

Date: 20220509

File: 521-02-44373

Citation: 2022 FPSLREB 35

*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

ADAM WEINSTEIN

Applicant

and

**DEPUTY HEAD
(Correctional Service of Canada)**

Respondent

Indexed as

Weinstein v. Deputy Head (Correctional Service of Canada)

In the matter of an application pursuant to section 234 of the *Federal Public Sector Labour Relations Act*

Before: Edith Bramwell, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Orlagh O’Kelly, counsel

For the Respondent: Marc Séguin, counsel

Decided on the basis of written submissions,
filed March 31 and April 4, 2022.

REASONS FOR DECISION

I. Application before the Board

[1] On March 14, 2022, Adam Weinstein (“the applicant”) requested that a certified copy of the order issued by the Federal Public Sector Labour Relations and Employment Board (“the Board”) on August 31, 2021, exclusive of the reasons for the order, be filed in the Federal Court. For the reasons that follow, the applicant’s request is granted.

II. History of the proceedings

[2] On August 31, 2021, a decision of the Board was issued in the matter of a grievance against the applicant’s termination (*Weinstein v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 100). The order issued in that decision was as follows:

...

[341] The grievances are allowed.

[342] I order the respondent to reinstate the grievor to his position, retroactively to September 13, 2017.

[343] I order the respondent to reimburse the grievor his salary, including increases to which he would have been entitled, and all benefits including pension rights, subject to the usual deductions and accounting for the grievor’s employment income from September 13, 2017, to the date of his reinstatement. This calculation will include an additional allowance for overtime, calculated with reference to the average number of overtime hours he worked in the two-year period before September 13, 2017.

[344] The grievor is entitled to interest from September 13, 2017 until the date payment is made.

[345] I order removed from the grievor’s disciplinary, labour relations, and any other personnel records any documentation other than this decision that relates to the suspension without pay and the termination of his employment.

[346] I award damages to the grievor in the sum of \$20 000.00.

[347] Exhibit 2, the grievor’s book of documents, Part 1, Tab 64, is ordered sealed.

[348] I shall remain seized for 90 days of any question relating to the calculation of the amounts due under this order.

...

[3] Neither party contacted the Board during the 90-day period during which the panel of the Board remained seized, which expired on November 29, 2021.

[4] On December 23, 2021, the applicant contacted the Board and asked that it remain seized of the matter for an additional 45 days, retroactive to December 1, 2021, because he had not yet seen the calculations of the respondent, the deputy head of the Correctional Service of Canada, in relation to the order, and he had yet to be reinstated. The respondent opposed his request.

[5] By way of a letter decision issued on January 18, 2022, the panel of the Board communicated to the parties that she was *functus officio* and that she would exceed her authority were she to remain seized of this matter retroactively, as the applicant requested. In the same letter, she further indicated as follows:

...

[9] Although the Board is no longer seized of this matter, should the enforcement of the Board's order become an issue, section 234 of the Federal Public Sector Labour Relations Act and section 35 of the Federal Public Sector Labor Relations and Employment Board Act make provision for filing an order of the Board with the Federal Court in specified circumstances. I leave this for the further consideration of the parties.

...

III. Summary of the evidence

[6] The applicant's April 4, 2022, initiating document states that neither reinstatement nor the payment of retroactive salary, overtime, and other benefits, as specified by the order, has occurred, and as such, the order has not been implemented. The applicant also states that the delay has caused hardship.

[7] In its March 31, 2022, reply, the respondent states that the applicant has been reinstated into his position as a CX-01 correctional officer. With respect to his physical return to the workplace, the respondent states that he is set to return to the Correctional Service of Canada's Edmonton Institution pending a Worker's Compensation Board ("WCB") update. The respondent indicates that retroactive calculations with respect to base salary, overtime, "CX in lieu", and annual leave payout have been shared with the applicant and that the overtime and annual leave payout has been processed. The respondent further states that it has been advised by Public

Services and Procurement Canada that its target to complete the remaining payments is “the end of March, beginning of April.” According to the respondent, the applicant has been paid non-taxable damages in the amount of \$20 000.00, in accordance with the order.

[8] In his answer to the respondent’s reply dated April 4, 2022, the applicant indicates as follows:

- no retroactive salary had yet been paid, as of the date of the letter;
- there is a dispute with the respondent as to whether the applicant is entitled to retroactive pay based on a CX-02 or CX-01 base salary;
- the respondent refuses to pay salary and overtime for the period between April 2020 and April 2022, when the applicant received WCB benefits;
- the WCB benefits were known to the respondent from the documents submitted at the termination-grievance hearing;
- the applicant states that he is willing to deduct WCB benefits from salary paid pursuant to the order for the period from April 2020 to April 2022;
- despite the applicant’s requests, no retroactive benefits have been provided, and no amounts have been received for benefits lost;
- the applicant has not had his pension rights reinstated; and
- there is a dispute between the parties with respect to the applicant’s return to the workplace.

IV. Summary of the arguments

[9] The applicant submits that “... the order has not been implemented in whole or in part.” In his answer to the respondent’s reply, he notes, “Without filing this Order in the Federal Court, the Grievor has no reasonable, alternative means to ensure compliance with the terms of the Order.”

[10] The respondent submits that there is no automatic requirement for the Board to file an order with the Federal Court on request. It is up to the Board to decide whether to act, based on the two tests set out in the legislation (see *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 174 at para. 19; and *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 159 at para. 18).

[11] The respondent submits that the Board has broad flexibility and discretion in considering whether the respondent has complied or will comply with the order and whether there is “... another good reason why the filing of the order ... would serve no useful purpose”, per the legislation. The Board can refuse to file an order if the dispute can be resolved in other ways (see *Veillette*, at para. 42). The purpose of s. 234 of the

Federal Public Sector Labor Relations Act (S.C. 2003, c. 22, s. 2; *FPSLRA*) is to ensure compliance with an order when there is an indication that it will not be complied with, when it is deemed in the public interest to file the order, or when it serves some other purpose useful to the maintenance of labour relations (see *Herbert v. Deputy Head (Parole Board of Canada)*, 2020 FPSLREB 89 at para. 15).

V. Reasons

[12] Section 234 of the *FPSLRA* is found in Part 2 of the *Act* and sets out the procedure and conditions for the filing of orders issued under that part. A similarly drafted provision is found in s. 35 of the *Federal Public Sector Labor Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *FPSLREBA*) to deal with orders issued under other areas of Board jurisdiction (see s. 234(2) of the *FPSLRA*). Section 234 reads as follows:

Filing of order in Federal Court

234 (1) *The Board must, on the request in writing of any person who was a party to the proceedings that resulted in an order of an adjudicator or the Board, as the case may be, file a certified copy of the order, exclusive of the reasons for it, in the Federal Court, unless, in the opinion of the Board,*

(a) *there is no indication, or likelihood, of failure to comply with the order; or*

(b) *there is another good reason why the filing of the order in the Federal Court would serve no useful purpose.*

Non-application

(2) *Section 35 of the Federal Public Sector Labour Relations and Employment Board Act does not apply to an order of the Board*

Dépôt à la Cour fédérale

234 (1) *Sur demande écrite de toute partie à l'affaire qui a donné lieu à l'ordonnance, la Commission dépose à la Cour fédérale une copie certifiée conforme du dispositif de son ordonnance ou de l'ordonnance de l'arbitre de grief, selon le cas, sauf si, à son avis :*

a) *ou bien rien ne laisse croire que l'ordonnance n'a pas été exécutée ou ne le sera pas;*

b) *ou bien, pour d'autres motifs valables, le dépôt ne serait d'aucune utilité.*

Non-application

(2) *L'article 35 de la Loi sur la Commission des relations de travail et de l'emploi dans le secteur public fédéral ne s'applique pas aux ordonnances de la Commission visées au paragraphe (1).*

Effet de l'enregistrement

(3) *En vue de son exécution, l'ordonnance, dès le dépôt à la Cour fédérale de la copie certifiée conforme, est assimilée à une ordonnance rendue par celle-ci.*

referred to in subsection (1).

Effect of filing

(3) An order of an adjudicator or the Board becomes an order of the Federal Court when a certified copy of it is filed in that court, and it may subsequently be enforced as such.

[Emphasis in the original]

[13] As the respondent correctly states, the Board has discretion with respect to filing a certified copy of one of its orders in the Federal Court in two circumstances. The first is when there is no indication or likelihood of a failure to comply with the order, and the second is when there is another good reason why filing it in the Federal Court would serve no useful purpose. I must now consider whether either of those circumstances applies to the current facts.

[14] In other factual contexts than those currently before the Board, an indication that sums of money have already been paid and that calculations are underway and have been shared with the other party might well be sufficient to indicate the existence of circumstances of the nature of those specified in ss. 234(1)(a) and (b) of the *FPSLRA*.

[15] It is clear that some of the monies owing pursuant to the order, such as the non-taxable sum of \$20 000.00, have been paid. The respondent indicates that it is engaged in processing further payments, the calculations for which have been shared with the applicant. There is no reason to doubt this. It is entirely reasonable to assume that there is an indication or a likelihood that these sums, as specified by the respondent, will eventually be paid to the applicant.

[16] What remains unclear is whether the sums that the respondent has calculated and intends to pay are those specified by the order. The order is unambiguous with respect to retroactive salary, overtime, and related compensation, and reads as follows:

...

[343] I order the respondent to reimburse the grievor his salary, including increases to which he would have been entitled, and all benefits including pension rights, subject to the usual deductions

and accounting for the grievor's employment income from September 13, 2017, to the date of his reinstatement. This calculation will include an additional allowance for overtime, calculated with reference to the average number of overtime hours he worked in the two-year period before September 13, 2017.

...

[17] The order states that the applicant is to be paid salary and overtime (according to a specified method of calculation), as well as other entitlements, from September 13, 2017, to the date on which the order reinstated him, which was August 31, 2021.

[18] The respondent submits that the order has been partially implemented and will soon be fully implemented. According to the applicant, the respondent has not calculated (and has no plans to pay) any retroactive salary, overtime, and related compensation for the period from April 2020 to April 2022, when the applicant was in receipt of WCB benefits.

[19] The respondent had the option of returning to the Board within 90 days of the August 31, 2021, order, and requesting that it clarify the order's unambiguous terms, in light of the applicant's previously disclosed receipt of WCB benefits. Had it done so, issues such as applying mitigation principles to WCB benefits (which the applicant appears to concede), or the possibility that the WCB may recapture WCB benefits paid for periods in respect of which any amount of salary has been received, could have been explored and addressed by the panel of the Board.

[20] The respondent chose not to request the Board's assistance in clarifying these issues before the end of the 90 days during which the panel of the Board remained seized, and it opposed the applicant's request for the Board's assistance after the 90-day period elapsed. The respondent did not seek judicial review of the order; nor would a judicial review application have operated to stay the order, in and of itself.

[21] The parties remain subject to the unambiguous wording of the order with respect to retroactive salary, overtime, and related compensation from September 13, 2017, to the date of the order. Based on the submissions now before the Board, it is not possible for me to conclude that the respondent intends to fully comply with these aspects of the order. In these circumstances, I cannot conclude that there is no indication, or likelihood, of a failure to comply with the order.

[22] Even where a respondent's approach to damages is based on a good-faith assessment or surmise as to what the parties might ultimately have negotiated (or what the panel of the Board might have concluded), had the parties returned to the Board while it was still seized, it is not open to a respondent to substitute its own ideas about damages for the Board's order. Having chosen not to seek clarification with respect to the order, the parties to this application must now live with a plain-language interpretation of the order's wording, including its wording on retroactive salary, overtime, and related compensation.

[23] It appears from the submissions that the parties dispute other issues with respect to what would constitute the full implementation of the order, including the position to which the applicant should be reinstated. In light of the conclusions already reached in this decision, I need not address those issues.

[24] I am not aware of any other ways in which these disputes can conclusively be resolved; nor did either party bring any to my attention. I also was not made aware of any other reason why filing the order in the Federal Court would serve no useful purpose.

[25] For these reasons, I find that it is not possible to characterize the circumstances before the Board as those to which the exceptions in ss. 234(1)(a) and (b) of the *FPSLRA* apply. As such, the Board must file the certified copy of the order in the Federal Court, as requested.

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

(The Order appears on the next page)

VI. Order

[27] The applicant's request is granted that a certified copy of the order issued by the Federal Public Sector Labour Relations and Employment Board on August 31, 2021, exclusive of the reasons for the order, be filed in the Federal Court.

[28] A certified copy of the August 31, 2021, order of the Board in respect of the applicant's termination grievance will be filed in the Federal Court upon the issuance of the order in this application.

May 9, 2022.

**Edith Bramwell,
Chairperson, Federal Public Sector
Labour Relations and Employment Board**