Date: 20010518

File: 166-2-29706

Citation: 2001 PSSRB 51

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JAMES WAYNE GREGORY

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Guy Giguère, Deputy Chairperson

For the Grievor: Philip G. Hunt and Alison Dewar, Counsel

For the Employer: Carole Bidal, Counsel

Heard at Ottawa, Ontario,
December 4 and 5, 2000.

DECISION

[1] James Wayne Gregory is a Civil Aviation Inspector in the Air Navigation Services and Airspace Branch at Transport Canada. On December 24, 1999, he grieved that the "Letter of Agreement (99-4) – Recruitment and Retention Allowance" for the Aircraft Operations Group (AOG) provides for a different allowance for two groups (A & B) of employees performing similar work at the same classification level. By way of remedy, Mr. Gregory is requesting that the "retention and recruitment allowance be equalized at the higher level of $4,200", which is the allowance for Group A.

[2] The employer denied this grievance at the final level of the grievance procedure. The "Recruitment and Retention Allowance" (Allowance) was negotiated by the employer and the bargaining agent, the Aircraft Operations Group Association (AOGA). The Allowance forms part of the collective agreement, which was ratified by an overwhelming majority of employees in the bargaining unit. As Mr. Gregory falls within Group B, he is entitled to an allowance of $1,800. The employer contends that to do anything but administer the collective agreement as written would be in violation of the collective agreement.

[3] On May 8, 2000, Wayne C. Foy, then National Chairman of the AOGA, wrote to the Board indicating that a total of 146 grievances were of the same nature and would be held in abeyance pending the outcome of Mr. Gregory's grievance.

[4] On November 20, 2000, Mrs. Bidal submitted that the grievance should be dismissed for want of jurisdiction. According to Mrs. Bidal, the grievance does not concern a dispute relating to the interpretation or application of the collective agreement as required by section 91 or 92 of the *Public Service Staff Relations Act* (*PSSRA).* Mrs. Bidal submitted that Mr. Gregory is requesting that an adjudicator amend the collective agreement to provide him with a higher allowance, which he is not entitled to under the collective agreement. Such a result is prohibited under subsection 96.(2) of the *PSSRA*.

[5] Mr. Hunt replied on November 30, 2000 and submitted that the grievance falls squarely within the ambit of section 91 of the *PSSRA* as it concerns the arbitrary and discriminatory application of the collective agreement. Mr. Hunt also submitted that the Board has jurisdiction to hear the evidence and grant a remedy that does not violate subsection 96.(2) of the *PSSRA*.

Evidence

[6] Greg Holbrook, the current Chairman of the AOGA, explained that he was a member of the bargaining team prior to being elected Chairman of the AOGA. Negotiations started in September 1998 and the collective agreement was signed on December 6, 1999. The AOG had been without a negotiated contract throughout the 1990's and the members of the AOG had received only one slight increase by the Treasury Board during that period.

[7] Mr. Holbrook testified as to how difficult negotiations were with the employer with respect to the "Recruitment and Retention Allowance". Initially, the employer was proposing a three-tier structure for a "Recruitment and Retention Allowance" where Group A would receive a certain amount, Group B a lesser amount and Group C would receive nothing. The AOGA negotiating team voiced their opposition to this proposition, as their position was that there should be an equal allowance for all employees. Later, negotiations broke down and a conciliation board was appointed. After the report of the conciliation board was filed, the bargaining agent elected to exercise its right to strike by targeted work stoppages and slowdowns across the country. Mr. Holbrook explained that it was not typical of the AOG to go on strike, even if it had occurred before.

[8] After three weeks of strike action, the employer asked that the AOGA negotiating team return to the bargaining table. By then, the employer had come back with a two-group allowance structure and it became obvious that the employer would not budge from this position. A rational for this arbitrary allocation of the Allowance was requested but never provided by the employer. Recruitment and retention was not unique to Group A and was also experienced by Group B. The AOGA's negotiating team informed the membership that they could not solve the issue of the split allowance and that they believed that if they went on strike they would face back-to-work legislation. Mr. Holbrook testified that they were the last bargaining table restricted by legislation to a maximum increase of 2.5% and 2%, and that the Allowance was a way of putting more money on the table without running against legislation. Mr. Holbrook also explained that there were other increments (signing bonus, extra duty allowances, adjustment of pay scale) in this agreement that made it the best package available for the AOG. The AOGA's negotiating team felt they could not achieve a better deal. Mr. Holbrook also declared that it became known by the membership that it was Transport Canada that was insisting on having a split allowance.

[9] Mr. Holbrook, in cross-examination, added that "it was an optimum deal given the context; yes, we decided to take it back to membership and they ratified it".

[10] Mr. Gregory explained that he is a member of Group B and testified that the Allowance did not solve the problem that it was supposed to resolve. He explained that all the employees in Group A and Group B are civil aviation inspectors. The difference in what they do is that employees in Group A are mainly involved in commercial aviation and those in Group B are developing procedures, criteria for procedures, licensing, etc. The Letter of Agreement (99-4) defines Group A and Group B as:

…

> *(a) Group A, which comprises:*
>
> *(i) Employees in the Engineering Test Pilot Subgroup*
>
> *(ii) Employees in the Civil Aviation Inspector Subgroup who are incumbents of CAI positions in:*
>
> *Commercial and Business Aviation at Transport Canada*
>
> *Maintenance and Manufacturing at Transport Canada*
>
> *The Transportation Safety Board, employed as Senior Investigators, Team Leaders and Managers*
>
> *(b) Group B, which comprises all other employees in the Aircraft Operations Group who are incumbents of positions in the bargaining unit.*

[11] The problem of retention with the civil aviation inspectors in Commercial and Business Aviation (Group A) was that they have valuable experience for commercial operators. They are experienced on 737's and any of the large class of airplanes and can be hired to fly these airplanes without having to be trained. Therefore, they were being offered substantial sums of money to leave the Department and some employees did leave to go to the private sector. However, there is a problem in Group B in terms of recruitment and there also has been a turnover of people in the Department going from Group B into Group A. These problems have not been resolved by the Allowance. Mr. Gregory explained that he filed a grievance and several of his colleagues filed similar grievances because, as employees in Group B, they are dedicated to safety in flying and their functions might be different but they are as important as

those of employees in Group A. It is not as much a money issue as a question of principle where employees in Group B are made to feel like second class citizens.

[12] In cross-examination, Mr. Gregory declared that all the membership had access to the Letter of Agreement with details of the Allowance before the ratification and the membership voted to ratify the agreement. The membership feared that if they did not accept the package, any gains would be lost. Therefore, they voted for the agreement believing that the issues could be resolved later.

[13] Mr. Gregory also testified that two weeks after the collective agreement was signed, he learned that all excluded managers would be receiving the Allowance for Group A. Exhibits G-5 and G-6 were introduced as evidence to establish this. Mr. Gregory explained that this event made employees of Group B feel even more dissatisfied with the Allowance.

[14] Ronald Anthony Carter, a management exclusion at the CAI-5 level, testified under subpoena for the grievor. As a manager of employees in Group B, he has nevertheless received the higher allowance, which, according to the Letter of Agreement (99-4), is for employees in Group A. Mr. Carter found this objectionable as he was receiving a higher allowance denied to the employees he was supervising. Mr. Carter tried to find a way to not receive the higher allowance. He has tried to seek resolution with management and discussed the matter with the Director General of Civil Aviation, Art LaFlamme. He explained to Mr. LaFlamme how divisive it was in his group that he was receiving the higher allowance and this compounded the existing problem of having two separate allowances for the two groups. Mr. LaFlamme responded that it was impossible to change. He consulted the staff in the Pay and Benefits Division but was told that it was not possible, that the only way would be for him to increase the amount given to charity.

Arguments

For the Grievor

[15] Mr. Hunt submitted at the hearing and through correspondence sent to the Board on November 30, 2000 that ”the real issue in the grievance is whether the Letter of Understanding is void given that its application creates two arbitrary categories of employees and uses these categories to discriminate against one group by paying them less than the other, for the performance of work of equal value”. Evidence was presented that employees in Group B were

made to feel like second class citizens but both groups contribute meaningfully and equally and have the same qualifications and perform work of equal value. Mr. Gregory testified there was no justification on the issue of having a different allowance for Group A and Group B, as both groups have problems with retention and recruitment. No rationale for the arbitrary allowance between Group A and Group B was offered by the employer, which contributed to a lower morale and unhealthy labour relations.

[16] Mr. Carter testified that excluded managers in Group B were getting the higher allowance of Group A. This fact was never disclosed at the bargaining table. The effect of this decision by the employer has been to further aggravate the labour relations and morale problems and to underscore the fact that there is no justifiable rationale for the differentiation of employees into Group A and Group B.

[17] Mr. Hunt submitted that the Letter of Agreement (99-4) effectively creates an ad hoc and arbitrary reclassification of a large number of employees in the Civil Aviation Inspection Group, the effect of which is that employees in Group A are being paid more than employees at the same classification and level in Group B. This arbitrary reclassification in the Letter of Agreement (99-4) violates Article 23 of the Universal Declaration of Human Rights (Declaration), to which Canada is a signatory, which states that "everyone, without discrimination, has the right to equal pay for equal work".

[18] Mr. Hunt concluded by stating that Mr. Gregory comes before the Board because there is no other avenue and "where there is a wrong, there is a remedy". Mr. Hunt submitted that the grievance is proper and valid under section 91 of the *PSSRA* and the Board has the jurisdiction to hear the evidence and grant a remedy that does not violate subsection 96.(2) of the *PSSRA*.

For the Employer

[19] Mrs. Bidal, at the hearing and through correspondence to the Board dated November 20, 2000, submitted that Mr. Gregory's grievance should be dismissed for want of jurisdiction. Mrs. Bidal explained that this grievance does not concern a legitimate dispute relating to the interpretation or application of the collective agreement as required by section 91 or 92 of the *PSSRA*. In fact, the grievor is not disputing the application of the collective agreement but the existence of the Letter of Agreement (99-4).

[20] Mrs. Bidal also submitted that it is clear that the grievor is requesting that an adjudicator amend this provision of the collective agreement to accord him a benefit to which he is not entitled. Such a result is prohibited under subsection 96.(2) of the *PSSRA*. The Allowance, with its two levels, was negotiated in good faith by the Treasury Board and the AOGA. Mrs. Bidal acknowledged that there was some unhappiness with the proposal, but the negotiation team decided to present the proposal to the membership. The members decided to ratify it and it was signed making it a valid collective agreement. The employer followed through and paid the employees. It is the employer's submission that the collective agreement has been properly applied.

[21] In view of subsection 96.(2) of the *PSRRA*, it is important to note that there is a mechanism in the collective agreement (Article 39.01) to amend if the parties so choose to. The rationale or lack thereof for the different allowance in the Letter of Agreement (99-4) is irrelevant. By its nature, the collective agreement is an instrument of compromise between the parties and it is accepted or rejected through a democratic process by which the majority rules.

[22] As for the grievor's submission that the different allowance contravenes the Declaration, Mrs. Bidal submitted that the Federal Court of Appeal in *Canada (Attorney General) vs. Boutilier* (C.A.) [2000] 3F.C. 27 (Q.L.) ruled that this Board is not the proper forum to raise human rights grievances. Under subsection 91.(1) of the *PSSRA*, the Board is without jurisdiction as another recourse exists to raise issues dealing with human rights found in the Declaration and that is the Canadian Human Rights Commission (CHRC).

[23] Mrs. Bidal concluded by saying that there is a remedy for the grievor's expressed discontent with the negotiated agreement. A proper avenue to raise such a matter is through the collective bargaining process.

Reasons for Decision

[24] In essence, the grievor's submission is that the "Recruitment and Retention Allowance" in the Letter of Agreement (99-4) is unfair as he does work of equal value as employees receiving the higher Allowance. As a remedy, the grievor is asking that the Allowance be equalized at the higher level, which is $4,200. The employer disputes that this grievance concerns the application of the Letter of Agreement (99-4) and therefore under sections 91 and 92 of the *PSSRA* this grievance is not adjudicable. Also, the remedy requested by the grievor would require the amendment of the collective agreement, which is prohibited under subsection 96.(2) of the *PSSRA*.

[25] The right to refer a grievance to adjudication is founded in section 92 of the *PSSRA* and in the instant case particularly paragraph 92.(1)(a), which states:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> …
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

[26] Mr. Gregory testified that he is an employee that falls into Group B and as such has received the Allowance of $1,800 as provided in the Letter of Agreement (99-4). Accordingly, he is not arbitrarily denied the Allowance of Group B or discriminated against within Group B. Thus, there is no argument that the collective agreement is being incorrectly applied in this matter. The problem, as Mr. Hunt explained, is that the application of the Letter of Agreement (99-4) creates two arbitrary categories of employees and discriminates against one group by paying it less for work of equal value.

[27] Mr. Hunt argued that the different allowance for Group A and Group B is contrary to Article 23(2) of the Declaration. Article 23(2) states that everyone without discrimination (emphasis added) has the right to equal pay for equal work. Article 2 of the Declaration is helpful to understand the scope of Article 23(2) as it defines what is meant by discrimination. Article 2 reads as follows:

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

[28] It is well-settled law that international treaties and conventions are not part of the Canadian legal system until they are incorporated into Canadian law by way of implementing legislation (see *Capital Cities Communications Inc. v Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 *and Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). The Declaration has been incorporated into the Canadian legal system by the adoption of the Canadian Charter of Rights and Freedoms and several statutes such as the *Canadian Human Rights Act (CHRA*).

[29] In *Boutilier* (supra), Linden J.A. of the Federal Court of Appeal confirmed the decision of Madam Justice McGillis of the Federal Court that primary jurisdiction in human rights matters resides with the CHRC. In his decision, Linden J.A. quoted, at paragraph 17, this part of Madam Justice McGillis' decision, which is very relevant to the instant case:

> *… Accordingly, where the substance of a purported grievance involves a complaint of a discriminatory practice in the context of the interpretation of a collective agreement, the provisions of the Canadian Human Rights Act apply and govern the procedure to be followed. …*

[30] Therefore, the CHRC is the proper forum to raise the argument that the Allowance discriminates against employees of Group B. I find that by virtue of subsection 91.(1) of the *PSSRA*, I do not have jurisdiction to hear this argument.

[31] The principal argument made by Mr. Hunt and supported by the evidence is that the separating of employees into two groups to receive the Allowance has resulted in considerable disruptions of labour relations in the workplace.

[32] I have carefully reviewed the testimony of the grievor and his witness, as well as the arguments put forth by Mr. Hunt. I am convinced by the evidence put forth by the grievor that there is considerable unhappiness within the AOG with the "Retention and Recruitment Allowance". The evidence presented to me is uncontradicted that the Allowance has resulted in a lowered labour relations morale. However, separating the employees into two groups and allocating a different allowance for each group is what the AOGA and the Treasury Board

negotiated. The employer had initially proposed three groups, with Group C receiving no allowance. During the negotiating process, the employer changed this proposal to a two-group allowance. The AOGA negotiating team was unsuccessful in getting the employer to agree to an equal allowance for all employees. Thus, the Allowance was presented to the membership as part of the "best deal" that could be negotiated and the membership ratified it. Messrs. Holbrook and Gregory themselves testified to this. For these reasons, I find that the provision is not being applied in an arbitrary or discriminatory manner. Rather, it is being applied by the employer precisely in accordance with the agreement of the parties. What in effect the grievor is asking me to do is to amend the collective agreement and this I cannot do by virtue of subsection 96.(2) of the *PSSRA*.

[33] Subsection 96.(2) of the *PSSRA* clearly states as follows:

> *(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.*

[34] As the preamble in the Letter of Agreement (99-4) indicates, to resolve recruitment and retention problems, the employer provides an allowance for the recruitment and retention of employees in Group A and Group B. The parties have negotiated and agreed to the different allowance for both groups and this was ratified by the membership. Mr. Gregory is in Group B and he has testified that he, accordingly, receives the Allowance for Group B. This Allowance has disrupted labour relations in the workplace but I cannot intervene and amend the collective agreement. For all these reasons, the grievance is dismissed.

[35] Mr. Hunt submitted that there should be a remedy for the problem experienced by the grievor and his colleagues. There is a remedy and it lies at the bargaining table. I sincerely hope that this issue can be resolved through that process.

Guy Giguère,
Deputy Chairperson

OTTAWA, May 18, 2001.