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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

ANNE-MARIE CHARBONNEAU AND WILMA VAN DOORN

Grievors

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Charbonneau v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Goretti Fukamusenge, Public Service Alliance of Canada

For the Employer: Cristina St-Amant-Roy, counsel

Heard on the basis of written submissions,
filed August 27, September 20 and 27, and October 2, 2019.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] On August 15, 2006, Anne-Marie Charbonneau and Wilma Van Doorn ("the grievors") filed their respective grievances against the Canada Border Services Agency ("the Agency"). This interim decision deals with the Treasury Board of Canada's ("the employer") objection to the Board's jurisdiction to hear the grievances.

[2] The grievances are identical and allege the following:

> [Translation]
>
> *I feel that my rights were not respected because my employer forced me to accept a position at a lower level (PM-05 to PM-04). I feel that I have suffered intimidation and that my employer discriminated against me. Consequently, I was demoted, and I would never have accepted it had I known all the facts.*

[3] As corrective action, the grievors request the following:

> [Translation]
>
> *That my employer recognize that my group and level is PM-5 and that it be maintained from its effective date.*

[4] In accordance with s. 210 of the *Federal Public Sector Labour Relations Act* ("the *Act*"), the grievors gave proper notice to the Canadian Human Rights Commission, which on February 17, 2011, informed the Board that it did not intend to participate in the grievance hearing.

II. Procedural background

[5] The grievors filed their respective grievances on August 15, 2006. In November 2010, the employer dismissed them at the final level of the grievance process. It granted an extension of time until February 11, 2011, for referring them to adjudication. On February 4, 2011, the Public Service Alliance of Canada referred them to adjudication in accordance with s. 209(1)(a) of the *Act* and asked that they be dealt with through mediation. On March 2, 2011, the employer informed the Board that it refused mediation.

[6] No communications were received from the parties between 2011 and 2016. In 2017, the Board put the grievances' hearing on the hearings calendar, which was to be

held on January 30 and 31, 2018. On December 14, 2017, the bargaining agent requested a *sine die* postponement of the hearing for medical reasons in Ms. Van Doorn's case. Because Ms. Van Doorn's and Ms. Charbonneau's cases were to be heard together and the employer did not object, the Board granted the postponement request.

[7] The parties did not follow up with the Board so that it could again place the cases on its hearings calendar. It put the matter on the hearings calendar. It was to take place finally on May 8, 9, and 10, 2018. On April 19, 2018, the Board held a prehearing conference. The bargaining agent informed the Board that it would request a postponement of Ms. Van Doorn's grievance hearing for medical reasons. On April 24, 2018, it provided a medical certificate on that point. The employer did not object to the postponement request. The Board granted it and asked the bargaining agent to provide an update on Ms. Van Doorn's state of health by no later than November 5, 2018.

[8] The Board put the grievances on the hearings calendar so that they could be heard from February 5 to 8, 2019. On November 8, 2018, the bargaining agent informed the Board that Ms. Van Doorn would be unable to participate in the hearing of her grievance before mid-June 2019. It provided a medical certificate to support the request. The employer did not object. The Board granted the postponement request and asked the bargaining agent to provide an update on Ms. Van Doorn's state of health by no later than June 29, 2019.

[9] On June 3, 2019, the bargaining agent informed the Board that the treating physicians did not believe that Ms. Van Doorn would be able to work or participate in a hearing before 2020. The bargaining agent asked that the hearing of Ms. Van Doorn's case be postponed for medical reasons. The employer consented to the postponement request for a hearing in 2020.

[10] On August 6, 2019, the Board held a teleconference with the parties. It asked the bargaining agent to confirm the wishes of Ms. Van Doorn to proceed with the hearing of her grievance and the corrective action she sought and to provide a medical certificate establishing the functional limitations and the accommodations that the Board could provide so that she could participate in the hearing of her grievance. The Board also asked whether it was possible to proceed independently with the hearing of

Ms. Charbonneau's grievance and whether a single decision could address their respective grievances. The bargaining agent did not respond to that question.

[11] The Board raised the issue of its jurisdiction to hear the grievances. The parties were to provide their written submissions on whether the grievances, as stated, met the referral criteria under s. 209 of the *Act*. The written submission process was completed on October 2, 2019. The bargaining agent did not respond to the Board's questions as to whether it was possible to proceed independently with Ms. Charbonneau's grievance hearing and whether a single decision could address the grievors' respective grievances.

III. Factual background, and allegations

[12] In 2003, the grievors worked as hearing officers for the Department of Citizenship and Immigration, the CBSA's predecessor, in Montreal. They were classified at the PM-04 group and level. In 2004, along with several of their colleagues, they filed classification grievances in which they alleged that their positions should be reclassified to the PM-05 group and level. In 2005, the employer informed them that a classification committee had been formed to review their grievances and the classification of their positions.

[13] In 2006, shortly before the classification committee made a definitive decision on their classification grievances, both grievors were temporarily assigned to positions classified at the PM-04 group and level and to acting assignments at the PM-05 group and level in Ottawa.

[14] In their grievances, the grievors alleged that the employer forced them to accept a transfer to indeterminate positions located in Ottawa and classified at the PM-04 group and level. They argued that they wished to await the results of their classification grievances before accepting the transfer offer but that their director had refused their requests. At the insistence of their director and against their wills, they accepted the lateral transfer offer to the PM-04 positions in Ottawa. They maintained that their male colleague had not been subjected to the same pressure to make a decision about a transfer offer. They alleged that he had received a two-year extension; that is, preferential treatment because of his male gender. In addition, they stated that their proposed new managers in Ottawa agreed with the extension request. They

argued that the director knew that the classification decision was imminent and that it was bad faith to refuse their extension requests.

[15] The classification committee issued its decision on the classification grievances in May 2006. Consequently, the positions in question were reclassified to the PM-05 group and level effective December 12, 2003. The employer told the grievors that given that they were now in indeterminate positions at the PM-04 group and level and that those positions were different from the ones that were the subjects of the grievances, they would not be reclassified after the decision, and they would receive only the salary from the date on which the decision came into effect until the date on which they obtained their new positions in Ottawa.

IV. Reasons

[16] The parties had to answer the following question: Do the grievances meet the criteria for a referral under s. 209 of the *Act*?

[17] Despite that the employer and in particular the grievors tried to include evidence in their written submissions, the employer's objection to the Board's jurisdiction was heard entirely based on written submissions; no oral testimony of any kind was considered when determining the issue.

[18] The parties have no issue as to the right to retroactive pay. The grievances challenge the employer's actions. According to the grievors' allegations, the employer demonstrated bad faith, demonstrated discrimination on the basis of their gender, and applied undue pressure, which forced them to accept positions classified at a lower level.

[19] The employer objected to the Board's jurisdiction on the grounds that the grievances are untimely and are about a reclassification request. The employer stated that neither grievor filed a discrimination grievance when each was refused a transfer extension. It also stated that each grievor waited several months after receiving the decision on her reclassification grievance to file a grievance. That decision was rendered in May 2006, and these grievances were filed in August 2006. In that respect, the employer cited *Burchill v. Canada (Attorney General)*, [1980] F.C.J. No. 97 (C.A.)(QL).

[20] The grievors maintained that the employer's timeliness objection should be dismissed. They emphasized that it objected to the grievances' timeliness 8 years after

they were referred to the Board and 13 years after they were filed. The employer did not raise the objection in any of its responses to the grievances.

[21] I agree with the grievors. Section 95(1)(b) of the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*") provides that no later than 30 days after receiving a copy of a grievance's reference-to-adjudication notice, a party may raise an objection on the grounds that the time limit prescribed by the *Act* or provided by a collective agreement for referring a grievance to adjudication was not met. As stated in many Board decisions, including *Shandera v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 21, and in the *Regulations*, timeliness objections must be made at all levels of the grievance process. The employer did not do that. Consequently, as indicated in *Santawirya v. Deputy Head (Canada Border Services Agency)*, 2017 FPSLREB 10, I find that the *Regulations*' wording bars me from hearing the employer's objection to the Board's jurisdiction on the ground of timeliness. The employer objected to the grievances' referrals 8 years after they were referred to the Board. Consequently, its timeliness objection with respect to the grievances' referrals is dismissed.

[22] The employer maintained that in reality, the grievances are reclassification requests. It argued that since they were referred to adjudication under s. 209(1)(a) of the *Act*, they must involve interpreting or applying the collective agreement. They could not properly have been referred to adjudication under s. 209(1)(a). Section 7 of the *Financial Administration Act* assigns the employer exclusive jurisdiction over classification. The grievors voluntarily signed their transfer offers, and there is no reason to believe that undue pressure was applied. The employer alleged that they did not sign their offers with any reservations. The employer has exclusive jurisdiction over transfer extensions. To support its allegation, it referred me to *Professional Institute of the Public Service of Canada v. Treasury Board*, 2017 PSLREB 41, and *Fong v. Canada Revenue Agency*, 2017 PSLREB 45.

[23] The grievors denied that the grievances are in reality about reclassification. They involve interpreting article 19 of the collective agreement and include allegations of discrimination, arbitrary conduct, and undue pressure by the grievors' employer. They alleged that their manager continually refused to grant them an extension, despite the fact of allegedly granting one to a male colleague occupying the same position and without undue pressure. They claimed that that conduct led them to

accept the transfers, to their detriment. The fact that the discrimination allegation is connected to the application of a reclassification cannot render this issue outside the collective agreement's scope: *Haynes v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 85, and *Public Service Alliance of Canada v. Treasury Board (Immigration and Refugee Board)*, 2017 FPSLREB 5.

[24] The grievors referred me to *Babb v. Canada Revenue Agency*, 2015 PSLREB 80, with respect to the Board's jurisdiction to hear and decide discrimination cases. In particular, they mentioned paragraph 28 of *Babb*, which finds that the only limitation to referring grievances about applying a collective agreement provision, in this case article 19, non-discrimination, is that the grievors obtain their bargaining agent's consent.

[25] I do not agree that the grievances are in reality about reclassification. Even if the corrective action requested in them is reclassification, in itself it does transform their substance into reclassification grievances. Clearly, they allege that article 19 of the collective agreement was violated and that the grievors were victims of gender-based discrimination. They have their bargaining agent's support. In their submissions, they refer to a male colleague who obtained an extension for his transfer request, while they were refused the same privilege. The employer effectively argued that that allegation was pure fantasy. In that respect, I find that the employer did not meet the burden required for me to dismiss the grievances based on its preliminary objection. That is not to say that I dismiss the employer's argument about the grievances' substance; I simply find that it is a matter of substance that will require holding a full hearing.

[26] To follow up on the grievors' demotion allegation, the employer denied that discipline was imposed. The grievances were not referred to adjudication under s. 209(1)(b). In that respect, the employer referred me to *Cameron v. Deputy Head (Office of the Director of Public Prosecutions)*, 2015 PSLREB 98. It also maintained that any remedy is limited to the 25 days before the grievances were filed. To support its argument, it referred me to *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL).

[27] The grievors maintain that without the forced transfers, like their male colleague, they would have benefitted fully from the decision to reclassify their positions. According to them, the principle raised in *Burchill* and the employer's

allegation that the grievances were not referred to adjudication as demotion grievances under s. 209(1)(b) of the *Act* do not apply. The employer was not taken by surprise, given that no different or amended grounds were cited in the reference. The *Burchill* principles do not apply.

[28] I find that this allegation is a matter of evidence that requires a hearing. The grievors will have to demonstrate on a balance of probabilities that their transfers to lower-level positions were forced and that the reason their manager denied them transfer extensions was tainted with discrimination, in violation of article 19 of the collective agreement. The employer's objection to the Board's jurisdiction is dismissed.

[29] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[30] The employer's objection is dismissed.

[31] The grievances will proceed to a hearing on the merits.

January 6, 2022.

FPSLREB Translation

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board