File: 166-2-26686

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

HENRY ROWAN RAPHAEL

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Louis M. Tenace, Vice-Chairperson

For the Grievor: Peter J. Barnacle, Counsel, Canadian Air Traffic Control Association

For the Employer: Robert E. Smart

Heard at Edmonton, Alberta,
December 13, 1995

DECISION

At the commencement of the hearing, representatives of the parties submitted the following Agreed Statement of Facts:

1. *The grievor is presently an AI-05 operational controller at Edmonton Area Control Centre.*

2. *The grievor voluntarily resigned from an AI-05 operational position at Edmonton ACC on January 5, 1993 after 24 years service. (Exhibit - para 2)*

3. *In August, 1993, the grievor applied for rehire as an controller and, on September 15, 1993, he was rehired as an IFR Controller in Training at the minimum level AI-03. (Exhibit - para 3)*

4. *The grievor successfully completed his checkout and was appointed to an AI-05 position, at the minimum increment as of September 24, 1993. (Exhibit - para 4)*

5. *In October, 1993, the grievor requested pay and compensation at the maximum level, AI-05. This request was denied.*

6. *By letter dated March 30, 1994, the grievor requested the intervention of the Regional Director General, Aviation in obtaining recognition of his previous status as an air traffic controller. (Exhibit - para 6)*

7. *The grievor wrote a follow-up letter on July 19, 1994 again requesting assistance in remedying the situation. (Exhibit - para 7)*

8. *By letter dated August 15, 1994, the RDG, Aviation rejected the grievor's request and advised that his previous experience had been recognized in his being provided an adjusted grade during training. (Exhibit - para 8)*

9. *The grievor asked the RDG, Aviation to reconsider, given the grievor's assumption at the time of hire that he would assume his previous AI-05 level on requalification. (Exhibit - para 9)*

10. *The grievor also advised the Association, by letter dated September 5, 1994, of the issue and his attempts to resolve. (Exhibit - para 10)*

11. *By letter dated October 31, 1994, the RDG, Aviation responded to the further appeal of the grievor, dated September 5, 1994. The grievor was advised that*

management had the discretion to appoint above minimum level only on initial appointment. (Exhibit - para 11)

12. *The grievance is dated December 4, 1994, and replies are dated December 15, 1994 (First Level), January 10, 1995 (Second Level) and June 26, 1995 (Final Level). (Exhibits - para 12)*

13. *The parties reserve the right to call other evidence at the hearing of this matter.*

Prior to the date of the hearing, Mr. Robert E. Smart, the representative of the employer, had faxed to the Board, on December 4, 1995, a letter wherein he requested that the grievance be dismissed on the ground that it is not a grievance that may be referred to adjudication pursuant to section 92 of the Public Service Staff Relations Act. He noted that neither the grievance nor the reference to adjudication contained any reference to an alleged violation of any provision of the applicable collective agreement. Moreover, the grievor was contesting his salary on initial appointment to the AI-05 level following his re-appointment to the public service. Mr. Smart submitted that appointments to positions within the public service are vested in the Public Service Commission by virtue of section 38 of the Public Service Employment Act. Based on a previous decision of the Board in Mark et al. (Board files 166-2-21451 to 21455), he requested that the grievance be dismissed for lack of jurisdiction. A copy of this letter was also faxed to Mr. Peter J. Barnacle, counsel for the Canadian Air Traffic Control Association (CATCA).

Mr. Barnacle wrote to the Board on December 5, 1995 and submitted that the grievance and the employer's replies to it make it clear what provisions of the collective agreement are alleged to have been contravened. He submitted that the employer's failure to place the grievor at the maximum increment level of his classification (AI-05), on completion of his training, was a violation of the implied duty of fairness and reasonableness in application of Article 14 and Appendix "A" of the collective agreement. Mr. Barnacle submitted further that this case is distinguishable from Mark et al. (supra) since the grievor is grieving his subsequent placement on the AI-05 salary grid on requalification and not his initial appointment.

On a related matter, Mr. Barnacle noted in his letter that the employer, in its replies to the grievance at all levels had raised the issue that the grievance was untimely and that the employer's representative was going to make such an objection at the hearing. Consequently, Mr. Barnacle requested, pursuant to section 63 of the PSSRB Regulations and Rules of Procedure, that the adjudicator appointed to hear this grievance assume the authority of the Board to consider a request with respect to an application for relief against time limits, should a violation of time limits be found on the evidence.

At the commencement of the hearing, the employer's representative requested that the grievance be dismissed without an oral hearing. He submitted that this case was identical to Mark et al. (supra) in virtually every respect. The grievor is contesting an appointment and salary placement which were made pursuant to section 24 of the Public Service Employment Act. He submitted further that clause 14.01 of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Code: 402/91) specifies that the terms and conditions governing the application of pay are not affected by the collective agreement. The provision reads as follows:

> *ARTICLE 14*
>
> *PAY*
>
> *14.01 Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.*

The employer's representative also noted that the issue of timeliness had been mentioned by the employer in all of the replies to the grievance at the various levels. Furthermore, the grievor was now attempting to alter the grievance at adjudication by stating that he is contesting a subsequent appointment to the AI-05 level rather than the initial appointment to the AI-03 level.

On the basis of both preliminary objections, the employer's representative requested that the grievance be dismissed.

Counsel for the grievor submitted that the grievance was not untimely as the grievor had only followed the normal practice in the region of dealing with his

problem as a complaint first. Only after the employer made it clear that he would not be paid at the maximum of his level did the grievance crystallize, whereupon the grievor filed his grievance. In the alternative, counsel for the grievor requested that, if I conclude that the time limits have not been met, I should grant the grievor's request for an extension of the time limits. I indicated that I would deal with the question of timeliness in my ultimate determination, if need be.

One witness testified on behalf of the grievor as well as the grievor himself. One witness testified on behalf of the employer.

SUMMARY OF THE EVIDENCE

The grievor testified that upon being rehired and after qualifying (which he managed in five days), he was appointed to the very position he had held when he retired. No one had been hired to fill the position as his duties were undertaken by other controllers on an overtime basis. He testified that it was only when he received his first pay cheque that he realized he was being paid at the AI-05 minimum level rather than at the maximum. He then began to pursue the matter with local management. Ultimately, on December 4, 1994, he filed a grievance, approximately fourteen months after checking out (qualifying) and being appointed to the AI-05 minimum level.

During cross-examination, the grievor acknowledged that he had resigned voluntarily and he agreed that an employee who resigns to start a different career does so at his own peril.

Richard Snow is the Branch Chairman for CATCA at the Edmonton Control Centre. He testified that it has been the practice in the Edmonton Region since approximately 1992 to attempt to resolve problems/grievances through an informal complaint process before filing a formal grievance. This, according to his testimony, is precisely what occurred in Mr. Raphael's case. The grievor had attempted to resolve his problem informally. Mr. Snow testified that, in his experience, there have never been any time limits during the complaint stage which could last for weeks or months.

Dennis Lukawesky is the Regional Superintendent of Air Traffic Services, Training and Human Resources, a post he has held since 1991. He testified that the grievor first telephoned him and later came in to speak to him about the possibility of being rehired. Mr. Lukawesky explained to the grievor the terms under which he would be hired, including the pay he would receive.

During cross-examination, Mr. Lukawesky agreed that the employer was getting a good deal in rehiring a former employee such as the grievor at a lower rate of pay. However, that was the policy and he simply applied it.

ARGUMENT

The arguments of both parties on the preliminary objections have been covered in sufficient depth earlier and there is no need to repeat them here. Counsel for the grievor also submitted that the issue in this case was really a pay problem and not an appointment problem. His reasoning is as follows: the grievor was initially rehired at the AI-03 level and, upon being checked out, was promoted to the minimum of the AI-05 level; the fact that the employer appointed him at the minimum level rather than at the maximum level was a pay matter within the exclusive authority of the employer. As a pay matter, I as an adjudicator, could assume jurisdiction. In his submission, the Public Service Commission had nothing to do with setting the grievor's salary. It was determined solely by the employer.

Counsel submitted further that, if I decide that it is a pay matter and I have jurisdiction, then I should determine if there is an implied duty on the employer to apply the collective agreement in a reasonable manner (i.e. duty of fairness). Counsel pointed out that this same issue has been before the Board on other occasions and the Board has yet to make a definitive ruling thereon. In the instant case, he submitted that the issue for me to determine is whether the employer applied the pay clause of the collective agreement to the grievor in a fair and reasonable manner. In his view, the employer did not do so.

In support of his submission, counsel for the grievor referred me to the following: Damer (Board File 166-2-25623); Lessard (Board File 166-2-10531); Brampton Hydro Electric Commission v. CAW Canada, Local 1285 (1993), 108 D.L.R. (4th) 168; Council of Printing Industries of Canada and Toronto Printing Pressmen

and Assistants Union No. 10 et al. (1983), 42 O.R. (2d) 404; Metropolitan Toronto Board of Commissioners of Police and Metropolitan Police Association et al. (1981), 124 D.L.R. (3d) 684; Wardair Canada Inc. V. Canadian Air Line Flight Attendants Association (1988), 63 O.R. (2d) 471; and Metropolitain Toronto (Municipality) v. C.U.P.E. (1990), 74 O.R. (2d) 239.

The employer's representative submitted that the case had nothing to do with reasonableness or fairness. The grievor's appointment to AI-05 was a promotion and the employer applied the existing rules. This was not an initial appointment. The grievor was rehired at the AI-03 level and promoted to the AI-05 level a week or so later. Thus, it was not a matter within the scope of an adjudicator appointed under the Public Service Staff Relations Act.

The employer's representative submitted further that while the rates of pay may be found within the collective agreement, the determination of where an employee fits within a range of rates is found elsewhere. Pay is calculated after the appointment is made and this is done pursuant to the Public Service Terms and Conditions of Employment Regulations.

In support of his submission, the employer's representative referred me to the following: Mark et al. (Board Files 166-2-21451 to 21455); Smith (Board File 166-2-25488); Kilburn (Board File 166-2-26434); and Canadian Labour Arbitration Third Edition, Brown and Beatty, Chapters 2:1200 and 4:2320.

REASONS FOR DECISION

In my opinion, this case is "on all fours" with Mark et al. (supra) decided by Deputy Chairperson Chodos in 1992. In that case, the grievors, who were Air Traffic Controllers, resigned from the Department and, several years later, were rehired. The grievors accepted the initial offer of employer at the minimum of the AI-00 salary range. After a training period which permitted them to "check out" (i.e. qualify), their salaries were adjusted to the minimum of the AI-03 level. They were then assigned to the Toronto region, which is an AI-04 facility, and their salaries were ultimately adjusted to the minimum of the AI-04 level. The grievors felt that, after their "checkout", they should have been paid at the maximum of their level which is the salary step in the range they had reached at the time they resigned. Deputy

Chairperson Chodos concluded that the issue raised by the grievors was outside the jurisdiction of an adjudicator appointed under the Public Service Staff Relations Act. He concluded as follows:

> *Section 8 of the Public Service Employment Act in effect confers on the Public Service Commission the exclusive authority to make appointments to the Public Service... In other words, in accordance with the comprehensive legislative scheme enacted by Parliament in 1967, which includes the Public Service Employment Act, the Financial Administration Act and the Public Service Staff Relations Act, the authority to make appointments and to stipulate the rate of pay in an offer of appointment is derived from the Public Service Employment Act and conferred on the Public Service Commission. While this authority may be delegated to a Department, or a Departmental manger, that does not detract from the fact that the exercise of the authority is in respect of the Public Service Employment Act.*

I agree with Deputy Chairperson Chodos' reasoning and find it applicable to the instant case.

While it consequently becomes unnecessary for me to deal with other issues and arguments raised by the representatives of the parties, I do wish to comment on one matter. Counsel for the grievor argued that I did have jurisdiction to hear this case and that, in making my determination on the merits, I should apply the principle of fairness or reasonableness in assessing the employer's application of the collective agreement to the grievor. Setting aside whether the principle of fairness is even applicable in the instant case, even if I could take jurisdiction, I would still be unable to find in favour of the grievor. I believe that counsel for the grievor's interpretation of fairness, in this instance, is that the grievor should be paid at the maximum level of the AI-05 salary because he was once paid at that level and other similarly qualified employees at that facility are being paid at the AI-05 level. With due respect to the able arguments submitted by counsel for the grievor I can not agree with that reasoning. In his own testimony, the grievor, in a candid and forthright manner, agreed that an employee who resigns from a position to retire or to seek other employment can not hold the employer responsible for the consequences. There is a risk involved that is not attributable to the employer. When an employee leaves an

employer, even in the most favourable of circumstances (and frequently they are not so favourable), an employee who returns to the former employer seeking to be re-employed after a month, a year or five years, should not expect that the clock can simply be turned back and that the *status quo ante* can be resumed. It is neither fair nor unfair that employees are on different salary levels within a range. It depends upon the applicable rules and regulations, an individual's qualifications and, in some instances, the collective agreement or the employer's discretion. While it may be true that the employer was getting a good deal in rehiring the grievor, one can not conclude that the employer's decision to place the grievor at the AI-05 minimum level was unfair or unreasonable. I offer no opinion about the wisdom of such an action as that will likely become evident over time.

The grievance is, therefore, dismissed for want of jurisdiction.

Louis M. Tenace,
Vice-Chairperson

OTTAWA, January 16, 1996.