Tremblay v. Ontario (Ministry of Natural Resources and Forestry), [2020] O.P.S.G.B.A. No. 11

Ontario Public Service Grievance Board Decisions

Ontario Public Service Grievance Board

Panel: Andrew Tremayne (Vice Chair)

Heard: June 12, 2020 by written submissions.

Decision: July 9, 2020.

PSGB Nos. P-2017-3151, P-2017-3253, P-2017-3254,

P-2017-3346, P-2017-3348,

P-2017-3349, P-2017-3350, P-2017-3732,

P-2017-3733, P-2017-3734,

P-2017-3735, P-2017-3794, P-2017-3795

[2020] O.P.S.G.B.A. No. 11

IN THE MATTER OF an Arbitration under the Public Service of Ontario Act Between Tremblay et al, Complainant, and The Crown in Right of Ontario (Ministry of Natural Resources and Forestry), Employer

(33 paras.)

Appearances

For the Complainant: Eric Tremblay.

For the Employer: Thomas Ayers, Treasury Board Secretariat Legal Services Branch, Counsel.

Decision

1 This decision deals with a preliminary objection raised by the employer concerning complaints filed by 13 senior managers in the Aviation Services Section of the Ministry of Natural Resources and Forestry. The employer takes the position that the Board has no jurisdiction to deal with the complaints because they are essentially about the complainants' job classification, and the Board lacks jurisdiction over complaints of this nature. The complainants disagree, saying that the issue is the removal of their salary allowances and that their complaints should be heard on the merits.

2 This is the second preliminary objection raised by the employer concerning the Board's jurisdiction to hear and determine these complaints. The first objection was about the timeliness of the complaints, and the Board dismissed that objection in a decision dated February 4, 2020: *Tremblay et al. v. Ontario (Ministry of Natural Resources and Forestry)*, 2020 CanLII 20407 (ON PSGB). Following the release of that decision, the parties agreed that the Board would rule on the employer's second preliminary objection based on written submissions, and these were exchanged following an agreed schedule.

3 In addition, the parties agreed that at the same time they exchanged written submissions on the employer's

second preliminary objection, they would also exchange written submissions on the employer's alternative argument on the merits of the complaints. That argument, briefly, is that the complainants have not identified a term or condition of their employment that has been breached by the employer and that the removal of the salary allowances (as it has been described by the complainants) does not amount to a breach of their terms and conditions of employment.

4 The employer acknowledges that it bears the onus to demonstrate that the complaints should be dismissed without a hearing on the merits. For reasons which are set out below, the employer's second preliminary objection to the Board's jurisdiction to hear and determine these complaints is dismissed. The complainants bear the onus of demonstrating that there was a breach of the terms and conditions of their employment, and the Board's decision on the merits of the complaints will be dealt with in a separate decision.

Background to the Complaints

5 A summary of the principal facts helps provide the context for this decision. In 2014, the complainants started to receive a special salary allowance, which the employer introduced because Aviation Services was experiencing a retention and recruitment problem. They were paid the salary allowance over and above the normal salary that applied to their classification. The details are set out in Management Board of Cabinet Directive 33-51 under the PSOA 2006, titled *Directive for the Creation of Salary Allowances and Related Payments* (dated January 27, 2014).

6 According to documents from the employer, a salary allowance is an approved pensionable amount paid in addition to an employee's basic salary rate and under certain conditions. It is paid bi-weekly and is subject to all deductions, including pension contributions. It is included in calculating benefits but not included in transactions arising from a change in status (e.g. promotion) and not included in pay for performance calculations.

7 In late 2018, the employer implemented the Management Job Evaluation Project (MJEP). The main objective of MJEP is to standardize job descriptions for managers who are in similar roles across the Ontario Public Service. MJEP was implemented along with a new compensation plan for managers, which reduced the total number of classification levels and salary ranges. The overall effect was a complete reconstruction of the compensation system for managers, including the complainants. The details are set out in Management Board of Cabinet Directive 33-66 under the PSOA 2006, titled *Directive for the Creation of Classes of Position, Salary Ranges, Remuneration and Transition for Middle Managers* (dated November 15, 2016, and reissued on September 12, 2017, and March 20, 2018).

8 In practical terms, MJEP was used to determine the classification level of all managerial positions in the new system. Managers were then assigned to a new "class of position," each of which has a salary range. A manager's "pre-MJEP" salary was used to determine their placement on the new salary ranges, and rules for pay administration were devised and set out in the *Directive* to assist with the placement. For example, if a manager's "pre-MJEP" salary was below the minimum of the salary range in effect for the manager's new class of position, the manager would be placed at the minimum of the new class of position; if the "pre-MJEP" salary were greater than the maximum of the salary range for the manager's new class of position, the manager's salary would not increase until the maximum caught up to the manager's salary.

9 The *Directive* also says that if a manager received a salary allowance, it was to be included in the "pre-MJEP" salary, effectively rolling it into a manager's base salary, and that going forward, the manager would no longer be eligible for a salary allowance. This provision is of particular relevance to the complainants, because they had been entitled to receive a salary allowance since 2014. Moreover, the salary allowance was always paid in addition to their regular salary and was shown as a separate "line item" in the complainants' biweekly pay stub.

10 The complainants frame their complaint as the "removal" of their salary allowance. They argue that by including the amount of salary allowance in the calculation of the "pre-MJEP" salary, the employer's new compensation system has worked to their financial disadvantage. Instead, the employer ought to have transitioned them to the new system without consideration of the salary allowance, then placed them in the appropriate salary range based

solely on their base salary. The salary allowance should be added to their total compensation at the end, argue the complainants, as it was before MJEP was implemented.

Statutory Framework

11 It is useful to briefly review the Board's statutory framework to place the employer's preliminary objection in context.

12 The Board only has the powers granted by the *Public Service of Ontario Act* and the regulations made under that legislation, notably Regulation 378/07, which states as follows:

> 4. (1) Subject to subsection (2), a public servant who is aggrieved about a working condition or about a term of his or her employment may file a complaint about the working condition or the term of employment with the Public Service Grievance Board,
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> . . . .
>
> (2) The following matters cannot be the subject of a complaint about a working condition or about a term of employment:
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> 1. The term or duration of the public servant's appointment to employment by the Crown.
> 2. The assignment of the public servant to a particular class of position.
> 3. A dismissal without cause under subsection 38(1) of the Act or a matter relating to such a dismissal.
> 4. The evaluation of a public servant's performance or the method of evaluating his or her performance.
> 5. The compensation provided to or denied to a public servant as a result of the evaluation of his or her performance.
>
> [emphasis added]

13 In the Board's jurisprudence, "class of position" has been interpreted as a reference to the class, or classification, to which an employee has been assigned and which determines, among other things, their pay range. That is, subsection 4(2)2 has been understood to remove from the Board's jurisdiction complaints about being assigned to a specific classification. In other words, if a complainant is seeking a declaration from the Board that they have been assigned to the wrong classification, then the matter would be outside the Board's jurisdiction.

14 For example, the Board dismissed a complaint where it was alleged that the employer had violated its Pay on Assignment Policy when it did not give the complainant a promotional increase. In *Ilika v Ontario (Community Safety and Correctional Services)*, 2014 CanLII 76834 (ON PSGB), the complainant had been awarded a new job with additional responsibilities, although he remained in the same job class. He alleged that certain other employees were paid at a higher rate, creating an imbalance and an environment of resentment. Among other things, the complainant asked the Board to award him a 5% retroactive raise and to move him in the salary grid to an amount equal to his colleagues who did the same work.

15 The employer, in that case, argued that the complaint should be dismissed without a hearing on the merits because the complaint did not make out a viable or *prima facie* case for the remedies claimed and because the Board had no authority to grant them. The Board observed as follows:

> [19] In order to have a potentially successful grievance, there must be a term or condition of the complainant's employment, a breach by the employer, and a remedy connected to the breach that is within the Board's statutory power to give. It is my finding that the complainant's arguments and materials do not provide a sufficient basis for the complaint to succeed, even accepting the facts he asserts to be true, such

> as that he has increased responsibilities, or that others are paid more to do the same or very similar work. What is lacking is any facts that make out a possible breach, as well as that the Board does not have the jurisdiction to decide that the complainant ought to be paid more, unless there is a contractual term requiring that he be paid more.

It was undisputed that the complainant's classification had not changed, and that the definition of "promotion" in the Pay on Assignment Policy required the employee to be assigned to a position in a class with a higher salary range maximum. In other words, the relevant Policy had been correctly appplied, so there was no viable legal argument that it had been breached. Further, to the extent that the complainant felt that he should be paid on par with employees in other classifications, the complaint was essentially about the job class to which the complainant had been assigned. Thus, even accepting the facts asserted in the complaint to be true and provable, the case could not succeed. The Board dismissed the complaint because it did not make out a viable or *prima facie* case for the remedies claimed, which in any case were outside the Board's jurisdiction to award.

16 The Board has reached a similar conclusion where it has found that the substance of a complaint is "pay for performance," which is another matter that cannot be the subject of a complaint before the Board as set out in subsection 4(2)5 of Regulation 378/07. In *Smith et al. v. Ontario (Ministry of Community Safety and Correctional Services)*, 2014 CanLII 48098 (ON PSGB), the complainants alleged unfair, unequal, and inequitable treatment by the employer as a result of a pay freeze. The source of the alleged unfairness was that some employees, who were already at the maximum of the pay grid at the end of the previous fiscal year, had received lump-sum payments while the complainants had not. The remedy sought by complaints was more pay. The Board, finding that the essence of the complaint was the denial of pay for performance as a result of the pay freeze, dismissed the complaint as beyone its jurisdiction. See also *Berenbaum v. Ontario (Ministry of Labour)*, 2011 CanLII 23299 (ON PSGB), where the Board found that the portions of the complaint that related to the complainant's pay for performance were not within its jurisdiction, even if the complainant could show that the employer had erred in the amounts that it had paid to him.

17 The Board will always look carefully at the substance of a complaint, however, and while a complaint may be dismissed without a hearing on the merits, the basis for that outcome is not always rooted in the Board's jurisdiction. For example, where a complaint was for stand-by pay, which was not a term or condition of employment that applied to the complainants but which did apply to other classifications, the Board rejected the employer's argument that the complaint concerned the classification of the complainants. In that recent decision *(Johnston et al. v. Ontario (Community Safety and Correctional Services)*, 2019 CanLII 65197 (ON PSGB)), the Board said the following:

> [36] In this case, the complainants are not suggesting they should be assigned to a different classification. They are disputing one aspect of their remuneration, relating to on-call or stand-by duties. Employer counsel accurately observes that the remedy claimed, insofar as it relates to a claim for stand-by pay pursuant to the compensation directive, is a claim for a provision pertaining to a different classification. This fact has consequences which will be discussed below, but does not turn this complaint into a complaint about the "assignment to a particular class of position". Assignment to a different class of position would entail a change to all the terms and conditions of employment of the alternate classification, rather than just one.

While the Board in *Johnston* went on to dismiss the complaint because it did not make out a viable or *prima facie* case for the remedies claimed, the Board nevertheless found that the complaint fell within its jurisdiction and dealt with it on its merits.

18 Finally, not all complaints that touch on other aspects of classification are outside the Board's jurisdiction. For example, subsection 4(2)2 has not been read to exclude from the Board's jurisdiction complaints about being assigned work that is alleged to be outside of one's own classification during an on-call rotation. See, for example, *Hasted/Berezowsky v. Ontario (Community Safety and Correctional Services)*, 2015 CanLII 7473 (ON PSGB); *Courchesne-Godin et al v. Ontario (Children and Youth Services)*, 2017 CanLII 89957 (ON PSGB), *Doyle v Ontario*

(Municipal Affairs and Housing), 2018 CanLII 109219 (ON PSGB), and *Boucher v. Ontario (Community Safety and Correctional Services)*, 2018 CanLII 119631 (ON PSGB).

Submissions and Analysis

19 The employer argues that the complaints are disguised classification grievances. As such, the complaints are outside the Board's jurisdiction, and they should be dismissed without a hearing on the merits. By objecting to how their compensation is now provided and administered, the complainants are attempting to create an opportunity for an increase to their total compensation package. In essence, submits the employer, the complainants are attempting to move themselves to a higher classification (with a correspondingly higher salary range) and create an increase in their potential total compensation package without directly asking the Board to review and change their classification.

20 Further, the employer points to the extensive submissions made by the complainants in two areas: the reduction in their compensation as a result of the removal of the salary allowance, and the unique attributes of the positions that they hold as managers in Aviation Services. These submissions also show that the complaints are, in essence, about the complainants' classification, argues the employer.

21 On the first point, the complainants allege that they have been denied merit increases, pay for performance, salary progression, and have lost pensionable earnings. Some of them have also been red-circled, and will not be eligible for further salary increases until the salary range catches up to their red-circled salary. The Board should conclude from these passages that the complaints are entirely related to compensation. The complainants are attempting to achieve the result of creating an increase to their potential total compensation package without asking directly to be reclassified, the employer submits, but by asking the Board to change the structure of their compensation package they will achieve the same result, which the Board is not empowered to do.

22 As to the uniqueness of the complainants' positions, the employer highlights the sections of the complaints that describe how no other manager in the same classification as the complainants could qualify for their positions, due to the extensive requirements imposed by Transport Canada. At the same time, submits the employer, the complainants say that they would be qualified to apply for any other vacancy that occurred in the managerial ranks. The only conclusion that can be drawn from these and similar statements in the complaint, the employer argues, is that the complainants believe that they have been improperly classified. Changing the complainants' classification or their salary range is a remedy that the Board does not have the jurisdiction to award, submits the employer.

23 The employer argues that the facts in this case are analogous to the facts that were before the Board in *Ilika*, where the complainant alleged that he had been improperly denied a pay increase after he was promoted. In that decision, the Board found that the essence of the complainant's argument was that he should be paid more because his new position came with increased responsibilities. Similarly, the core of the Aviation Managers' complaints is that the removal of the salary allowance has reduced their future earnings and placed many of them in a position where they are red-circled.

24 The complainants submit that they have never alleged that they are improperly classified. They recognize that they cannot be in a higher classification than their superiors, who are already at the maximum for their organization. This is not a new scenario, however, and it was one of the reasons for the salary allowance: it allowed the hierarchy to be preserved while addressing the broader staffing issues, namely the retention and recruitment problem in Aviation Services, which is not in dispute. The salary allowances were "outside" the classification, which meant that the unique attributes of the managers' positions could be recognized and compensated, although they were still classified in a way that respected reporting relationships and the hierarchy.

25 Further, the complainants point out that there is a separate process under MJEP to address concerns about classification. Classification appeals under MJEP are a stand-alone issue over which the Board has no influence. The purpose of the complaints has only ever been to address the removal of the salary allowance. Still, it is not possible to understand the complainants' position without referring to MJEP and the classification process. These

references were provided for context and not to portray the complaints as classification grievances, submit the complainants.

26 The information about the uniqueness of the managers' positions was provided to show that the positions are required by Transport Canada and that special considerations apply to them, the complainants submit. It is simply a fact that other managers in the OPS could not be appointed by Transport Canada to one of the key positions. The complaints before the Board are not about placement in classifications and they are not about assigned duties. The only thing at issue is that the salary allowance was part of the complainants' terms and conditions of employment and now it is not, argue the complainants.

27 The issue to be decided is whether the complaints are essentially about the complainants' job classification, which is something that subsection 4(2)2 has removed from the Board's jurisdiction. Although several years have passed since the complaints were filed with the Board, it is helpful to return to them briefly before turning to the parties' submissions on the employer's preliminary objection.

28 Other than the identity of the complainants, the substance of all 13 complaints is very similar, and after they were filed, the Board ordered that the complaints would be heard together. In these proceedings, Mr. Tremblay, who has been the Chief Rotary Wing Pilot in Aviation Services since April 2014, has "taken the lead" in presenting submissions on behalf of all of the complainants. As a result, and although most of the key elements of all 13 complaints are very similar if not identical, I will focus on and use excerpts from Mr. Tremblay's complaint, the substance of which is attached as "Appendix A" to his Form 1.

29 As noted by the employer, Mr. Tremblay's complaint sets out the unique attributes of his position, which is Chief Rotary Wing Pilot. It also describes in detail the direct effect of the removal of the salary allowance on Mr. Tremblay's income. Having carefully reviewed all of the complaints as well as the parties' submissions on the employer's preliminary objection, I find that it is more accurate to characterize these parts of the complaints as information that provides history, context, and/or colour. For example, it would have been extremely difficult for Mr. Tremblay to explain to the Board why the removal of the salary allowance is of concern to him without describing how it came to be implemented in the first place, and a significant part of that story is directly connected to the uniqueness of the positions held by the complainants. It is also fair to say that Mr. Tremblay is entitled to describe for the Board the financial hardship that he alleges has ensued. In my view, none of this information has the effect of transforming the complaints into classifications grievances.

30 The substance or "nub" of the complaint is set out elsewhere and described very differently, however:

> 7. The premise of my complaint is simply that all of the calculations regarding my compensation structure as it relates to placement in the new pay grid should have been calculated in isolation from my salary allowance. My position as Chief Pilot Remains unchanged as it was described in all the supporting Salary Allowance documents provided to me on my appointment to this position.
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> . . .
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> 10. It has been suggested to me that the Venue for this complaint is to rely on the MJEP appeal process that may or may not be available to me sometime after May. Although I agree that this may be the process for appealing my placement on the new Grid I contend that the Salary Allowance is not associated with my MJEP placement as it is to be paid "in addition" to my Salary whatever it may be.

In these paragraphs, it is clear the complainants are not asking the Board to decide whether their current classifications are correct or to assign them to a different classification. Rather, the focus is clearly on the significance of the salary allowance in the complainants overall terms and conditions of employment and its removal.

31 MJEP is also mentioned extensively in the complaints. It is not disputed that the main objective of MJEP is to

standardize job descriptions for managers who are in similar roles across the Ontario Public Service and that the overall effect was a complete reconstruction of the compensation system for managers, including the complainants. MJEP is a job evaluation system, and the substance of the complaints is not that the complainants' jobs were incorrectly assessed or not measured properly. Nor are the complainants seeking to have all of the terms and conditions of employment of another classification apply to them. Rather, the only matter at issue is whether the salary allowance forms part of the complainants' terms and conditions of employment, and if so, whether the employer has breached those terms and conditions by removing it. The salary allowances were removed as a result of the MJEP process, and describing this undisputed fact in the complaints, even at length, does not transform them into classification grievances.

32 Having carefully considered the parties submissions, I find that the facts, in this case, are very similar to those in *Johnston et al.*, where the Board found that disputing one aspect of one's remuneration did not turn a complaint into a complaint about "the assignment to a particular class of position." Here, the complainants are disputing the removal of the salary allowance. They are not asking the Board to decide whether their current classifications are correct or to assign them to a different classification.

Disposition

33 To summarize, having carefully considered the evidence and the submissions of the parties, the complaints are not classifications grievances which would be beyond the Board's jurisdiction. The employer's second preliminary objection is dismissed, and the matter will be addressed by the Board on the merits.

Dated at Toronto, Ontario this 9th day of July, 2020.

Andrew Tremayne, Vice-Chair
