.

[16] The complainant opposes the respondent's motion and takes issue with its effort to revisit the matter that I addressed in my earlier decision. Furthermore, he disagrees with the respondent's calculation method. He points out that according to the collective agreement, persons employed in GL-VHE-10 positions are paid on an hourly basis based on a 40-hour week. Accordingly, if the AS-04 salary of $72 660.00 is calculated hourly, based on the shorter workweek set out in the applicable Program and Administrative Services collective agreement, the hourly wage would be $38.55. In contrast, the GL-VHE-10 position has an hourly wage of $35.77. The complainant submits that therefore, given this difference in hourly salary, the selected person's move to the AS-04 position would be a promotion.

[17] The respondent disagrees with the complainant's contention that the comparison should be done based on hourly pay rates instead of an annual salary. To determine the annual salary for the selected person's former substantive position, the respondent made the following calculation, which results in a sum that exceeds the maximum annual salary for AS-04 positions ($72 660.00):

> 52.179 weeks x 40 hours x $33.47 hourly rate
> = $69 853.22 + 6.5%
> = $74 393.68

[18] The complainant rejects the respondent's assertion that the calculation of the GL-VHE-10 position's annual salary should be based on a 40-hour week. He maintains that the same 37.5-hour workweeks for AS-04 employees should apply, which would yield the following calculation:

> 52.179 weeks x 37.5 hours x $33.47 hourly rate
> = $65 491.17 + 6.5%
> = $69 748.10

[19] Using this calculation, the maximum annual salary of an AS-04 position would clearly be higher ($72 660.00 - $69 748.10 = $2911.90). The *Regulations* require that this difference be compared with the lowest pay increment in the pay scale rates for AS-04 positions. The parties do not appear to dispute that the lowest pay increment is $2555.00. The complainant submits that the difference between the maximum salaries of the two positions exceeds this increment. Therefore, applying the test set out in s. 3(1)(a) of the *Regulations*, the complainant contends that the selected person's move to the AS-04 position was a promotion.

[20] The Public Service Commission (PSC), for its part, submits that if the Board determines that no internal appointment was made but rather a deployment, there would be no right to complain to the Board under s. 77 of the *PSEA*. Should this be the case, the Board would not have jurisdiction to consider the complaint, and it should be dismissed.

IV. Analysis

[21] The complainant objected to the respondent being allowed to make a second request that the complaint be dismissed. However, in my letter decision of December 13, 2019, I was clear that I could not determine "at the present time" if a deployment or an appointment under the *PSEA* occurred. This did not prevent the parties from

revisiting the issue later if additional information were made available, particularly given that the issue raises a fundamental question about whether the Board has jurisdiction under the PSEA to hear the complaint.

[22] For the second motion to dismiss the complaint, the complainant maintains that the test for determining whether the selected person was promoted should be based on a calculation of hourly rates of pay. I am not convinced by this argument.

[23] The rates of pay in the collective agreement for the AS-04 position are determined on an annual basis. It would be an artificial exercise to attempt to calculate them down to an hourly rate to make a comparison. Furthermore, I note that the calculations required by s. 3 of the *Regulations* call for a comparison with the lowest pay increment in the scale of pay of the new position. For AS-04 positions, the increments are defined on an annual basis, not hourly.

[24] On the other hand, the pay rates applicable to the selected person's prior substantive position make it quite simple to calculate the maximum annual rate of pay, by merely multiplying the number of weeks in the year (52.179) by the hourly rate and the agreed-to workweek of 40 hours. It makes no sense to reduce the workweek to 37.5 hours. The fact is that employees in GL-VHE-10 positions are paid to work 40 hours per week, all year. It would be fiction to say that the calculation should be based on a different workweek — the reality is that the workweek is 40 hours.

[25] Thus, a straightforward yearly salary-to-yearly salary comparison shows that the maximum pay rate at the selected person's new position is less than the maximum pay rate at his prior substantive position. Therefore, he was not promoted within the meaning of the *Regulations*. The staffing action met the criteria for a deployment.

[26] Under s. 77 of the *PSEA*, the Board has only the authority to deal with appointments. Since at s. 53(1), the *PSEA* provides that deployments are not appointments, the complainant could not make a s. 77 complaint to the Board about the selected person's deployment, and the Board has no jurisdiction to hear it.

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

(The Order appears on the next page)

V. Order

[28] The complaint is dismissed.

November 27, 2020.

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board