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File: 566-02-11699

Citation: 2021 FPSLREB 21

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

SERGE GUILBAULT

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Guilbault v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Linda Gobeil, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Kim Patenaude, counsel

For the Employer: Josh Alcock, counsel

Heard at Montreal, Quebec,
July 9, 2019.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] On February 13, 2012, Serge Guilbault ("the grievor") filed a grievance against the Department of National Defence ("the employer"). The grievor alleged that the employer refused to grant him standby pay under article 30 of the collective agreement entered into between the Public Service Alliance of Canada and the Treasury Board for the Technical Services Group, which expired on June 21, 2011, ("the collective agreement") (Exhibit P-1, Tab 1, and Exhibit E-1, Tab 10).

[2] The employer dismissed the grievance at each level of the grievance procedure. In its responses, it stated that the grievance had not been filed within the 25-day time limit set out in clause 18.15 of the collective agreement. At the hearing, the employer reiterated its objection. It maintained that I did not have jurisdiction to decide the merits of the grievance as it was filed after the 25-day time limit set out in the collective agreement. It should be noted that the grievor did not apply for an extension of time in this case. I decided to take the objection under advisement and hear the evidence.

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former 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. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] On June 19, 2017, *An 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) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of

the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act* and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

II. Summary of the evidence

A. For the grievor

[5] The grievor testified that since 2006, he has been a technical supervisor. His position is classified at the TI-4 group and level at the 25 Canadian Forces Supply Depot (25 CFSD) in Montreal. He explained that the division has three sections, including one that manages toxic substances such as chlorobiphenyls (or PCBs) (Exhibit T-1, Tab 5).

[6] The grievor explained that as part of his duties, he must handle everything that is at "[translation] end of life" for the employer, such as F-18 aircraft and submarines. In 2006, seven employees reported to him. At that time, the HAZMAT Safety and Management Manual was the reference tool (Exhibit T-1, Tab 8). This manual includes a chapter on handling PCBs.

[7] In 2006, when he returned from a three-week training course on handling hazardous materials, his supervisor at the time, Michel Millette, gave him a pager and told him that if an incident involving hazardous materials were to occur, he should call him. According to the grievor, his position requires diligence and availability. He said that during his training, he was told that he could go to prison if he was not diligent, especially when handling PCBs.

[8] The grievor explained that wearing a pager made him less "[translation] spontaneous". That is, he always had to have a plan B and make sure that he could "[translation] delegate" his pager to one of his employees, Mr. Hinse or Mr. St. Louis, if, for example, he went on vacation.

[9] The grievor testified that his pager number and his home phone number are listed in the "[translation] Emergency Procedures Document" for 25 CFSD (Exhibit P-1, Tab 7, pages 8 and 9). During his testimony, the grievor reviewed the contents of the

General Safety Program Manual and highlighted the laws applicable to hazardous materials, the procedures, and the fact that every effort must be made to properly manage hazardous materials (Exhibit P-1, Tab 8).

[10] The grievor explained that he was the custodian of materials that contain PCBs and that only he and his two employees, Mr. St. Louis and Mr. Hinse, were authorized to enter the PCB warehouse. He insisted that severe penalties would be imposed for failing to comply with the procedures (Exhibit P-1, Tab 8, and Exhibit P-2).

[11] The grievor testified that during the 2010 holiday period, colleagues saw him wearing his pager while they were at an arena. His colleagues then told him that he was entitled to receive standby pay under article 30 of the collective agreement. He had never claimed this payment for wearing his pager. In cross-examination, the grievor admitted that in December 2010, he had learned about article 30 of the collective agreement through Daniel Rodgers, the local union president. The grievor admitted that when he spoke with Mr. Rodgers and when he read article 30, it was clear to him that it applied to his situation, so he thought he was entitled to claim standby pay.

[12] The grievor stated that although he read article 30 of the collective agreement in December 2010, and he spoke with the local union president, he was uncomfortable filing a grievance, and he decided to "[translation] let it lie; ruminate on it". He explained that he wanted to avoid any conflict.

[13] However, on May 9, 2011, he decided to ask his manager, Guillaume Quessy, for standby pay as set out in article 30 of the collective agreement. He also asked whether his claim could be retroactive (Exhibit P-1, Tab 2). On December 12, 2011, after a consultation, Mr. Quessy informed the grievor that the employer would not pay him the standby pay set out in article 30 (Exhibit P-1, Tab 3, page 3). The grievor was then encouraged to give back the pager if he wished. On December 15, 2011, the grievor reiterated his request at a meeting with Mr. Quessy and his supervisor, Christian Masse, (Exhibit P-1, Tab 3, page 2). In his February 1, 2012, response, Mr. Masse referred to the fact that the application had already been denied on December 12 and December 15, 2011, and that the decision had not changed (Exhibit P-1, Tab 3, page 1).

[14] During his testimony, the grievor insisted that the employer's response was wrong, particularly when Mr. Masse stated that the grievor "[translation] had no

obligation to answer the pager" (Exhibit P-1, Tab 3, page 4). According to the grievor, all of this is contrary to the rules and procedures set out in the emergency plans. The grievor stated that these procedures are established by people who outrank Mr. Masse and that his name and telephone number are listed in the emergency plans such as the one for PCBs. The grievor would have liked the base commander to decide this matter.

[15] In cross-examination, the grievor stated that he handed over the pager to his employer and that he did not subsequently ask it to remove his name from the emergency plans.

B. For the employer

[16] Mr. Masse testified for the employer. He is now a patrol officer for the Royal Canadian Mounted Police, but he was chief of operational support for 25 CFSD from October 30, 2011, to July 2013. He reported to the commander at that time (Exhibit E-1, Tab 3).

[17] Mr. Masse stated that he was familiar with article 30 of the collective agreement, and he explained that normally, employees were informed that they were standby in writing.

[18] Mr. Masse explained that on December 6, 2011, he informed Mr. Quessy that the grievor was not entitled to the standby pay set out in article 30 of the collective agreement. Mr. Quessy informed the grievor of this on December 12, 2011. According to Mr. Masse, only the commander has the authority to approve or deny an application for standby pay. Mr. Masse explained that the grievor came to see him on December 15, 2011, to ask him to validate the denial to grant him standby pay. Mr. Masse then reportedly reiterated that he had the necessary delegation and that he was the designated person to decide whether the standby pay should be granted. He also told the grievor that the employer had never asked him to be on standby within the meaning of article 30 and that as a result, the grievor was not entitled to receive the payment. In cross-examination, Mr. Masse agreed that he had discussed the grievor's application with the commander. Mr. Masse explained that given the amount at stake in the event that the payment was made, he had to inform the commander but that this did not change the fact that he had the necessary delegation to deny the application.

[19] Mr. Masse explained that the grievor was not entitled to the payment because after checking the facts, he verified that the grievor had never been asked to be on standby. Mr. Masse stated that the pager was nothing more than a communication tool. He pointed out that 25 CFSD is very large, so the pager can be useful to reach employees.

[20] Mr. Masse argued that certain conditions must be met when an employee is on standby under article 30, for example, they must avoid using alcohol and not leave the premises. The grievor was never asked to do that. As well, he was never informed in writing or otherwise that he had to be available "[translation] during off-duty hours" pursuant to article 30 of the collective agreement.

[21] Mr. Masse stated that once the grievor returned the pager, the employer removed the pager number from its emergency plans (Exhibit E-1, Tab 8). As for the grievor's argument that he was responsible, for example, in the event of a PCB spill, Mr. Masse testified that that was not a reason to put someone on standby. The emergency plan is an informational document for employees. Mr. Masse also clarified that in the event of a major PCB spill, for example, the grievor is not on the list of contacts.

III. Summary of the arguments

A. For the grievor

1. Was the grievance filed late?

[22] The grievor stated that although he realized in December 2010 that he was eligible for standby pay, he was reluctant to apply for it. However, in May 2011, after raising the issue and receiving responses from Mr. Quessy and Mr. Masse, he believed that Mr. Masse did not have the authority to decide his application. The evidence shows that Mr. Masse consulted with the commander to have him validate his decision. The grievor stated that he did not receive a definitive response about his application until February 1, 2012 (Exhibit P-1, Tab 3, page 1). Before that date, there were only discussions. Therefore, the grievance is not untimely as it was filed on February 13, 2012, less than 25 days after the grievor was notified of the decision. As well, this is a continuing grievance. The grievor referred me to *Campbell v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 42.

2. The standby payment set out in article 30 of the collective agreement

[23] The grievor argued that he was given a pager in 2006 with the condition that he could be reached at any time. He explained that when he was unavailable, he arranged to give the pager to one of his employees. According to the emergency procedures document (Exhibit P-1, Tab 12), this responsibility existed until 2017.

[24] According to the grievor, the consequences were significant if he could not be reached. He could be fined or imprisoned (Exhibit P-1, Tab 8).

[25] The employer was responsible for giving the grievor clear instructions as to whether he was on standby pursuant to the standby article. The grievor referred me to the following decisions: *Gasbarro v. Treasury Board* (*Canadian Transportation Accident Investigation and Safety Board)*, 2007 PSLRB 87, and *Beaulieu v. Canada Customs and Revenue Agency*, 2002 PSSRB 3.

B. For the employer

1. Was the grievance filed late?

[26] The employer referred me to the wording in clause 18.15 of the collective agreement and submitted that as early as December 2010, the grievor thought he could make a claim under article 30. However, only much later, i.e., February 13, 2012, did he choose to file a grievance. In the circumstances, the employer submitted that I do not have jurisdiction to decide this grievance as it was filed after the 25-day time limit from when the grievor became aware of the circumstances that gave rise to the grievance.

[27] The grievor admitted that in December 2010, he was informed by the union representative, Mr. Rodgers, about article 30 of the collective agreement on standby pay and its application to his situation. The grievor also admitted that he had looked at this article and concluded that he was entitled to the payment. However, he raised the issue with his employer on May 9, 2011, five months later.

[28] On December 12, 2011, the grievor received a response from Mr. Quessy that he denied his application. Mr. Masse gave him the same response three days later, on December 15, 2011. The grievor chose not to file a grievance at that time. He explained

that he believed that Mr. Masse did not have the authority to decide his application. That explanation does not hold water.

[29] According to the employer, the grievor was aware of article 30 of the collective agreement, and he was aware of the circumstances that gave rise to the grievance in December 2010, but he did nothing about it. He waited until May 2011 to raise the issue. He received a negative response from Mr. Quessy on December 12, 2011, which was repeated by Mr. Masse at a meeting on December 15, 2011. He didn't file his grievance until February 13, 2012, which was after the prescribed 25-day time limit. Clearly, it was late. The employer referred me to *Sonmor v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 20, and *Marks v. Canadian Food Inspection Agency*, 2012 PSLRB 77.

2. The standby payment set out in article 30 of the collective agreement

[30] The employer stated that the grievor has the burden of demonstrating that he met the conditions set out in article 30 of the collective agreement, namely, the employer asked him to be on standby during off-duty hours. According to the employer, this evidence was not provided.

[31] The employer argued that it is not up to the grievor to declare himself on standby and hold the employer accountable. Unlike in *Gasbarro*, where through its actions and comments the employer made it clear to the grievor that he had to be on standby outside normal working hours, there is no such indication in this case. The grievor made up his mind about the regulations; however, the employer did nothing to create a situation that would have suggested that the grievor had to be on standby.

[32] Although the grievor's name appears in some documents, such as the emergency procedures, there is absolutely no indication that the grievor had to be on standby during off-duty hours (Exhibit E-1, Tab 7). The employer recalled Mr. Masse's testimony, which indicated that in the event of a major PCB spill, the grievor would not be contacted.

[33] The employer stated that there is no evidence that the grievor was ever paged from 2006 to 2012. Therefore, this is proof that having an employee on standby under article 30 of the collective agreement was definitely not an issue for the employer. The employer certainly did not see the need to have an employee on standby.

[34] The employer felt that there appeared to be confusion between being on standby and being called back to work.

[35] The employer referred me to *Gasbarro* and *Beaulieu*, as well as to the following decisions: *Kettle v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-21941 (19920412), [1992] C.P.S.S.R.B. No. 55 (QL); *Mullins v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-17752 (19890202), [1989] C.P.S.S.R.B. No. 32 (QL); and *Roach v. Treasury Board* (*Department of National Defence)*, 2006 PSLRB 3.

IV. Reasons

[36] I will first deal with the employer's preliminary objection asking that I dismiss this grievance because it was filed after the 25-day time limit provided in the collective agreement for filing a grievance.

[37] Clause 18.15 of the collective agreement reads as follows:

> ***18.15*** *A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance.…*

[38] In this case, the evidence showed that as early as December 2010, after discussions with his colleagues and the local union president, Mr. Rodgers, the grievor was aware of the circumstances that gave rise to his grievance. He even admitted that he had read article 30 of the collective agreement and agreed that it applied to the circumstances of his grievance. The grievor also admitted that he did not wish to file a grievance and that he had decided to wait and "[translation] let it lie; ruminate on it". He applied for standby pay with his employer on May 9, 2011, almost five months later.

[39] As well, the evidence was clear that on December 12, 2011, the grievor was informed of the employer's decision not to grant him standby pay. This negative response was repeated to him at a meeting with Mr. Quessy and Mr. Masse on December 15, 2011(Exhibit E-1, Tab 5). The grievor didn't file his grievance until February 13, 2012, which was after the 25-day time limit provided for in the collective agreement.

[40] The grievor argued that he did not believe that the employer's response was final on December 12 and 15, 2011, as he doubted Mr. Masse's authority to decide his application request. I disagree with that statement. Mr. Quessy's December 12, 2011, response is unequivocal as to the employer's refusal to pay the standby pay. This refusal was reiterated in the presence of Mr. Masse on December 15, 2011. If the grievor really had doubts about Mr. Masse's decision-making authority, he should have filed a grievance within 25 days of the December 15 meeting, but he chose not to.

[41] It is very clear to me that in December 2010, the grievor, by his own admission and after a discussion with his union representative, was aware and had become familiar with the circumstances that gave rise to his grievance under the terms of clause 18.15 of the collective agreement. He knowingly chose to wait. As well, once he was clearly informed of the employer's denial on December 12 and 15, 2011, he again chose to wait and file his grievance on February 13, 2012, which again was after the 25-day time limit provided for in the collective agreement.

[42] Under the circumstances, I have no hesitation to deny the grievance for failing to meet the deadline for filing it.

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

(The Order appears on the next page)

V. Order

[44] The grievance is denied.

March 3, 2021.

FPSLREB Translation

Linda Gobeil,
a panel of the Federal Public Sector
Labour Relations and Employment Board