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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

PASCAL GENEST

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of the interpretation and application of a collective agreement

Before: Paul Fauteux, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: François Ouellette, counsel

For the Employer: Patrick Turcot, counsel

Decided on the basis of written submissions,
filed April 23 and May 7, 2021.
(FPSLREB Translation)

I. Context

[1] On March 23, 2021, the Federal Public Sector Labour Relations and Employment Board ("the Board") rendered the decision allowing the grievances in this case in *Genest v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 31 ("the 2021 FPSLREB 31 decision").

[2] At paragraphs 100 to 108 of that decision, the Board explained why it had refrained from deciding the corrective measures. In short, the employer (the Treasury Board (Correctional Service of Canada)) had argued that the bargaining agent (Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN)), in its reply to the employer's written submissions on the merits of the case, had attempted to add other corrective measures to its application, which it was not entitled to do.

[3] Once that decision was issued, a case management conference was held on April 7, 2021.

[4] In accordance with the Board's order made on April 7, 2020 (summarized at paragraph 104(d) of the 2021 FPSLREB 31 decision), on April 7, 2021, the Board made a new order, requiring the employer to submit written arguments by April 23, 2021, at the latest, on the bargaining agent's reply, which would have the opportunity to respond, if it wished to, by May 7, 2021, which it did.

A. The employer's position

[5] In its initial written submissions dated February 18, 2020, the bargaining agent requested this:

> a) That the grievances be allowed.
> b) A statement that the interpretation and application of clause 30.07 of the collective agreement between the UCCO-SACC-CSN and the employer for the CX group (expiry date: May 31, 2014; "the collective agreement") are incorrect and/or discriminatory.
> c) A statement that the employer violated the collective agreement.
> d) An order that the employer compensate the grievor by paying him 23% of his weekly rate of pay for the two 5-week periods claimed, as provided at clause 30.07 of the collective agreement.

[6] In relation to that request, the employer does not dispute that the following corrective measures be granted:

> a) the grievances be allowed;
> b) the employer incorrectly interpreted and applied clause 30.07 of the relevant collective agreement;
> c) therefore, the employer violated the collective agreement; and
> d) the Board need not decide the discrimination allegation.

[7] In its rebuttal of April 23, 2021, the employer informed the Board, the bargaining agent, and the grievor that the reimbursement equivalent to 23% of the grievor's weekly rate of pay for the two 5-week periods claimed would soon be paid to him.

[8] However, the employer challenges what it describes as a new corrective measure requested in the grievor's rebuttal of March 27, 2020, which was that the Board's order "[translation] … would not reduce his partner's parental allowances or harm her in any way".

[9] According to the employer, the grievor's bargaining agent is not entitled to make submissions on the interpretation and application of a collective agreement to which it is not a party. It adds that the collective agreement of the grievor's spouse (Marie-Ève Lapointe) recognizes the Public Service Alliance of Canada as the sole bargaining agent for all the employees it serves.

[10] The employer also submits that the Board found that it does not have before it a request for an interpretation and application of Ms. Lapointe's collective agreement and that the grievor acknowledged as much in his rebuttal. Therefore, the employer believes that the order that the Board must make on the corrective measures should not affect another collective agreement that applies to other public servants and to another bargaining agent, which are not parties to the dispute.

[11] Finally, the employer states that it raised the issue of Ms. Lapointe's collective agreement in its written arguments "[translation] … solely to present the rationale for denying the grievor's claim at the time".

[12] For these reasons, the employer asks the Board to dismiss the corrective measure at issue for lack of jurisdiction.

B. The grievor's position

[13] In response to those written arguments, the grievor recalls the following:

> [Translation]
>
> *… the employer submits that although it is compelled to pay the grievor the parental allowances he claims under the collective agreement, it is open to the employer to recover the equivalent of those amounts from the grievor's spouse, who is also employed by the federal public service.*

[14] In doing so, he paraphrases paragraph 13 of the employer's argument of March 13, 2020, cited at paragraph 73 of the 2021 FPSLREB 31 decision, as follows:

> [Translation]
>
> *… if the bargaining agent and grievor insist that the employer pay the 23% of his salary, **to which he is entitled under his collective agreement**, the employer will be required to take steps to recover the overpayment to Ms. Lapointe, i.e., the 38% that was overpaid for the 5 weeks, under her collective agreement.*
>
> …
>
> [Emphasis in the original]

[15] The grievor believes that doing so would circumvent the 2021 FPSLREB 31 decision and annul its effects. He feels that "[translation] in the spirit of the principle of proportionality", the Board has jurisdiction to make the appropriate orders to enforce the decision and avoid the repetition *ad nauseam* of legal proceedings on the same issue.

[16] The grievor develops this position by setting out a series of arguments that I summarize as follows:

> Allowing the employer to retroactively take from his spouse the amounts to which he is entitled under the 2021 FPSLREB 31 decision
> a) would allow it to recover the amount it is compelled to pay from the same patrimony;
> b) would allow it to circumvent the effects of the 2021 FPSLREB 31 decision;
> c) would completely annul any corrective measure;
> d) would allow the employer to indirectly do what the 2021 FPSLREB 31 decision orders it not to do directly;
> e) would make the decision purely theoretical;
> f) would deny the grievor's right to be compensated for damages; and
> g) would make the Board's 2021 FPSLREB 31 decision meaningless.

[17] The grievor states that the issue is not whether the Board has jurisdiction to interpret and apply his spouse's collective agreement but to give full effect to his collective agreement and to the Board's interpretation of it.

[18] He argues that the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) gives adjudicators very broad remedial authority, including at s. 228(2), which states, "After considering the grievance, the adjudicator or the Board, as the case may be, must render a decision, make the order that the adjudicator or the Board consider appropriate in the circumstances …".

[19] He cites the Supreme Court of Canada's decision in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28, in support of the principle that adjudicators have broad discretion to shape the corrective measures necessary to implement their decisions.

[20] The grievor expounds at length on the principle of proportionality, and I summarize his remarks as follows:

a) it is not in the interests of the parties or of saving judicial resources to reinitiate new litigation with respect to the essentially the same issue, but this time against the grievor's spouse;
b) this would be contrary to the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, which invites parties and decision makers to take an approach proportional to the interests at stake and the nature of the litigation, thus promoting justice that is both expedient and affordable;
c) the stakes in this case are minor, especially for an employer such as the Treasury Board of Canada — a mere 10 weeks of allowance equivalent to 23% of the grievor's salary, which is less than 2.5 weeks' salary or a gross amount of less than $4000;
d) however, the proceeding is neither expedient nor affordable, as this is already the fourth decision on this issue, including two Board decisions, the first of which was rendered 8 years ago;
e) each proceeding is costly in terms of time, money, and judicial resources for the parties and the Board;
f) especially in light of paragraph 84 of the decision, there is no need to decide the issue a fifth time, this time through a grievance filed by the grievor's spouse;
g) such a multiplication of court proceedings would be disproportionate to the interests at stake and would go against the "culture shift" the Supreme Court of Canada called for in *Hryniak*; and
h) granting the employer's request would unnecessarily extend this case by multiplying the proceedings and would deprive the grievor of his right to have his damages remedied in a timely and proportionate manner.

[21] In conclusion, the grievor asks the Board to "[translation] … make the necessary orders to ensure that the effects of its decision are fully carried out and prevent the employer from recovering from his spouse the allowances it is ordered to pay the grievor."

C. My decision

[22] I agree with the employer that the Board does not have jurisdiction to make an order that would affect the rights of Ms. Lapointe and the Public Service Alliance of Canada, which are not parties to the dispute before me.

[23] Making the order that the grievor requests would violate the rules of natural justice *audi alteram partem*, which states that a court cannot rule on an application that affects the rights of a party without the party being heard, so I will not make it.

[24] On the other hand, I am sympathetic to the grievor's arguments, which, although they do not justify the order he seeks for the reasons stated earlier, deserve to be addressed and to have recommendations made, as I consider the matters before me cause for concern. In that respect, see the Federal Court's decision on the powers of one of the Board's predecessors, the former Public Service Staffing Tribunal, in *Canada (Attorney General) v. Beyak*, 2011 FC 629, as well as the Board's recent decision in *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 22.

[25] As the Board noted at paragraphs 37 to 41 of the 2021 FPSLREB 31 decision, the employer chose to ignore the Federal Court of Appeal's findings in *Canada (Attorney General) v. Dufour*, 2015 FCA 226, which had clearly established that its interpretation and application of clause 30.07(k) in this case, which are identical to those it made in the same clause in *Dufour*, were unreasonable.

[26] Instead of trying its luck in the hope that the Board would contradict its case law and that of the Federal Court of Appeal, had the employer applied *Dufour* and respected the grievor's rights under his collective agreement, there would have been no need to file the grievances, which would have avoided spending all this time, energy, and the Board's resources.

[27] Therefore, I recommend that the employer learn some lessons from this for the future.

[28] As the Board indicated at paragraph 84 of the 2021 FPSLREB 31 decision, if it had to rule on the interpretation and application of Ms. Lapointe's collective agreement, it would be sensitive to the grievor's arguments summarized at paragraphs 78 and 79 of that decision, because the employer did not persuade it that the use of the word "shared" in clause 40.02(k) of Ms. Lapointe's collective agreement demonstrated that its interpretation of that clause was valid.

[29] Therefore, I recommend that the employer also apply *Dufour* in Ms. Lapointe's case and respect her rights under that clause of her collective agreement to avoid another grievance being filed based on similar facts and a new unnecessary expenditure of time, energy, and resources for the Board and the parties.

[30] In the passage I quoted at paragraph 11, the employer stated that it raised the issue of Ms. Lapointe's collective agreement in its written arguments "… solely to present the rationale for denying the grievor's claim at the time".

[31] However, as noted at paragraph 14, the employer stated as follows:

> *… if the bargaining agent and grievor insist that the employer pay the 23% of his salary, **to which he is entitled under his collective agreement**, the employer **will be required** to take steps to recover the overpayment to Ms. Lapointe, i.e., the 38% that was overpaid for the 5 weeks, under her collective agreement ….*
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> [The first passage is emphasized is in the original, and I added the emphasis for the second passage.]

[32] As the Board observed at paragraph 74 of the 2021 FPSLREB 31 decision, the employer cited s. 155(3) of the *Financial Administration Act* (R.S.C., 1985, c. F-11), which states as follows, to support that last statement:

> ***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.*
>
> [Emphasis added]

[33] It also cited two other documents that deal with the Receiver General's authority to recover overpayments and the process for recovering them, respectively, but that also do not impose any obligation on the employer to recover them.

[34] The employer's threat to exercise its discretion to proceed with the recovery by presenting it as an obligation ("will be required") underpins the entire debate about what it then presented as a new corrective measure requested by the grievor. This threat appeared directed at the Board to deter it from allowing the grievances, as it was too late to influence the grievor's position. In any event, it was a very bad idea, which also resulted in the Board expending its time, energy, and resources, which could otherwise have been avoided.

[35] Given the passage I quoted at paragraphs 11 and 30, the employer suggests that it has since given up carrying out its threat, which would on the contrary be an excellent idea.

[36] Therefore, I recommend that the employer refrain from recovering from Ms. Lapointe the reimbursement to which the grievor is entitled, which is 23% of his weekly rate of pay for the two 5-week periods claimed.

[37] The Board has already determined that it did not have to rule on the discrimination allegation, and it allowed the grievances.

[38] The employer informed the Board that it recognizes that it incorrectly interpreted and applied clause 30.07 of the collective agreement and thus violated the agreement.

[39] The employer also informed the Board that it would reimburse the grievor the 23% of his weekly rate of pay for the two 5-week periods claimed.

[40] The Board takes note of these statements but considers that it must decide the corrective measures by making the following order:

(The Order appears on the next page)

II. Order

[41] The Board declares that the employer's interpretation of clause 30.07 of the collective agreement is incorrect and that it violates the collective agreement.

[42] The Board orders the employer to reimburse the grievor 23% of his weekly rate of pay for the two 5-week periods claimed, as provided at clause 30.07 of the collective agreement.

July 7, 2021.

FPSLREB Translation

Paul Fauteux,
a panel of the Federal Public Sector
Labour Relations and Employment Board