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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

JEAN-CLAUDE POUPART

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Poupart v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: François Ouellette, counsel

For the Employer: Philippe Giguère, counsel

Decided on the basis of written submissions, filed June 3, 19, and 25, August 28, September 18 and 30, and December 11, 2020.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] On December 6, 2017, Jean-Claude Poupart ("the grievor") filed a grievance contesting the Correctional Service of Canada's ("the employer") decision to recover sums paid for an injury-on-duty leave.

[2] The grievance reads as follows:

> [Translation]
>
> *Description of grievance*
>
> *I contest the employer's decision to recover the injury-on-duty leave that was duly granted to me for the period from December 2014 to August 2015, in contravention of section 363 of the Act respecting industrial accidents and occupational diseases:*
>
> *363. Where the Commission, following a decision under section 358.3, or the Administrative Labour Tribunal cancels or reduces the amount of an income replacement indemnity or of a death benefit contemplated in section 101 or in the first paragraph of section 102 or a benefit provided for in the personal rehabilitation program of a worker, the sums already paid to a beneficiary are not recoverable unless they were obtained through bad faith or unless they were wages paid as an indemnity pursuant to section 60.*
>
> *Corrective measures requested*
>
> *I request the reimbursement of all sums recovered from me and that all the workdays missed because of financial deprivation due to the employer's error be compensated as if they had been worked. In addition, I request damages and interest for a wilful or reckless practice.*

[3] The employer dismissed the grievance at each level of the grievance process. Mr. Poupart referred the grievance to adjudication on March 1, 2018, with the support of the bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"). The applicable collective agreement is the one between the employer and the bargaining agent for the Correctional Services Group that expired on May 31, 2014.

II. Summary of the facts

[4] The facts of the grievance are not in dispute. The parties introduced several documents, including a joint statement of facts signed by both parties' counsel. In

paragraphs 5 to 19 that follow, I outline the basics of the statement by specifying when a document was adduced into evidence by both parties' agreement.

[5] Mr. Poupart has worked for the employer as a correctional officer at Drummond Institution in Quebec since April 26, 2009.

[6] On January 31, 2015, Mr. Poupart produced a notice to the employer and request for reimbursement. In the notice, he alleged that an inmate had subjected him to death threats and intimidation. He ceased working the same day.

[7] On February 2, 2015, he consulted a doctor, who reported "[translation] anxiety connected to death threats and a possible post-traumatic stress developing vs. adjustment disorder". On February 18, 2015, the treating physician made a diagnosis of "[translation] adjustment disorder with anxious mood". He extended Mr. Poupart's leave.

[8] On March 5, 2015, Mr. Poupart filed a "Worker's claim" with the Commission de la santé et de la sécurité du travail du Québec (CSST). On the same day, the employer signed and issued a notice of compensation for an injury-on-duty leave with pay retroactive to February 1, 2015, pending the CSST's approval.

[9] On March 12, 2015, the treating physician diagnosed "[translation] adjustment disorder with anxious mood versus post-traumatic stress syndrome". The leave was extended at subsequent consultations.

[10] On March 16, 2015, the employer disputed Mr. Poupart's Worker's claim filed with the CSST on March 5, 2015. According to the employer, his allegations were groundless because he was not the victim of an injury on duty. On June 18, 2015, the CSST accepted his industrial accident claim, which made him eligible for compensation for loss of pay. After that decision, he was "[translation] placed" on injury-on-duty leave, retroactive to when he had ceased working, under clause 30.16 of the collective agreement.

[11] On July 14, 2015, the employer requested a review of the CSST's decision from the CSST's Direction de la révision administrative. According to the employer, it was not an industrial accident or employment injury under s. 2 of the *Act respecting industrial accidents and occupational diseases* (chapter A-3.001; "the *AIAOD*").

[12] On August 10, 2015, 136 days after Mr. Poupart's injury-on-duty leave with pay began, the employer ended it, relying on its Bulletin 2014-04. His file was transferred to the CSST, which paid him income replacement compensation for an industrial accident. As of August 10, 2015, Mr. Poupart was on sick leave without pay compensated by the CSST.

[13] On November 2, 2015, the CSST's Direction de la révision administrative reversed the CSST's June 18, 2015, decision on the grounds that Mr. Poupart had not suffered an employment injury. As a result, the CSST stopped paying him income replacement compensation, but no process was launched to recover the income replacement compensation already paid to him.

[14] From August to December 11, 2015, Mr. Poupart received $9916.12 in income replacement compensation from the CSST. He also received Sun Life long-term disability insurance benefits from May 4, 2015, to May 3, 2017. The Sun Life benefits paid to him from May 4, 2015, to July 31, 2015, before deductions, totalled $12 405.54. He repaid an overpayment of $10 559.89 in Sun Life insurance benefits that he received.

[15] On November 30, 2015, Mr. Poupart challenged the CSST's Direction de la révision administrative decision before the Commission des lésions professionnelles, which in the meantime had become the Administrative Labour Tribunal ("the Tribunal").

[16] On April 6 and 27, 2016, and in later discussions, the employer informed Mr. Poupart that it would retroactively rescind the salary paid during the injury-on-duty leave because of the CSST's decision. When it did so, the employer informed him that it would proceed with recovering an overpayment of $33 422.00 before deductions, or a net amount of $21 826.84, from the first available funds on his return to work. It informed him that he had to submit an "[translation] application for exemption" on his return to work if the recovery caused him financial difficulties.

[17] On February 3, 2017, the Administrative Labour Tribunal dismissed Mr. Poupart's challenge, which confirmed the decision made on November 2, 2015. The Tribunal found that he did not suffer an employment injury in the form of an industrial accident within the meaning of the *AIAOD*. That decision was not appealed via judicial review.

[18] On June 8, 2017, Mr. Poupart returned to work. Given that an overpayment had been generated in the Phoenix pay system, it was automatically recovered from the first available funds. Consequently, after deductions, taxes, and debt recovery, his paycheques were $0 until October 18, 2017. After the parties had several discussions, the employer granted him four salary advances, totalling $3843.00.

[19] Beginning with the first pay in November 2017, and after the parties had several discussions, the recovery was spread out over a longer period and accounted for less than 10% of Mr. Poupart's gross salary.

[20] Therefore, Mr. Poupart was absent from work from February 1, 2015, to June 8, 2017. This grievance focuses in particular on the period from February 1, 2015, to December 11, 2015. During part of that period, he received Sun Life insurance benefits, but he repaid them later, given his eligibility for injury-on-duty leave that was eventually established. He was on injury-on-duty leave from February 1, 2015, to August 10, 2015. During that time, he received his full salary, which was later subject to recovery. Then, from August 11 to December 11, 2015, his file was transferred to the CSST, which paid him income replacement compensation for an industrial accident.

III. Preliminary objections

A. For the employer

[21] The employer asked the Board to dismiss the grievance on the grounds that its subject matter is not within the jurisdiction established by s. 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). According to the employer, Mr. Poupart's grievance and allegations have nothing to do with the collective agreement. That agreement was not referenced in the grievance or during the internal grievance process. Instead, Mr. Poupart alleged that the employer's decision contravened s. 363 of the Quebec *AIAOD*. But the Board has no jurisdiction to interpret that legislation, which in any case does not apply to federal employees, who are instead governed by the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5; "the *GECA*").

[22] The employer also argued that in the referral to adjudication, Mr. Poupart and the bargaining agent cited a violation of clause 30.16 of the collective agreement and used the relevant form. Since Mr. Poupart did not report a collective agreement violation in his grievance or in the submissions at the different levels of the grievance

process, thus, he altered his grievance at adjudication. He had no right to alter it at that stage, under the principle established in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.). However, the employer withdrew that objection on August 25, 2020.

[23] The employer also argued that Mr. Poupart's grievance was untimely.

[24] In support of its objections, the employer referred me to the following decisions: *Cameron v. Deputy Head (Office of the Director of Public Prosecutions)*, 2015 PSLREB 98; *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 31; *Nadeau v. Canada (Attorney General)*, 2018 FCA 203; *Wray v. Treasury Board (Department of Transport)*, 2012 PSLRB 64; *Lee v. Deputy Head (Canada Food Inspection Agency)*, 2008 PSLRB 5; *Société canadienne des postes Santé-Sécurité v. Boucher*, 2007 QCCLP 4772; *Boudreau v. Treasury Board (Department of National Defence)*, 2010 PSLRB 100; and *Boudreau v. Canada (Attorney General)*, 2011 FC 868.

B. For the grievor

[25] The grievor argued that the grievance remained the same from its filing to its referral to adjudication. According to him, the employer's responses to the grievance showed that it perfectly understood the details of the accusations against it; that is, the retroactive recovery of injury-on-duty leave compensation. The employer could not declare that it was taken by surprise because the grievance does not refer to the injury-on-duty leave article of the collective agreement.

[26] According to the employer, the Board is not the forum for dealing with the issue raised in the grievance, as it has no jurisdiction to interpret the *AIAOD*, which does not apply to federal employees governed by the *GECA*. But the issue is something else entirely because the grievance expressly states that Mr. Poupart challenges the employer's decision to recover the injury-on-duty leave. The issue concerns the application and interpretation of clause 30.16 of the collective agreement. The Board is the only forum for challenging such a decision by the employer.

[27] Clause 30.16 of the collective agreement refers directly to the fact that compensation claims are related to the *GECA*, which does not apply independently of provincial legislation. It incorporates provincial legislation by reference in several

places, particularly with respect to compensation. The higher courts have recognized this countless times.

[28] Finally, in this case, the employer could not raise a timeliness objection at the adjudication step. Under the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"), the employer had 30 days to raise such an objection, which it did not do. It could not now raise one.

[29] The grievor referred me to the following decisions: *Burchill*; *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56; *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28; *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25; *Lafrance v. Treasury Board (Statistics Canada)*, 2006 PSLRB 56; *Sidhu v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 76; *McWilliams v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 58; and *Pannu v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 4.

C. Reasons related to the preliminary objections

[30] The employer raised two objections. First, it objected to the Board's jurisdiction to hear a grievance contesting an employer decision that was contrary to s. 363 of the *AIAOD*, which does not apply to federal employees. The employer also objected to the fact that the grievance referred to adjudication differed from the grievance initially filed.

[31] The employer also asserted that Mr. Poupart's grievance was referred outside the established timelines. On that point, I agree with the bargaining agent that the employer cannot raise a timeliness objection at adjudication. According to the *Regulations*, the employer has 30 days to raise such an objection, which it did not do. It is now too late to do it. I am not certain whether it wanted to formally raise a timeliness objection. In any event, it mentioned as much, and I was required to rule on the issue.

[32] The employer's objections are intertwined. It is clear that in his grievance, Mr. Poupart claims the sums that the employer recovered. They were initially paid during the injury-on-duty leave. He explicitly grieves that recovery decision, and I quote: "[translation] I contest the employer's decision to recover the injury-on-duty

leave that was duly granted to me for the period from December 2014 to August 2015 …".

[33] Of course, in his grievance, rightly or wrongly, Mr. Poupart alleges that the employer's decision contravened s. 363 of the *AIAOD*. Then, when he referred the grievance to adjudication, he alleged a violation of clause 30.16 of the collective agreement. Nevertheless, the basis of the grievance remains the challenge to the employer's decision to recover the sums paid during the injury-on-duty leave.

[34] According to the principle established in *Burchill*, an employee does not have the right to transform a grievance presented at the internal grievance process into a different one at adjudication. The employee would risk depriving the other party of its right to properly examine the issues during the grievance process. Therefore, I must determine whether the grievance that Mr. Poupart presented at adjudication differs from the one he presented at the grievance process. Was the employer aware of the subject matter of the grievance, and did it have an opportunity to address the issue raised?

[35] The issue being challenged is the decision to recover the salary paid during the injury-on-duty leave. In his grievance, Mr. Poupart submitted that the recovery contravened s. 363 of the *AIAOD*. In its response to the grievance, the employer stated that the "[translation] sums paid may be recovered". It justified its decision as follows: "[translation] … s. 363 of the Act … does not apply to employees governed by the *GECA*. But Government of Canada employees are governed by the *GECA*."

[36] Injury-on-duty leave with pay is granted under clause 30.16 of the collective agreement. The employer paid Mr. Poupart his full salary between February and August 2015 based on that clause. Then, after the CSST reviewed its initial decision, the employer decided to recover the sums paid.

[37] It is clear that the employer's decision is the very basis of the grievance. Mr. Poupart argued that it could not recover the sums already paid, while it argued the opposite. His argument is the issue of whether the *AIAOD* and its s. 363 apply. This issue could have a certain importance with respect to dealing with the grievance on its merits, but it is not the basis of the grievance. Instead, it is Mr. Poupart's argument in support of the grievance.

[38] This is a far cry from *Burchill*. In that case, the grievor, a term employee who was laid off, sought to refer a grievance to adjudication in which he alleged that he had been wrongfully dismissed because his term-employee status was not recognized. He did not benefit from the specific statutory provisions that applied to indeterminate employees during a reduction to the employer's workforce. In the referral to adjudication, the grievor alleged that he had been disciplined.

[39] The grievance referred to adjudication did not differ from one presented at the different levels of the grievance process. *Burchill* is without effect in this case.

[40] The employer opposed the grievance because its subject matter does not fall under the jurisdiction established by s. 209 of the *Act*. According to the employer, Mr. Poupart alleged that its decision was contrary to s. 363 of the *AIAOD*. But the Board has no jurisdiction to interpret that Act, which in any case does not apply to federal employees, who are instead governed by the *GECA*.

[41] I also dismiss that objection. As I wrote earlier, the employer's decision to recover the sums already paid under clause 30.16 of the collective agreement is the basis of this grievance. It is true that to support his grievance, Mr. Poupart alleged that a contravention of the *AIAOD* occurred in that the employer could not recover the sums already paid. However, this is not the issue of which I am seized. Instead, I must determine whether the employer contravened clause 30.16 of the collective agreement by recovering the sums already paid under that clause. There is no doubt that the Board has jurisdiction to deal with such an issue.

IV. Summary of the arguments

A. For the grievor

[42] The dispute is about the fact that after the CSST accepted Mr. Poupart's claim, the employer granted him injury-on-duty leave with pay under clause 30.16 of the collective agreement. Then, the CSST reversed that decision on the employer's challenge and on reviewing the file. The employer then decided unilaterally to retroactively recover the sums Mr. Poupart had received to that point, in the amount of $33 422.00 before deductions. He contested that decision.

[43] The ordinary meaning of the words in clause 30.16 of the collective agreement reveals that leave with pay is granted to an employee when he or she makes a claim to

a workers' compensation authority that certifies that the employee is unable to work by reason of an employment injury or occupational disease. In this case, Mr. Poupart meets both conditions. The CSST accepted his claim on June 18, 2014. Thus, it recognized that he was the victim of an occupational disease. Consequently, the employer placed Mr. Poupart on leave with pay for 136 days.

[44] Clause 30.16 of the collective agreement is silent on the issue of the retroactive recovery of leave with pay if the CSST's decision to accept the employee's claim is reversed by a later decision.

[45] To shed some light on this issue, the collective agreement must be analyzed in its entirety, as the modern principle of interpretation suggests. In that respect, it is interesting to note that elsewhere in that agreement, the parties explicitly provided for the possibility of recovering leave or sums of money paid to employees, as for marriage leave with pay (clause 30.01), vacation leave (clause 28.05), education leave (clause 32.05), maternity and parental allowances (clauses 30.04(a)(iii)(C) and 30.07(a)(iii)(C)), and some sums paid under clause 29.21 and Annex B.

[46] Therefore, it is clear that had the parties to the collective agreement wanted to provide a recovery right to the employer with respect to allowances, leave, or benefits, they would have done so expressly. But if the parties explicitly agreed to apply recovery rights for some allowances or some leave, no right of recovery should be applied if none is mentioned.

[47] In summary, if no restriction is provided in the collective agreement with respect to a right, then when other rights in the same agreement are prescribed restrictions, there is no need to change the wording of such a right in the absence of an explicit restriction. Had the parties wished to limit the employees' right to the compensation provided in clause 30.16 of the collective agreement so that the employer could recover that type of compensation in some circumstances, they would have provided for it expressly.

[48] It is useful to refer to the employer's Bulletin 2014-04, in which it explains how it applies to clause 30.16 of the collective agreement. In the third paragraph on page 3, the bulletin provides for a retroactive review of injury-on-duty leave, but only if it is to grant the leave when a claim submitted to the CSST is accepted on appeal. Thus, even that document, prepared unilaterally by the employer, does not provide for the

retroactive recovery of injury-on-duty leave. On the contrary, it provides for the possibility of a retroactive compensation payment.

[49] Clause 30.16 of the collective agreement refers directly to the *GECA* with respect to employee compensation. Because the collective agreement is silent as to the retroactive reimbursement of injury-on-duty leave, it is particularly relevant to analyze the legislative framework to deal with the issue of the retroactive repayment of compensation that was already paid.

[50] The *GECA* establishes a system of employment-injury and occupational-illness compensation for federal employees. The compensation system applies to all federal employees. On reading the legislation, it is clear that the legislator did not wish to establish compensation conditions. Instead, it left that to provincial legislation.

[51] In this case, the *AIAOD* is the applicable provincial legislation. In its s. 363, it states that benefits already paid to a beneficiary cannot be recovered after a higher body reviews a CSST decision unless the benefits were obtained in bad faith. Applying this provision clearly prevents recovering the benefits already provided to Mr. Poupart under clause 30.16 of the collective agreement, unless bad faith is established.

[52] The employer's interpretation of the collective agreement also leads to unfair and inequitable outcomes for Mr. Poupart. First, he has been penalized even though he simply followed the normal process for an employee who is the victim of an employment injury. The CSST accepted his claim on June 18, 2014. Then, the employer paid him directly for 136 days, from February 2, 2015, to August 10, 2015, and then the CSST did so until November 2, 2015, the date on which the decision was reviewed. The CSST did not recover the sums paid between its initial decision and November 2, 2015. Therefore, Mr. Poupart did not have to repay the sums received in good faith from the CSST. However, he had to repay the employer for the same kind of compensation that it paid for the period before August 10, 2015, while he was on leave. Obviously, he could not receive any compensation from the CSST while he received his full salary under clause 30.16 of the collective agreement.

[53] The employer's application and interpretation of clause 30.16 of the collective agreement would put employees in an untenable position. In fact, an employee with a recognized employment injury but for whom the decision is in dispute could at any time have to fully repay the salary the employer paid throughout the duration of the

employee's injury-on-duty leave. It is a real sword of Damocles hanging over the heads of employees who are victims of employment injuries.

[54] Given the inherent delays in the administrative and legal processes, employees sometimes wait months or even years before obtaining a final decision on their entitlement to income replacement compensation. For employees who receive compensation directly from the employer throughout this time, it is their only income source. Under the employer's recommended interpretation, if an employee receives an unfavourable decision, the employer would be justified depriving the employee, retroactively, of his or her sole source of income throughout that time. It would simply be contrary to the principles of natural justice for an employee who suffered an employment injury in good faith and whose claim the CSST accepted to be constrained to live in such precarious conditions. Such an absurd outcome can in no way have been the intention of the parties to the collective agreement.

[55] Mr. Poupart asks that I allow his grievance and that I order the employer to stop its recovery of the amount of $33 422.00 and to reimburse him for all sums already deducted from his pay with respect to recovering that amount. He also asks for moral damages of $8000 because of the significant, precarious financial situation the employer's actions placed him in.

[56] Mr. Poupart referred me to the following decisions: *Martin*; *Communication, Energy and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery*, 2004 A.G.A.A. No. 44 (QL); *Delios v. Canada Revenue Agency*, 2013 PSLRB 133; *Delios v. Canada (Attorney General)*, 2015 FCA 117; *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17; *Canada (Attorney General) v. Fehr*, 2018 FCA 159; *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2016 PSLREB 77; *Bell v. Treasury Board (Shared Services Canada)*, 2020 FPSLREB 20; *Syndicat des postiers du Canada v. Société canadienne des postes*, 1997 CanLII 10828; *Société canadienne des postes v. Québec (Commission d'appel en matière de lésions professionnelles)*, 1999 CanLII 13745; *Attorney General of Canada v. Mullin*, 2016 NBCA 31; *CSSS du Nord de Lanaudière v. Jutras*, 2016 QCTAT 6408; and *Hamilton v. Canada (ministère des Anciens combattants)*, 2014 QCCLP 3898.

B. For the employer

[57] According to the employer, the overpayment Mr. Poupart claimed is not part of the usual course of an overpayment that results from an administrative error or omission. In this case, the employer made no error. Instead, the overpayment arose from Mr. Poupart's actions. He submitted a request for injury-on-duty leave with pay even though he never suffered an injury on duty. He cannot plead ignorance. From the beginning, the employer warned him that it did not agree with his claim and that it would contest his request because he did not suffer an injury on duty. The CSST's higher authority and the Tribunal also confirmed it. Therefore, it is clear that he did not meet the specific and unequivocal terms of clause 30.16 of the collective agreement.

[58] It is recognized that the employer has the right to recover injury-on-duty leave with pay under the *Financial Administration Act* (R.S.C., 1985, c. F-11; "the *FAA*"). Neither the collective agreement nor the *GECA* limits this right or prescribes the terms that the employer must follow for the recovery. The money paid to Mr. Poupart does not belong to him; it belongs to the employer and to Canadian taxpayers. The employer has the right to recover the sums to ensure the repayment of the money it is owed and compliance with the terms of the collective agreement. It would not be common sense for Mr. Poupart to be able to sell the butter he made by keeping both the money and the butter. He cannot enrich himself without cause, to the detriment of the employer and taxpayers.

[59] The only issue that the Board must determine is whether Mr. Poupart demonstrated that the employer misinterpreted clause 30.16 of the collective agreement when it required reimbursing the injury-on-duty leave with pay. For the following reasons, the employer's interpretation should be preferred because it is consistent with the wording of clause 30.16 and its purpose and with the rest of the collective agreement. As for the bargaining agent's interpretation, it would produce an inequitable result and would require the Board to change the wording of clause 30.16.

[60] First, the bargaining agent's interpretation is inconsistent with the wording of clause 30.16 of the collective agreement. Mr. Poupart did not meet the eligibility criteria for injury-on-duty leave with pay. The collective agreement is clear and unequivocal. For an employee to be entitled to that leave, the employee must be unable to work by reason of an injury on duty. Specifically, via the wording of clause 30.16,

the parties agreed to subject eligibility for injury-on-duty leave with pay to two predetermined criteria, which are that a claim must be filed under the *GECA*, and a workers' compensation authority must certify that the employee is unable to work because of personal injury accidentally suffered while performing his or her duties. In this case, Mr. Poupart did not meet the second criterion because he did not suffer an injury on duty. Although the CSST initially accepted his claim, later, the decision was reversed.

[61] The case law has already established that in cases like Mr. Poupart's, when an employee receives paid leave from an erroneous decision that the CSST's higher authority reverses, the paid leave must be cancelled and recovered to comply with the terms and conditions of the collective agreement. This calls the parties into question in a situation that accords with the state of the law and their intentions when they agreed on clause 30.16 of the collective agreement. In summary, an employee may lose or receive entitlement to injury-on-duty leave with pay, depending on whether the authorities in the provincial board rule for or against the employee, who cannot have it both ways.

[62] Based on the case law, the *GECA* in no way limits the employer's right to recover an injury-on-duty leave with pay that has already been paid to an employee without legal basis. In addition, the courts have already ruled that s. 363 of the *AIAOD*, to which the grievance and the bargaining agent's argument refer, does not apply to federal employees. The Board must interpret the collective agreement in light of the federal and not the provincial legislative framework. The *GECA* in no way prohibits recovering injury-on-duty leave with pay. Be that as it may, this case does not deal with recovering benefits paid to the grievor under the *GECA* but instead with recovering injury-on-duty leave with pay under clause 30.16 of the collective agreement.

[63] It is recognized that the employer, as an agent of Her Majesty, has the authority and is obligated under the *FAA* to recover overpayments as salary, wages, or allowances. The Board has already ruled several times that it does not have jurisdiction over the exercise of the employer's rights and obligations under the *FAA* unless the employer specifically did not agree to reduce its authority in the collective agreement, which is not so in this case. If the parties intended to limit the employer's authority to recover the overpayment, they would have clearly expressed it, as other bargaining agents and the Treasury Board have done in other collective agreements. On that point,

the employer referred to three collective agreement clauses that establish limits on the terms and process for recovering overpayments.

[64] The bargaining agent alleged that had the parties to the collective agreement wanted to provide the employer with the right to recover leave compensation or benefits, they would have expressly done so. The employer argued that instead, the reverse is true, since it is well known that the employer, as an agent of Her Majesty, has the authority to recover overpayments. Therefore, had the parties really wished to reduce that power through the collective agreement, they would have expressly done so. In any event, the collective agreement cannot be interpreted in a way that undermines the legal framework on which it was negotiated, which the bargaining agent recognized in article 5 of the collective agreement.

[65] The collective agreement's terms are clear and unequivocal. Mr. Poupart had to be acknowledged as being unfit to work because of an injury on duty to be entitled to the leave. But the CSST's higher authority and the Tribunal ruled that he did not suffer an industrial accident. Also, from the beginning of the process, the employer cautioned him that it did not agree with his claim.

[66] To understand clause 30.16 of the collective agreement, the intention of the parties to the collective agreement must be determined. It is clear that their intention was not to allocate sums of money for leave with pay to an employee who did not suffer an injury on duty. It is well recognized that a benefit that has a monetary cost to the employer must be clearly and expressly stipulated in the collective agreement. But the bargaining agent did not find any provision that allowed the grievor to keep the injury-on-duty leave with pay, even if he did not meet its requirements. When such a situation occurs, the employer must correct it to ensure compliance with the terms of the collective agreement that the parties agreed to.

[67] It is true that Mr. Poupart did not receive any pay for a while after he returned to work. However, the employer had the right to recover the sums owed it. When Mr. Poupart and the bargaining agent expressed dissatisfaction with the situation, the employer paid him some salary advances and limited the recovery to 10% of his salary for each pay period until the entire amount was recovered.

[68] Finally, according to the employer, Mr. Poupart is not going away empty-handed. He is lucky not to have to repay the non-taxable benefits paid under the *GECA*. In a

way, he obtained an interest-free loan from his employer for several years, which is a significant benefit. In addition, he also wishes to be reimbursed a considerable sum from public funds that do not belong to him and to which he is not entitled.

[69] In conclusion, the Board's role is limited to interpreting and applying the collective agreement. It cannot change clear provisions or establish new ones. In this case, clause 30.16 of the collective agreement is clear and unequivocal. It is also clear that Mr. Poupart does not meet its conditions. Thus, the employer had the right to recover the sums paid. Mr. Poupart did not demonstrate that the employer violated clause 30.16 of the collective agreement when it required repaying the injury-on-duty leave with pay. Therefore, the grievance must be dismissed.

[70] The employer referred me to the following decisions: *Delios*; *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112; *Churcher v. Treasury Board (Department of Fisheries and Oceans)*, 2009 PSLRB 83; *Mongeon v. Treasury Board (Department of Public Works and Government Services)*, 2014 PSLRB 66; *Labadie v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 90; *Canada Post Corp. v. Canadian Union of Postal Workers*, [1996] C.L.A.D. No. 819 (QL); *Société canadienne des postes v. Syndicat des travailleurs et travailleuses des postes*, 2008 CanLII 32332 (CA SA); *Syndicat des postiers du Canada v. Société canadienne des postes*, 1997 CanLII 10828 (QC CA); *Syndicat des postiers du Canada v. Société canadienne des postes*, [1995] 42 C.L.A.S. 190; *Professional Institute of the Public Service of Canada v. Treasury Board (Agriculture Canada)*, [1993] C.P.S.S.R.B. No. 82 (QL); *Public Service Alliance of Canada v. Parks Canada Agency*, 2020 FPSLREB 13; *Gardner v. Canada (Border Services Agency)*, 2009 FC 1156; *Smiley v. Treasury Board (Department of Agriculture)*, [1992] C.P.S.S.R.B. No. 167 (QL); and *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55.

C. The grievor's reply

[71] The employer's arguments simply do not reflect the current state of the law. In fact, *Martin* clearly established that the *AIAOD* applies to federal employees, contrary to the employer's argument.

[72] The employer stated that its general power to recover overpayments is not limited by the collective agreement. This position must be qualified. It presupposes that the amount paid to Mr. Poupart as injury-on-duty compensation was an

overpayment; it was not. In addition, if the Board determines that s. 363 of the *AIAOD*, through the *GECA*, applies to the employer, the general authority conferred on it to recover overpayments would be expressly limited by the legislation. Yet, clause 30.16 of the collective agreement expressly refers to the *GECA*. Therefore, the employer could not legally recover what it considers an overpayment because the legislative framework specific to the situation at hand limits its general authority conferred by the *FAA*.

[73] The employer described Mr. Poupart's situation by insisting on the fact that he is "[translation] lucky" and that he "[translation] basically obtained an interest-free loan from his employer for several years". The employer added that he wants to be reimbursed a considerable sum from public funds. How could he consider himself lucky by having almost five months of his salary retroactively reclaimed, with no other form of compensation for that period and by having the entirety of his salary seized? The employer's cavalier attitude shows a blatant lack of empathy and consideration for an employee in such a difficult situation.

V. Reasons related to the grievance

[74] Mr. Poupart referred a grievance to adjudication contesting the employer's decision to recover sums that he had already been paid during injury-on-duty leave. The sums in question total $33 422.00 before deductions. Clause 30.16 of the collective agreement is about injury-on-duty leave. It reads as follows:

> *Injury-on-duty Leave*
>
> *30.16 An employee shall be granted injury-on-duty leave with pay for such reasonable period as may be determined by the Employer when a claim has been made pursuant to the* Government Employees' Compensation Act*, and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:*
>
> *a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct,*
>
> *or*
>
> *b) an industrial illness or a disease arising out of and in the course of the employee's employment,*
>
> *if the employee agrees to remit to the Receiver General for Canada any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, illness or disease*

> *providing, however, that such amount does not stem from a personal disability policy for which the employee or the employee's agent has paid the premium.*

[75] The issue I am seized with is to determine whether the employer had the right to recover the sums already paid as injury-on-duty leave, given that on November 2, 2015, the CSST's Direction de la révision administrative reversed the June 18, 2015, CSST decision. Note that the CSST has not existed since February 5, 2016. It was replaced by the Commission des normes, de l'équité et de la santé et sécurité au travail (CNESST). Given that the facts of this grievance precede February 5, 2016, the CSST is referenced, not the CNESST.

[76] I must first point out the well-established principle that good faith is assumed. I carefully reread all the documents, whether the parties, the CSST, or the Administrative Labour Tribunal originally prepared them. Nowhere is it stated that Mr. Poupart's injury-on-duty claim contains an indication of bad faith, dishonesty, or fraud. Therefore, I assume that Mr. Poupart acted in good faith throughout this process. The reviews of the CSST's initial decision instead concerned the meaning and scope of the terms "[translation] industrial accident", "[translation] industrial illness", and "[translation] employment injury". In its initial June 18, 2015, decision, the CSST found that Mr. Poupart suffered an industrial accident. During the review at the higher level on November 2, 2015, it changed its mind and instead found that he had not suffered an employment injury. The Administrative Labour Tribunal reached the same conclusion.

[77] It is clear that the wording of clause 30.16 of the collective agreement does not explicitly provide that the employer may retroactively recover sums already paid. Still, as suggested in Mr. Poupart's argument, it does not mean that the employer cannot recover sums already paid to an employee. On that point, s. 155(3) of the *FAA* gives the employer the right, as an agent of Her Majesty, to recover overpayments to employees. That section reads as follows:

> ***155(3)*** *The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made.*

[78] Clearly, the *FAA* does not give the employer the right to recover at will sums already paid. An overpayment must have happened. According to the employer, there

was an overpayment from the moment that the CSST, reviewing a decision, ruled that Mr. Poupart did not suffer an employment injury. According to the employer, therefore, he was no longer eligible for injury-on-duty leave with pay, and the sums paid during the leave could then be recovered.

[79] The collective agreement's wording must be understood in the overall context of the agreement, according to its grammatical and ordinary sense and in harmony with the rest of the agreement, its purpose, and the parties' intentions (see Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at 4:2100, 2012).

[80] Clause 30.16 of the collective agreement is one of the wage earner's protections in terms of an injury on duty. That is the context in which it must be understood. It is part of the legislative framework established by the *GECA*, to which clause 30.16 directly refers. Commenting on a clause similar to clause 30.16, the adjudicator in *Vaughan v. Canadian Food Inspection Agency*, 2010 PSLRB 74, wrote the following at paragraph 61:

> *[61] While the case before me does not require that I directly interpret or apply any provision of the* GECA*, I must recognize as context that the legislator intended that employees in the public service who are injured while on duty have access to, and benefit from, the regime of income security provided under provincial workers' compensation systems. In that sense, there is nothing inherently problematic when an injured employee receives workers' compensation benefits as opposed to income directly from the employer. The extent to which the employer has an obligation to displace workers' compensation benefits by providing income security directly to an employee is an issue governed by the collective agreement. In interpreting that agreement, there is no presumption that it replaces what the legislator has put in place through the* GECA*, but rather that the collective agreement functions within the framework established by the* GECA*.*

[81] The parties agree that the *GECA* applies to this grievance. However, they differ in their positions as to whether the *AIAOD* applies to a federal employee. As will be seen later, this issue is important when determining whether the employer could recover the sums paid during Mr. Poupart's injury-on-duty leave with pay.

[82] The following provisions of the *GECA* are particularly relevant to this grievance:

…

Definitions

> ***2*** *In this Act,*
>
> …
>
> **compensation** *includes medical and hospital expenses and any other benefits, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and dependants of the deceased workmen; (*indemnité*)*
>
> …
>
> **industrial disease** *means any disease in respect of which compensation is payable under the law of the province where the employee is usually employed respecting compensation for workmen and dependants of the deceased workmen; (*maladie professionnelle*)*
>
> …
>
> ***Rate of compensation and conditions***
>
> ***4 (2)*** *The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who*
>
> ***(a)*** *are caused personal injuries in that province by accidents arising out of and in the course of their employment; or*
>
> ***(b)*** *are disabled in that province by reason of industrial diseases due to the nature of their employment.*
>
> ***Determination of compensation***
>
> ***(3)*** *Compensation under subsection (1) shall be determined by*
>
> ***(a)*** *the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or*
>
> ***(b)*** *such other board, officers or authority, or such court as the Governor in Council may direct.*
>
> …

[83] Those *GECA* provisions refer directly to the provincial legislation about industrial accidents, namely, the *AIAOD* in Mr. Poupart's case. In this case, the *AIAOD* establishes the compensation that the injured federal employee will receive and the eligibility conditions that must be met to receive that compensation. Therefore, I could find *a priori* that the provisions of the *AIAOD*, which deal with the compensation payable and the eligibility conditions, apply to federal employees subject to the *GECA*.

[84] On that last issue, the employer referred me to decisions from 1996 and 1997 involving the Canada Post Corporation. Based on wording similar to that of clause 30.16 of the collective agreement, the arbitrator then determined that the employer was entitled to recover sums already paid for injury-on-duty leave in cases in which the provincial authority had overturned a decision that initially favoured the employee. According to that arbitrator, nothing in the *GECA* prevented the employer from recovering sums already paid. And, again according to those decisions, even if the provincial authority determines the compensation amount, the *GECA* would not subject federal employees to the provincial legislation.

[85] I agree with the bargaining agent that the principles argued by the decisions it referred me to no longer hold since the Supreme Court of Canada's 2014 ruling in *Martin*, among others. The following excerpts from *Martin* illustrate well the Court's position on the issue:

> …
>
> *[19] For the reasons that follow, I conclude that the Commission was required to apply provincial law and policy to determine the entitlement to and rate of compensation for an employee governed by the* GECA*. The* GECA *incorporates provincial workers' compensation regimes, except where they conflict with the* GECA *… Where Parliament intended to impose different conditions, it has done so expressly.*
>
> …
>
> *[24] It would make little sense to defer to a provincial regime of compensation for the rates and conditions of compensation without also deferring on the question of eligibility, since those aspects of the regime are inevitably intertwined. "Condition" for the receipt of compensation will determine whether or not an employee receives compensation. Thus the "entitlement" under s. 4(2) to receive compensation "under the same conditions" as other employees in the province suggests that federal employees are entitled to receive compensation under the same circumstances. As I observe below, the legislative history clearly indicates that the reference to the "same conditions" was intended to indicate that the* eligibility conditions *for federal employees under the* GECA *were to be the same as under the provincial scheme.*
>
> …
>
> *[39] The issue in* Morrison *was whether a "benefit of the doubt" provision in the Nova Scotia workers' compensation legislation applied to workers who fell under the* GECA*. The Nova Scotia Court of Appeal held that the presumption with respect to causation in the provincial Act applied to federal workers as well.*

> *The court held that there was no conflict between the two statutes, as there was no language in the* GECA *to exclude federal workers from the benefit of such a presumption (para. 45)….*
>
> …
>
> *I agree. Where a direct conflict between the provincial law and the* GECA *exists, the* GECA *will prevail, rendering that aspect of the provincial law or policy inapplicable to federal workers. Otherwise, the provincial workers' compensation regime prevails. In either case, provincial boards and authorities will be responsible for adjudicating the claim.*
>
> …

[86] The Supreme Court's findings are clear. In this case, the *AIAOD* provisions apply. Specifically, clause 30.16 of the collective agreement should be interpreted by taking the *AIAOD* into account. In that respect, the following *AIAOD* provisions are particularly relevant:

> …
>
> ***4.*** *This Act is a public Act.*
>
> *Notwithstanding the first paragraph, a covenant or any agreement or order giving effect thereto may provide more favourably for a worker than does this Act.*
>
> …
>
> ***44.*** *A worker who suffers an employment injury is entitled to an income replacement indemnity if he becomes unable to carry on his employment by reason of the injury.…*
>
> ***45.*** *The income replacement indemnity is equal to 90% of the weighted net income that the worker derives annually from his income.*
>
> …
>
> ***60.*** *The employer of a worker at the time he suffers an employment injury shall pay him, if he becomes unable to carry on his employment by reason of his injury, 90% of his net salary or wages for each day or part of a day the worker would normally have worked had he not been disabled, for 14 full days following the beginning of his disability.…*
>
> …
>
> ***124.*** *The Commission shall pay to the worker the income replacement indemnity to which he is entitled from the fifteenth full day following the day the worker became unable to carry on his employment.…*
>
> …
>
> ***358.3.*** *After giving the parties on [sic] opportunity to present observations, the Commission shall make a decision on the basis of*

> *the record; it may confirm, quash or amend the initial decision or order and, if appropriate, make the decision or order that should, in its opinion, have been made initially.…*
>
> …
>
> ***363.*** *Where the Commission, following a decision under section 358.3, or the Administrative Labour Tribunal cancels or reduces the amount of an income replacement indemnity or of a death benefit contemplated in section 101 or in the first paragraph of section 102 or a benefit provided for in the personal rehabilitation program of a worker, the sums already paid to a beneficiary are not recoverable unless they were obtained through bad faith or unless they were wages paid as an indemnity pursuant to section 60.*
>
> …

[87] Those *AIAOD* provisions, by reference to the *GECA*, apply to federal employees. They establish that an employee is entitled to compensation at 90% of his or her net salary (s. 45) if the employee is the victim of an employment injury that makes him or her unable to work (s. 44). At the outset, the employer must pay the equivalent of the compensation for the first 14 days (s. 60). Then, beginning on the 15th day, the CSST pays the compensation (s. 124). When a higher authority reverses the CSST's initial decision to accept a claim, the compensation already provided to an employee is not recoverable (s. 363).

[88] Section 4 of the *AIAOD* also stipulates that a collective agreement may provide provisions more advantageous for an employee than those in that Act. This is precisely where clause 30.16 of the collective agreement comes in, which provides for the payment of the full salary for "… such reasonable period as may be determined by the Employer …". Obviously, the period may vary. On that point, the employer's Bulletin 2014-04 provides as follows:

> [Translation]
>
> …
>
> *Normally, if a correctional officer has no return-to-work date confirmed after 130 days of injury-on-duty leave with pay (from the beginning of the employee's absence), or if the return to work is not imminent, the delegated authority should consider making provisions for the employee to receive compensation for loss of pay (in accordance with the provisions of the relevant workers' compensation legislation) directly from the appropriate WCB.*
>
> …

[89] Therefore, according to its own policy, the employer establishes the reasonable period referred to in clause 30.16 of the collective agreement at 130 days or more. The effect of this clause is that the employees at issue receive more favourable protections than those provided in ss. 60 and 124 of the *AIAOD*, which from the outset is quite in line with s. 4 of the *AIAOD*. In fact, for this initial period, once approved for injury-on-duty leave, they receive their full salary.

[90] Conversely, the collective agreement cannot establish lesser injury-on-duty protections than the basic ones that the *AIAOD* provides.

[91] Yet, this is exactly what will happen in this case if I uphold the employer's interpretation of clause 30.16 of the collective agreement. In fact, according to that interpretation, the employer could retroactively recover sums paid for injury-on-duty leave if a higher authority reverses the CSST's initial decision to allow a claim. Nevertheless, according to s. 363 of the *AIAOD*, compensation provided to an employee cannot be recovered unless it was obtained in bad faith or if it was salary paid as compensation under s. 60 of the *AIAOD*. Those two exceptions do not apply in this case. Good faith is assumed. Nothing in the evidence submitted to me leads me to question Mr. Poupart's good faith. As for the compensation referred to in s. 60, it refers to the first 14 days of absence during which the employer pays the salary, and the CSST later reimburses it.

[92] It is established that the parties to a collective agreement are entirely free to agree on all working conditions but within the limits of complying with the applicable legislation. Clause 1.02 of the collective agreement also notes this principle, as follows:

> ***1.02*** *The purpose of this collective agreement is to establish, within the framework provided by law, orderly and efficient labour relations between the Employer, the Union and employees and to define working conditions aimed at promoting the safety and well-being of employees.…*

[93] Were clause 30.16 of the collective agreement given the meaning that the employer gives it, the effect would be to reduce the benefits provided by the *AIAOD*. That would make no sense. Without clause 30.16, the employee would keep the benefits paid by the CSST (90% of the employee's net salary), subject to the 2 exceptions set out in s. 363 of the *AIAOD*, if a higher authority reverses the CSST's initial decision to allow a claim. With clause 30.16, the employee would lose all the salary that the employer paid, which would thus create significantly less protection

than the *AIAOD* for employees covered by clause 30.16. I cannot imagine that that was the intention of the parties to the collective agreement.

[94] In light of the foregoing, I allow the grievance.

[95] Mr. Poupart fully met the requirements of clause 30.16 of the collective agreement. He submitted an employment-injury claim under the *GECA*, and the CSST certified that he was unable to carry out his duties by reason of the injury. Therefore, the CSST allowed his claim. From then, he met all the requirements of clause 30.16. It matters little whether the CSST's decision was maintained or was then reversed. Clause 30.16 makes no mention of this. The employer's interpretation has the effect of adding a supplementary condition of maintaining the CSST's initial decision. That condition was not included in clause 30.16. For it to apply, it would have to have been. Given that Mr. Poupart met the conditions of clause 30.16, thus, the employer could not recover the sums already paid.

[96] I would add that the employer's interpretation would have the effect of retroactively denying employees of their only source of income who were initially characterized as injured on duty by a workers' compensation board. Such an outcome can hardly have been the intention of the parties to the collective agreement. It is at odds with the legal system in place with respect to an injury on duty.

[97] Mr. Poupart also asks for moral damages of $8000 due to the precarious financial position he said the employer placed him in. It is possible that he found himself in a precarious financial situation after the employer's erroneous collective agreement interpretation. However, it is not enough for me to grant the damages. Nothing in what was submitted to me led me to believe that the employer acted in bad faith or arbitrarily with the aim of harming Mr. Poupart. Good faith is assumed. In the absence of evidence to the contrary, my view is that the employer acted in good faith. It believed that it had the right to recover the sums in question, and it did so.

[98] According to the joint statement of facts, the overpayment caused by the employer's erroneous interpretation of the collective agreement is for $33 422.00 before deductions and $21 826.84 after deductions. The employer is to reimburse Mr. Poupart the entirety of what was recovered from him.

[99] For all of the above reasons, the Board allows Mr. Poupart's grievance in part and makes the following order:

(The Order appears on the next page)

VI. Order

[100] The grievance is allowed.

[101] The employer contravened clause 30.16 of the collective agreement.

[102] I order the employer to reimburse the grievor, within 30 days of this decision, the sum that was initially paid to him as injury-on-duty leave and then recovered.

[103] I will remain seized of the grievance for 60 days for the purpose of dealing with any dispute that may arise when applying the order.

February 5, 2021.

FPSLREB Translation

Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board