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File: 566-34-49740

Citation: 2024 FPSLREB 149

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

CATHY HAMON

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Hamon v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Herself

For the Employer: Anne Levesque, Canada Revenue Agency

Decided on the basis of written submissions, filed May 30, June 27, July 9, and August 15 and 16, 2024.

I. Overview

[1] Cathy Hamon is an executive working for the Canada Revenue Agency (CRA). She was on medical leave from June 6 to September 30, 2022. She earned performance pay for the 2022-2023 performance cycle year; however, the CRA prorated her performance pay by paying her performance pay for only 8 of the 12 months for that year because of her absence for medical reasons. This was consistent with the CRA's policies about executive performance pay. Ms. Hamon asked that the CRA waive that rule in her case and that it pay her the full performance pay for 2022-2023. It refused. Ms. Hamon grieved that refusal, and the CRA denied that grievance. Ms. Hamon referred this grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which applies to disciplinary actions that result in a termination, demotion, suspension, or financial penalty.

[2] The CRA objects to this grievance being referred to the Board because its decision was not disciplinary and did not result in a financial penalty.

[3] I have concluded that the grievance is not related to disciplinary action and the Board has no jurisdiction to hear it. My reasons follow.

II. Facts giving rise to the grievance

[4] The facts of this dispute are not much more complicated than what was set out in the overview.

[5] The CRA has a policy governing performance management for executives called the *Procedures for Performance Management of the Executive (EX) Group*. The policy provides that executives' performance is assessed annually. Executives are given one of six performance ratings, ranging between level 0 and level 5. Executives who receive a performance assessment of at least level 2 are eligible to receive a lump sum performance award.

[6] The policy also provides that lump sum awards are prorated when an executive is on leave (as in this case) or appointed partway through the performance year. The prorating for executives who take leave reads as follows:

…

3. Prorating of lump sum performance awards

> *Performance assessments, performance ratings, and the performance awards should reflect achievements while performing the duties of the position.*
>
> *Executives who spent one month or more of the performance cycle on leave, with the exception of vacation leave, will have their lump sum performance award prorated.*
>
> *Prorating will be applied on a monthly basis. In the case of a partial month, a month will be calculated as a period of 11 working days or more (not applicable for the 3-month eligibility requirement). In certain situations, prorating can be calculated based on the proportion of the number of hours or days worked. Refer to section 6.3 Executives on Pre-Retirement Transition Leave (PRTL), working part-time or on other part-time arrangements.*
>
> …

[7] The provision about executives on pre-retirement transition leave or working part-time is not relevant to this grievance; however, lump sum performance awards are prorated for those employees too, for their hours of work instead of number of months worked.

[8] Ms. Hamon is an executive with the CRA with roughly 34 years of service. She was on medical leave from June 6 to September 30, 2022. At the end of the 2022-2023 performance year, her performance was assessed at level 3 ("Succeeded"). She was paid a lump sum performance award as a result. Her lump sum performance award was prorated because of her 4 months of medical leave, so that she received only 8/12ths of the lump sum performance award for that performance level. The reduction amounts to $4995.00.

[9] Ms. Hamon grieved the decision to prorate her lump sum performance award. In her grievance, she does not contest the CRA's interpretation of the policy but, instead, states that it should have granted her an exemption from the prorating rule. Her grievance states:

> …
>
> *This policy is inconsistent in its application as being away for the same time period of time on paid vacation leave does not attract the reduction in my performance award; outdated and punitive as it directly contradicts CRA's promotion of health and wellness as if you take your earned sick leave entitlement you are penalized financially for doing so; unfair as it treats people who take the same amount of sick leave in a year differently (i.e. if I take smaller amounts of leave throughout the year that add up to the same amount of time I would be entitled to the full performance award); and without a consistent point of logic as in either case*

> *vacation or sick leave for the same consecutive number of days you are not at the workplace contributing but vacation leave is treated differently. In addition, I was not advised by my supervisor of any pay consequences of using an earned paid leave entitlement so this came as a complete surprise.*
>
> *This was the first time that I have ever had to use my sick leave for an extended period like this and it was necessary due to extreme workplace stress. It is unfair to inflict a financial penalty for this absence.*
>
> …

[10] At the first level of the grievance process, the CRA agreed to review its prorating policy. The CRA says that this means that it allowed the grievance in part, while Ms. Hamon says that she did not ask for that review and that she wanted only to be paid the $4995.00, so her grievance was denied. Regardless, the CRA went on to deny the grievance at the remaining levels of the grievance process, and Ms. Hamon referred her grievance to adjudication with the Board.

[11] In her submissions in this preliminary objection, Ms. Hamon stated that this grievance is part of a larger dispute with the CRA. She says that she made a complaint against her management on December 31, 2020, which took over three years to resolve. She says that she was labelled a troublemaker for doing so and that the CRA downgraded her in its talent assessment from being ready to promote to the EX-02 level. As mentioned in her grievance, Ms. Hamon says that she went on medical leave to recover from the CRA's actions. Finally, Ms. Hamon also mentions other grievances she has filed and complains that her complaints and grievances were decided only internally within the CRA, which amounts to "self-policing" and "several forms of bias."

III. The Board has no jurisdiction over this grievance

[12] Ms. Hamon has attempted to refer her grievance to adjudication under s. 209(1)(b) of the *Act*. That paragraph permits the Board to hear a grievance if it is related to "… a disciplinary action resulting in termination, demotion, suspension or financial penalty …". This means that Ms. Hamon must demonstrate two things: that the CRA's decision that she is grieving was disciplinary and that it resulted in a financial penalty.

[13] In deciding whether the Board has jurisdiction over this grievance, I adopted an arguable case approach. As I explained to the parties when asking for additional written submissions, the arguable case approach requires the Board to treat the facts

Ms. Hamon alleges as true so long as those facts have an air of reality, are not based solely on possible future supporting evidence, and are more than mere arguments, speculation, or rhetorical questions; see *Kemp v. Public Service Alliance of Canada*, 2024 FPSLREB 87 at para. 54. None of the facts alleged by Ms. Hamon fall into those exceptions, so I have treated them as if they were true and not required her to prove them.

[14] In both her grievance and submissions to the Board, Ms. Hamon states that the CRA's prorating policy is discriminatory on the basis of disability. The Board has no jurisdiction to hear that argument because the Board has no jurisdiction to hear a grievance solely about an alleged violation of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6); see *Chamberlain v. Canada (Attorney General)*, 2015 FC 50 at paras. 39 to 41, and *Caron v. Canadian Nuclear Safety Commission*, 2021 FPSLREB 74 at para. 85 (upheld in 2022 FCA 196).

[15] If the Board had jurisdiction to hear that issue, it would have had to consider *Association of Justice Counsel v. Treasury Board*, 2012 PSLRB 32. For context, courts and tribunals distinguish between compensatory and non-compensatory employment benefits. Compensatory benefits (such as salary) are paid only to employees who perform work; non-compensatory benefits (such as service accrual) are provided to employees regardless of whether they work. Courts and tribunals have concluded that it violates human rights law to deprive employees on leave protected by human rights law (such as medical leave) of non-compensatory benefits, but it is not discriminatory to refuse to pay compensatory benefits to employees on leave. In *Association of Justice Counsel*, a Board predecessor concluded at paragraph 55 that performance pay is a compensatory benefit, and therefore, it was not discriminatory to prorate performance pay for employees on maternity or parental leave. If the Board had jurisdiction to decide Ms. Hamon's claim of discrimination, she would have to convince it that it should not follow the decision in *Association of Justice Counsel* that performance pay is a compensatory benefit, that medical leave should be treated differently from maternity or parental leave, or that *Association of Justice Counsel* can be distinguished in some other way. Ms. Hamon appears to be making the first or third argument by stating that because vacation is treated one way, it shows that performance pay is a non-compensatory benefit, and medical leave must be treated the same way as vacation leave.

[16] But as I have said that argument is not the issue before me. The sole issue before me is whether the CRA's decision was disciplinary and, if so, whether the prorating of performance pay was a financial penalty.

[17] A disciplinary decision is one made to correct misconduct. Whether an action is disciplinary depends upon a myriad of considerations, including (1) the nature of the employee's conduct that gave rise to the action taken by the employer (typically, whether the employee's conduct was voluntary), (2) the nature of the action taken, (3) the employer's stated intent or the employer's actual intent (if different from what is stated), and (4) the impact of the action on the employee; see *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027 at para. 56, *Caron v. Canada (Attorney General)*, 2022 FCA 196 at para. 52, and *Singh v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSLREB 4 at para. 30. These considerations can be boiled down to two questions: (1) what is the purpose, and (2) what is the effect of the employer's actions; see Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at 7:56.

[18] An assessment of those four factors discloses that there is no arguable case that the CRA's decision to prorate Ms. Hamon's performance pay was disciplinary.

[19] First, Ms. Hamon's conduct giving rise to prorating her performance pay was going on medical leave. This is involuntary conduct, as Ms. Hamon did not choose to become ill.

[20] Second, the action taken by the CRA was to follow its existing policy on prorating performance pay. Ms. Hamon does not deny that the CRA followed its policy. The CRA also states that it has never exempted employees on medical leave from this policy. Ms. Hamon does not deny that; she states only that she should be exempted nonetheless. Finally, the policy itself is not discretionary. The policy states that "[e]xecutives who spent one month or more of the performance cycle on leave, with the exception of vacation leave, **will** have their lump sum performance award prorated" [emphasis added]. Ms. Hamon is asking the CRA to exercise discretion where it has none. The CRA's refusal to do something it has never done before and is not permitted to do was not done to correct some alleged misconduct by Ms. Hamon.

[21] Third, Ms. Hamon never argues that the CRA's intention in making this decision was to punish her. She says that its decision was "without merit" but not that it was designed to punish. At best, Ms. Hamon argues that the CRA is punishing her for being

a troublemaker. However, when read carefully, her submissions are that **other** actions by the CRA (such as limiting her upward mobility, delaying processing her earlier complaint, and giving her substandard performance ratings in earlier years) were designed to punish her. When it comes to the prorating decision, Ms. Hamon says that it is discriminatory — not that it was intended to punish her.

[22] Fourth, the impact on Ms. Hamon is that she did not receive part of her performance award for 2022-2023. This financial impact is not trivial; however, a financial impact alone is not sufficient to show that the decision was disciplinary. This factor does not outweigh the other three.

[23] I have concluded that there is no arguable case that the CRA's decision was disciplinary. It was simply following its existing policy. Ms. Hamon wanted it to waive that policy or grant her an exemption to it. The CRA had never done so before, and the policy is not discretionary. Its decision to follow existing policy and treat Ms. Hamon the same as every other employee was not intended to, nor did it have the effect of, punishing her for real or imagined misconduct.

[24] When inviting the parties to make additional written submissions, I drew their attention to *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64, and *Charest v. Deputy Head (Department of Public Works and Government Services)*, 2017 FPSLREB 18, and invited them to make submissions about those cases, which were about whether the denial of performance pay was disciplinary and a financial penalty. In *McMullen* it was, and in *Charest* it was not.

[25] Ms. Hamon did not make any submissions about those cases.

[26] In addressing *McMullen*, the CRA argued that Ms. Hamon cannot claim that its decision was disciplinary because she did not make that argument during the grievance process. Ms. Hamon says that she did. I will not address that issue further, because the CRA made that jurisdictional objection for the first time on August 15, 2024, and, while Ms. Hamon refuted it the next day, I do not have enough information before me about the nature of the arguments at the different grievance levels to decide it.

[27] The CRA also argued that I should follow the result in *Charest*, in which the Board concluded that the denial of performance pay was non-disciplinary and not a financial penalty.

[28] I asked the parties to address *McMullen* and *Charest* because they say different things about whether the denial of performance pay is a financial penalty — *McMullen* says that it is (at paragraphs 124 and 125), and *Charest* says that it is not (at paragraph 73). However, because I concluded that the CRA's decision was not disciplinary, I do not need to decide whether the denial of a performance award is a financial penalty.

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

(The Order appears on the next page)

IV. Order

[30] The CRA's preliminary objection is allowed, and the grievance is denied.

October 25, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board