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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

HUGO BÉLAND FALARDEAU, JESSICA VINGERHOEDS-CARBINO, AND EVANGELIA COSTAMIS

Grievors

and

TREASURY BOARD
(Department of Employment and Social Development)

Employer

Indexed as
Béland Falardeau v. Treasury Board (Department of Employment and Social Development)

In the matter of individual grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Aaron Lemkow, Public Service Alliance of Canada

For the Employer: Simon Ferrand, counsel

Decided on the basis of written submissions, filed September 14, November 20, and December 18, 2023, and January 15 and 18, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Hugo Béland Falardeau, Jessica Vingerhoeds-Carbino, and Evangelia Costamis ("the grievors") each filed a grievance contesting their compensation. They allege that their employer did not recognize their service when it calculated their pay steps. On May 23, 2014, the grievances were referred to adjudication before the Public Service Labour Relations Board, which became the Federal Public Sector Labour Relations and Employment Board due to legislative changes ("the Board", which refers to the current board and its predecessors).

[2] For the purposes of this decision, the term "employer" refers to both the legal employer, the Treasury Board of Canada, which was a signatory to the collective agreement it entered into with the Public Service Alliance of Canada ("the bargaining agent"), for the Program and Administrative Services group that expired on June 20, 2014 ("the collective agreement"), and the Department of Employment and Social Development, where the grievors work.

[3] This decision was rendered on the basis of written submissions under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365).

II. Summary of the evidence

[4] The parties filed a joint statement of facts, which I have summarized in the following paragraphs. At the end of the evidence summary, I added the employer's response at the final level of the grievance process.

[5] Each grievor has had their particular path with the employer. I have presented their paths in summary form for ease of reading and consultation when it comes to the arguments specific to each situation. Unless otherwise specified, all employment periods were with the employer. The contract dates were confirmed by evidence adduced on consent. In the following summary, I refer to the employment dates, without taking into account contract extensions or shortenings.

A. Hugo Béland Falardeau (Board file no. 566-02-09814)

[6] For the purposes of this grievance, the employment history is as follows:

- August 10, 2009: hired as a benefits officer (PM-02) for a term that ended on September 30, 2010;
- October 1, 2010, to November 16, 2010: PM-01 position;
- November 17, 2010, to March 13, 2011: acting PM-02 position;
- March 14, 2011, to August 12, 2011: transferred to Statistics Canada;
- August 13, 2011, to December 11, 2011: the grievor did not work for the employer;
- December 12, 2011, to December 19, 2011: casual employment as a benefits officer (PM-02);
- December 19, 2011, to March 27, 2014: term PM-02 position;
- March 28, 2014: appointment to an indeterminate PM-02 position;
- September 12, 2013, to March 14, 2014: acting PM-03 position; and
- January 16, 2017: transfer to another PM-02 position.

B. Jessica Vingerhoeds-Carbino (Board file no. 566-02-09815)

[7] For the purposes of this grievance, the employment history is as follows:

- August 10, 2009, to October 1, 2010: term employment as a benefits officer (PM-02);
- October 2, 2010, to December 19, 2010: the grievor did not work for the employer;
- December 20, 2010, to March 13, 2011: term PM-02 position;
- March 13, 2011, to July 1, 2011: term employment with the Canada Industrial Relations Board;
- December 12, 2011, to December 18, 2011: casual PM-02 position;
- December 19, 2011, to April 19, 2013: term PM-02 position; and
- April 22, 2013: new indeterminate position as an analyst at Industry Canada.

C. Evangelia Costamis (Board file no. 566-02-09816)

[8] For the purposes of this grievance, the employment history is as follows:

- August 10, 2009, to August 17, 2009: casual employment as a benefits officer (PM-02);
- August 18, 2009, to October 1, 2010: term PM-02 position;
- October 2, 2010, to December 19, 2010: the grievor did not work for the employer; and
- December 20, 2010, to April 2014 (when appointed indeterminately): term benefits officer (PM-02) position.

[9] The grievances arose from the fact that the employer did not recognize the grievors' service before March 1, 2011, when calculating their step increments. The collective agreement (which came into effect on March 1, 2011) included a new article in Appendix A-2, which read as follows:

…	[…]
3. An employee appointed to a term position shall receive an increment after having reached fifty-two (52) weeks of cumulative service. For the purpose of defining when a determinate employee will be entitled to go [sic] the next salary increment, "cumulative" means all service, whether continuous or discontinuous within the core public administration at the same occupational group and level.	*3. Une personne nommée pour une période déterminée recevra une augmentation d'échelon de rémunération après avoir accumulé cinquante-deux (52) semaines de service cumulatif. Pour plus de précision, « service cumulatif » s'entend de tout service, continu ou non, dans l'administration publique centrale dans le même groupe professionnel et au même niveau.*
…	[…]

[10] The grievors filed grievances in June and July 2012 challenging the employer's decision not to recognize their service from before March 1, 2011. On March 14, 2014, the employer denied the grievances at the final level of the grievance process, and they were referred to adjudication on May 23, 2014.

[11] But I note that in Ms. Costamis's case, who started continuous service on December 20, 2010, on that date, the employer started the cumulative-service calculation for the step increment.

[12] The employer's response at the final level of the grievance process stated its reason for rejecting the grievances as follows:

> [Translation]
>
> …
>
> *I note that Article 66 of the* Program and Administration Services *collective agreement deals with the* duration of the agreement *and states that:*
>
> "**66.02** Unless otherwise specified, the provisions of this Agreement shall become effective on the date it is signed."
>
> *Thus, since the collective agreement came into force on March 1, 2011, and since no express indication to the contrary indicates the retroactive application of* Appendix A-2*, periods of discontinuous service before that date cannot count in the salary-step-increment calculation.*
>
> *In that spirit, the* Treasury Board Secretariat *drafted these explanatory notes of April 1, 2011, and June 8, 2012, stating that* Appendix A-2 *came into force on March 1, 2011, and that service periods from before the collective agreement's signing date are not counted in the salary-increase calculation.*
>
> …

III. Summary of the arguments

A. For the grievors

[13] The grievors submit that clause 66.02 of the collective agreement, which states that the agreement's provisions came into force on the date it was signed, does not preclude considering that they had accumulated at least 52 weeks of cumulative service as of March 1, 2011. Therefore, they should have progressed to the second pay step on March 1, 2011. Based on their subsequent service dates, they would have been entitled to move to the third step on the following dates:

- Mr. Béland Falardeau: November 28, 2012.
- Ms. Vingerhoeds-Carbino: November 28, 2012.
- Ms. Costamis: February 28, 2012.

[14] The grievors rely on the collective agreement interpretation principles according to the case law. I will return to the relevant case law in my analysis.

[15] According to the grievors, there is no time limit in article 3 of Appendix A-2 of the collective agreement. Clause 66.02 simply indicates the date from which employees may claim the effect of article 3.

[16] The grievors rely on the notion of seniority to claim that their weeks worked should be counted.

[17] According to the grievors, the employer's interpretation that weeks worked do not count until March 1, 2011, would lead to absurd and unfair results.

B. For the employer

[18] In the collective agreement signed on March 1, 2011, the employer and the bargaining agent agreed for the first time that the cumulative service (continuous and discontinuous) of someone appointed for a term would count toward the pay-step increment. Furthermore, clause 66.02 of the collective agreement provides that unless otherwise specified, the collective agreement provisions come into force on the agreement's signature.

[19] According to the employer, since the cumulative-service accrual provision for those appointed for a term came into force only on March 1, 2011, it cannot apply to prior facts; that is, cumulative service from before March 1, 2011.

[20] The employer notes the interpretation principles that apply to collective agreements — it is a matter of discerning the parties' intent and interpreting the words in their common and ordinary sense, while taking into account the collective agreement as a whole. Absurd results must be avoided.

[21] The change to the collective agreement is to recognize cumulative service, whether continuous or discontinuous, for persons employed for a term. Previously, it took 52 consecutive weeks to qualify for the step increment.

[22] The employer relies on a Treasury Board Secretariat interpretation dated June 8, 2012, which states as follows:

…	[…]
From the date of signing of the collective agreements going forward, pay increments are to be based on cumulative service, whether continuous or discontinuous, within the Core Public Administration. Service prior to the	*A compté [sic] des dates de signature de la convention collective allant de l'avant, les augmentations salariales doivent tenir compte du service cumulatif, continu ou discontinu, exercé au sein de l'administration publique centrale. Les périodes de service avant les dates de signature*

dates of signing does not count in calculating pay increments.	*ne comptent pas dans le calcul des augmentations salariales.*
…	[…]

[23] The employer submits that when the parties are of the opinion that the collective agreement applies at a date other than the signature date, the text clearly expresses it. This is particularly so for retroactive increases that have dates before March 1, 2011.

[24] The employer relies on the principle that the intention to confer a benefit that entails a financial cost must be expressed clearly.

[25] It is hard to believe that the employer intended to accept the enormous cost of recognizing cumulative service, continuous and discontinuous, before March 1, 2011. It is clear from reading the provision that it is committed to the future, not the past.

[26] If that was the bargaining agent's intent, it should have been clearly expressed in the negotiations and in the collective agreement's text.

[27] Granting cumulative service before March 1, 2011, means granting the grievors a salary benefit to which they were not entitled before March 1, 2011. That would amend the collective agreement, which is prohibited by s. 229 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2).

C. Reply and sur-reply

[28] The grievors maintain that they do not seek the retroactive application of article 3 of Appendix A-2 of the collective agreement. The increase would take effect on March 1, 2011, as provided in clause 66.02. However, the increase would be due to cumulative service that has already taken place and that should count from March 1, 2011.

[29] The employer submitted a brief sur-reply, to which the grievors responded. It deals in particular with the fact that Ms. Costamis was entitled to the cumulative-service calculation as of December 20, 2010, not as of March 1, 2011.

IV. Analysis

[30] The issue is, for a person appointed to a term (such as the grievors), do periods of discontinuous service before March 1, 2011, count toward the pay-step increment provided in article 3 of the collective agreement's Appendix A-2?

[31] Therefore, the new collective agreement provision must be interpreted, which now allows cumulative service, both continuous and discontinuous, for those appointed to terms.

[32] It is useful to recall the collective agreement interpretation principles, which were summarized as follows in *Duhamel v. Canadian Food Inspection Agency*, 2022 FPSLREB 87:

> …
>
> *[59] The fundamental presumption is that the parties are assumed to have intended the words expressed within that provision.*
>
> *[60] The words used must be construed in their ordinary and plain meaning unless such an interpretation is likely to result in absurdity or would be inconsistent with the entire collective agreement.*
>
> *[61] An adjudicator must consider the whole of a collective agreement as the overall agreement forms the context in which the words used are to be interpreted.*
>
> *[62] In the event that the adjudicator is faced with a choice between two linguistically permissible interpretations, the adjudicator may be guided by the following:*
>
> *· the purpose of the particular provision;*
>
> *· the reasonableness of each possible interpretation;*
>
> *· administrative feasibility; and*
>
> *· whether one of the possible interpretations would give rise to anomalies.*
>
> *[63] The fact that a particular provision may seem unfair is not a reason for an adjudicator to ignore it if it is otherwise clear.*
>
> *[64] An adjudicator's decision may not have the effect of requiring that a collective agreement or an arbitral award be amended.*
>
> …

[33] I think that it is useful, to put the provision at issue in context, to contrast as follows what was provided in the previous collective agreement with the one signed on March 1, 2011:

Collective agreement in force from January 29, 2009, to June 20, 2011; Appendix A-2:

Appendix A-2	***Appendice A-2***
PM - Programme Administration Group	***PM - Groupe Administration des programmes***
Pay Notes	***Notes sur la rémunération***
Pay Increment for Full-Time and Part-Time Employees	***Augmentation d'échelon de rémunération pour les employé-e-s à temps plein et à temps partiel***
1. *The pay increment period for employees at level PM-DEV is twenty-six (26) weeks and for employees at levels PM-1 to PM-6 is fifty-two (52) weeks. A pay increment shall be to the next rate in the scale of rates.*	***1.*** *La période d'augmentation d'échelon de rémunération pour les employé-e-s au niveau PM-PERF est de vingt-six (26) semaines et pour les employé-e-s aux niveaux PM-1 à PM-6 est de cinquante-deux (52) semaines. L'augmentation d'échelon de rémunération sera au taux suivant de l'échelle de taux.*
**	**
2. *The pay increment date for an employee appointed to a position in the bargaining unit on promotion, demotion or from outside the public service after April 23, 1976, shall be the pay increment period as calculated from the date of the promotion, demotion or appointment from outside the public service.*	***2.*** *La date d'augmentation d'échelon de rémunération de l'employé-e qui, par suite d'une promotion, d'une rétrogradation ou à son entrée dans la fonction publique, est nommé à un poste de l'unité de négociation après le 23 avril 1976, est la période d'augmentation d'échelon de rémunération, tel que calculé à compter de la date de la promotion, de la rétrogradation ou de l'entrée dans la fonction publique*
…	[…]

[Emphasis in the original]

Collective agreement in force from March 1, 2011, to June 20, 2014; Appendix A-2:

APPENDIX A-2	***APPENDICE A-2***
PM - PROGRAMME ADMINISTRATION GROUP	***PM - GROUPE ADMINISTRATION DES PROGRAMMES***
PAY NOTES	***NOTES SUR LA RÉMUNÉRATION***
PAY INCREMENT FOR FULL-TIME AND PART-TIME EMPLOYEES	***AUGMENTATION D'ÉCHELON DE RÉMUNÉRATION POUR LES EMPLOYÉ-E-S À TEMPS PLEIN ET À TEMPS PARTIEL***
1. The pay increment period for indeterminate employees at levels PM-DEV to PM-6 is the anniversary date of such appointment. A pay increment shall be to the next rate in the scale of rates.	*1. La date de l'augmentation d'échelon de rémunération pour les employé-e-s nommés pour une période indéterminée aux niveaux PM-PERF à PM-6 est la date d'anniversaire de leur nomination à leur poste. L'augmentation correspond au salaire de l'échelon suivant de l'échelle de rémunération.*
2. The pay increment period for term employees at levels PM-DEV to PM-6 is fifty-two (52) weeks. A pay increment shall be to the next rate in the scale of rates.	*2. La période d'augmentation d'échelon de rémunération pour les employé-e-s nommés pour une période déterminée aux niveaux PM-PERF à PM-6 est de cinquante-deux (52) semaines. L'augmentation correspond au salaire de l'échelon suivant de l'échelle de rémunération.*
3. An employee appointed to a term position shall receive an increment after having reached fifty-two (52) weeks of cumulative service. For the purpose of defining when a determinate employee will be entitled to go [sic] the next salary increment, "cumulative" means all service, whether continuous or discontinuous within the core public administration at the same occupational group and level.	*3. Une personne nommée pour une période déterminée recevra une augmentation d'échelon de rémunération après avoir accumulé cinquante-deux (52) semaines de service cumulatif. Pour plus de précision, « service cumulatif » s'entend de tout service, continu ou non, dans l'administration publique centrale dans le même groupe professionnel et au même niveau.*
…	[…]

[Emphasis in the original]

[34] In its arguments, the employer states as follows:

> [Translation]
>
> …
>
> *21. … before March 1, 2011, a break in service within a period of 52 weeks was sufficient to prevent a term employee from being granted a pay increment.*
>
> *22. It is in this context that the parties agreed to the wording of Article 3 of Appendix A-2 in the collective agreement signed on March 1, 2011. The intent of the parties was to ensure that the "continuous and non-continuous services" of a term appointee would count towards the pay increment.*
>
> …

[35] In other words, a person who previously had 52 continuous weeks in the same position was entitled to an increase, whether they were appointed for a term or indeterminately. The change introduced by the new article 3 of Appendix A-2 of the collective agreement allows persons appointed to terms to accumulate discontinuous periods.

[36] Article 2 of Appendix A-2 specifies that for people appointed to terms, the increment period is 52 weeks, as before. However, article 3 modifies the calculation in the appendix in that it can now include discontinuous employment periods.

[37] The calculation for an indeterminate employee is based on their appointment date to the position. For people appointed to terms, it is necessary to accumulate 52 weeks.

[38] Consider the effect of Appendix A-2 of the collective agreement: every year (52 weeks), an employee who works continuously is entitled to a step increment.

[39] For people who work discontinuous contracts, the inequity is that a person could have worked five years in the same position, without ever having had a step increment, if the period was not continuous.

[40] It is precisely that inequity that article 3 of Appendix A-2 of the collective agreement seeks to correct; from now on, after 52 weeks in the same position, even if discontinuous, the employee is entitled to a step increment.

[41] Nothing in the article indicates the calculation starting point for the 52 weeks. The only starting point is for indeterminate employees and is the appointment date,

which is also the starting point that applied to all employees in the previous collective agreement.

[42] There is no indication that the start of the calculation has changed. In other words, the appointment date continues to be the starting point. Had the parties wanted to specify a different start date, they would have done so.

[43] The employer relied on the Treasury Board Secretariat's bulletin to support its position that the calculation should begin on March 1, 2011. With respect, this interpretation is by one of the two parties to the collective agreement. It is not part of the collective agreement and does not have the other signatory's approval.

[44] The parties referred to decisions on the principles of interpretation and retroactivity. I have chosen those that seemed the most relevant to me.

[45] In *Bunka v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2002 PSSRB 15 (judicial review application denied in *Bunka v. Canada (Attorney General)*, 2003 FCT 807), the adjudicator held that a new method of remuneration for acting positions did not apply before the collective agreement's in-force date.

[46] In *Brault v. Canada Revenue Agency*, 2007 PSLRB 108, Mr. Brault paid his membership dues to his professional association two days before a new collective agreement came into force that provided for reimbursing professional dues. The employer refused to refund them. The adjudicator agreed. The collective agreement did not have retroactive effect.

[47] In this case, the parties agree that the compensation change began on the date on which the collective agreement was signed. At issue is the service calculation.

[48] The employer's argument that retroactivity must be clearly indicated (for example, in pay scales before March 1, 2011) comes up against all the provisions of the collective agreement's Appendix A-2 that pertain to the PM group, from a historical perspective.

[49] The change is not cumulative service; it is adding discontinuous service, for calculation purposes.

[50] In their arguments, the grievors rely in particular on the principle of seniority, which is a fundamental principle in labour law.

[51] I truly do not see its application to this case. The question is whether the new collective agreement clause applied to cumulative service before its in-force date. The question is not of seniority but rather of a step increase after 52 weeks of service.

[52] Seniority cannot be applied as a principle in this case because before March 1, 2011, for term employees, cumulative discontinuous employment periods were not recognized. There is no doubt that the grievors accumulated at least 52 weeks before March 1, 2011; however, previous collective agreements did not recognize those 52 discontinuous weeks.

[53] That makes it possible to distinguish two decisions that the grievors cited. In *BCGEU v. Prt Growing Services Ltd. (Johnson)* (2019), 2019 CarswellBC 3652, 142 C.L.A.S. 56 (BC Arb.), the parties to the collective agreement had agreed to new figures to accumulate the work hours that would qualify for a classification increase. The question was whether the hours worked before the new collective agreement was ratified would be counted in a new calculation formula. The employer argued that the count of hours should be restarted at zero from the collective agreement's in-force date.

[54] The new calculation led to two important changes: the number of hours required to achieve the next classification, and the fact that as of then, hours did not have to be worked in the same calendar year. The collective agreement included a clause stating that the changes would come into force on ratification. The arbitrator held that that did not mean that the calculation of hours restarted from zero. Nothing in the text indicated that hours already worked should not count.

[55] Unlike in the present case, the nature of the hours did not change. In this case, what are now counted have never been counted: discontinuous periods. What is counted cannot be changed retroactively.

[56] In *Ottawa-Carleton (Regional Municipality) v. CUPE, Local 503*, 1990 CarswellOnt 4230, [1990] O.L.A.A. No. 145 (QL), the employer challenged the arbitration board's jurisdiction to decide grievances that dealt with accumulating vacation leave during

parental leave. The leave was accumulated before the collective agreement came into force that gave that board jurisdiction.

[57] In that case, there was continuity in the accumulation of leave; there had been no change to the collective agreement's text. The question was narrowly concerned with the arbitration board's jurisdiction. It found that it had jurisdiction to decide the complainants' accumulated leave, since the entitlement to leave was based on the entire duration of employment.

[58] In this case, the service accumulation for step-increment purposes was modified. As of March 1, 2011, all periods counted for employees appointed to terms.

[59] So, the question is, when should the 52 weeks of service be counted from: before March 1, 2011, or as of March 1, 2011?

[60] The cumulative-service calculation gives employees appointed to terms a new entitlement in that now, all employment periods count.

[61] The grievors requested that the employer consider discontinuous periods before March 1, 2011. I agree with the employer that the new provision cannot have retroactive effect, which would count discontinuous periods that before March 1, 2011, were not counted for the step increment, unless the employment period exceeded 52 weeks.

[62] However, I do not think that the new calculation starting point is March 1, 2011. The fact is that the collective agreement is silent as to the start of the cumulation of hours. The step increment with 52 weeks of cumulative service took effect on March 1, 2011. However, service from the appointment date for the grievors began before March 1, 2011. Rather, the appropriate date is the appointment date. That was recognized for Ms. Costamis who, on December 20, 2010, started a period of continuous employment. That is the date on which the employer acknowledged that the 52-week calculation was to begin.

[63] Mr. Béland Falardeau and Ms. Vingerhoeds-Carbino were appointed to PM-02 positions on November 17, 2010, and December 20, 2010, respectively, and were in those positions when the collective agreement came into force. Given the amendment that all employment periods, regardless of length, are counted, it seems logical to me to start the 52-week count on the appointment date. That is consistent with what was

in place and was not expressly deleted in the collective agreement, which is that the calculation begins on the appointment date. Prior periods are not counted because the collective agreement does not apply to them.

[64] Therefore, the dates that serve as the starting points for cumulative weeks of service, continuous or discontinuous, are the appointment dates of the grievors that preceded the collective agreement coming into force.

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

(The Order appears on the next page)

V. Order

[66] The grievances are allowed in part.

[67] The date on which the cumulative service for the step increment begins is the appointment date before the collective agreement came into force.

May 15, 2024.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board