Federal Court  Cour fédérale

Date: 20200403

Docket: T-465-19

Citation: 2020 FC 481

Ottawa, Ontario, April 3, 2020

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, the Public Service Alliance of Canada [PSAC] brings this Application for Judicial Review of the decision of Employment and Social Development Canada [ESDC], which is represented by the Respondent, the Attorney General of Canada. PSAC challenges the decision of ESDC to restrict the scope of a remedy following from a job content grievance and reclassification of positions; in particular, to deny retroactive pay to some employees whose positions were classified at a higher level. PSAC argues that the decision was made in breach of a Memorandum of Understanding [MOU] entered into in 2008 between PSAC and ESDC

regarding the processing of grievances and the application of the ultimate outcome of the grievances.

[2] In a nutshell, employees who did not submit individual job content grievances on or around 2008 and who are not current incumbents of the reclassified position have been denied retroactive pay. This would affect, for example, an employee who was in the position for several years while the job content and reclassification exercise was ongoing, but left that position before the process was resolved and who did not file an individual grievance, based on his or her belief that the outcome of the group grievance, pursuant to the 2008 MOU between PSAC and ESDC, would apply to them. As a result, an employee who worked throughout that period, but not until the date of the finalized job description in 2018, performing the same work that was ultimately upgraded to the higher level, but who did not file an individual grievance back in 2008, would be treated differently in terms of pay than their colleague who either stayed in the position until 2018 or left the position but had previously filed an individual grievance. While this appears unfair to employees who did not grieve and who have waited over 12 years to see the benefit of the original group grievance, whether it is unfair is not the issue for the Court to determine.

[3] The key issue is whether PSAC can seek judicial review of the decision to restrict retroactive pay or whether this decision can and should be the subject of yet another grievance pursuant to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [*FPSLRA*]. If the decision could be judicially reviewed, the issues would be whether the decision is reasonable and/or procedurally fair.

[4] For the reasons that follow, the Court declines to exercise its discretion to determine this Application. The issues raised by PSAC, which focus on the MOU, but which arise in the context of the decision made by ESDC to restrict entitlement to retroactive pay, should first be addressed pursuant to the *FPSLRA*. PSAC's policy grievance filed in March 2019, which has been held in abeyance, should be expedited.

[5] Affected employees have waited long enough to resolve their concerns. If the determination of the grievance is that the decision cannot be grieved by PSAC because it does not fall within the grievance provisions of the *FPSLRA*, then PSAC could consider resorting to the Court.

I. Background

[6] PSAC is the certified bargaining agent representing federal government employees affected by ESDC's "Service Management Structural Model" [SMSM] Project. Between 2006 and 2008, the SMSM Project revised the work descriptions and classifications of many of its service delivery positions, affecting approximately 30,000 ESDC employees across the country.

[7] PSAC disputed the accuracy of many of the new job descriptions and classifications resulting from the SMSM Project. In 2008, PSAC filed grievances on behalf of affected employees against ESDC.

[8] In October 2008, in an effort to deal with the volume of grievances, PSAC and ESDC signed a MOU. The MOU, among other things, grouped grievances together so that only one job content grievance and one classification grievance would be heard for a given work description.

[9] PSAC and the Respondent take different views on the purpose of the MOU. PSAC submits that the MOU was intended to minimize the number of grievances in exchange for an agreement that all affected employees would be bound by and benefit from the decision on the grievances that were processed. PSAC submits that it was a common practice to propose this type of streamlined process to handle mass grievances. PSAC notes that it would have advised all of its affected members to file individual grievances if it shared the same interpretation of the MOU now suggested by Counsel for the Respondent.

[10] The Respondent submits that the MOU was simply for the purpose of facilitating discussions with respect to the management of the grievances and to allow the grievances to proceed directly to the final level grievance process. The Respondent submits that individual grievances were expected to continue and that the MOU applies to those who grieved.

[11] PSAC and the Respondent also take a different view of the interpretation of specific provisions of the MOU, in particular, clause 8.

[12] Clause 8 of the MOU, which is the key point of contention in this Application, addresses the application of the outcome of the grouped grievances. Clause 8 states:

> The outcome of the grievance(s) processed will be applied to all other incumbents of the applicable national work descriptions retroactive to September 14, 2006.

[13] The Respondent explains that the relevant grouped grievance filed in 2008 was held in abeyance for several years, but was ultimately allowed on March 26, 2013. ESDC then undertook to revise and issue a new work description for the Program Support Delivery Clerk [PSDC] position. ESDC conducted consultations with employees, managers and PSAC.

[14] ESDC ultimately finalized the work descriptions in 2018. Two separate work descriptions emerged: the Program Support Clerk and the Program Service Officer. The Program Service Officer position was classified at the higher PM 1 level. As a result, the Program Service Officer position resulted in an increase in pay.

[15] The new work descriptions were implemented on September 13, 2018, with an effective date retroactive to September 14, 2006.

II. The Decision Under Review

[16] The decision to deny retroactive pay to some employees who had performed the duties of the new Program Service Officer in the relevant period, ranging from 2006 to 2018, was provided to ESDC Managers in a document entitled “Questions and Answers for Managers, Program and Support Delivery Clerk” [Q and As], dated February 22, 2019. The Q and As appear to be a guide for Managers to communicate with their affected employees about how the work descriptions and pay would be implemented.

[17] Although the Q and As are not a typical form of an administrative decision, the parties submit that for the purpose of this Application, this constitutes the decision at issue.

[18] Question 12 addresses retroactive pay and states:

> Salary retroactivity applies for those employees who have been mapped to the Program Services Officer job description and who:
>
> 1) Are a current incumbent (on or after September 13, 2018) of the PSDC position in Pensions or Integrity who have been mapped to the Program Services Officer new job description; or
>
> 2) Grieved the content of the job description for PSDCs in Pensions and Integrity between 2008 and September 13, 2018, even if they have since left their position.

[19] Question 14 responds to the period of retroactive pay and states:

> Given that a MOU was signed with the union in 2008, in particular circumstances retroactivity may extend back to September 14, 2006 when the job description came into effect.

[20] Question 15 addresses why former incumbents of the PSDC position are not entitled to retroactive pay if they left the position prior to September 13, 2018 and states:

> The decision to apply retroactivity is at the discretion of the Department as per Treasury Board Policy and is further confirmed in a 2011 Bulletin on reclassifications. For this exercise a decision was taken that it would apply to current incumbents only occupying a Pensions and Integrity job mapped to the Program Services Officer job description, as of September 13, 2018.

[21] A one-page document entitled “Program Services Officer – Rationale for Retroactive Payments” [Rationale] supplements the information for Managers and expands on who is and is not entitled to retroactive pay.

[22] With respect to the exclusion of those who did not file a grievance, the Rationale states:

> In addition, retroactive payments will NOT apply to the following:
>
> Former incumbents of the PSDC CR-04 position who performed program delivery work but did not submit a grievance and have left the position prior to September 13, 2013.
>
> The Employer is exercising their managerial rights under Article 6.01 of the PA collective agreement in not paying these former incumbents of the PSDC CR-04 position.
>
> I. The employer is not able to a reasonable degree to re-create the all the [*sic*] relevant former incumbents' employment history and map said former employee to the correct position within a realistic timeline.
>
> II. As these former employees did not grieve the decision, the employer has no obligations to provide them retroactivity to 2006.

[23] The Rationale also states that:

> The decision to apply retroactivity is at the discretion of the employer. For this exercise, a decision was taken that it would apply only to current incumbents occupying Pension or integrity job [*sic*], mapped to the (title of job description) as of September 13, 2018, or after.

[24] On March 15, 2019, PSAC filed its Notice of Application for Judicial Review [Notice of Application] of the February 22, 2019 decision.

[25] On March 29, 2019, PSAC filed a policy grievance pursuant to section 220 of the *FPSLRA* noting that it is without prejudice to this Application. The grievance refers to the decision to deny retroactive pay to those who left their position before 2018 and did not grieve, alleging that this is in breach of the MOU. PSAC explains that the grievance was filed only to

protect itself against the expiry of the time limits for such grievances. PSAC submits that the breach of the MOU is not grievable as it does not fit into any of the provisions of the *FPSLRA*.

[26] PSAC and ESDC now also explain that PSAC's policy grievance is being held in abeyance pending the determination of this Application.

[27] In May 2019, the Respondent brought a Motion to strike PSAC's Notice of Application. In *Public Service Alliance of Canada v Attorney General of Canada*, 2019 FC 892 [*PSAC 2019*], and Justice Pentney dismissed the Respondent's motion, being unable to conclude that PSAC's Application was "doomed to fail". Justice Pentney noted the factors in favour of finding that PSAC should first pursue its grievance, including that, on its face, this was an employment-related matter and that the jurisprudence guides courts not to intervene in employment-related matters before the process set out in the labour relations regime has run its course (at para 13) and also noting the strong privative clause of section 236 of the *FPSLRA*. On the other hand, Justice Pentney considered that striking out an application at an early stage is an exceptional remedy and should not be exercised where the issue raised is debatable. Justice Pentney noted, among other things, that, allowing the Application to proceed on its merits with a more complete record could result in the Court allowing it, dismissing it, or finding that the Application is moot, given that PSAC's policy grievance could be determined in the intervening period (at para 23). Justice Pentney ultimately concluded that the Application could and should proceed without delay based on a full consideration of the evidence, law and submissions of the parties.

[28] Justice Pentney's comment that the Application could be moot if PSAC's policy grievance were determined before the hearing of the Application signals that the parties did not advise Justice Pentney that the policy grievance was being held in abeyance pending the Court's determination whether it would entertain the application for judicial review.

III. The Issues

[29] The preliminary and key issue is whether the grievance process in the *FPSLRA* is available to PSAC and should be exhausted and, if not, whether the Court should exercise its discretion to consider this Application. If the Court were to find that it should exercise its discretion to judicially review the decision, the issues would be: whether the decision is reasonable; and, whether ESDC breached its duty of procedural fairness by making the decision without notice to PSAC regarding its approach to retroactivity and without providing PSAC an opportunity to make submissions.

IV. Should the Court Exercise its Discretion to Consider this Application or Should PSAC Exhaust the Grievance Process Pursuant to the *FPSLRA*?

A. *The Applicant's Submissions*

[30] PSAC submits that the MOU must be respected and that judicial review is the only forum to address this breach.

[31] PSAC argues that it would be contrary to the MOU's purpose if the MOU could only be enforced through individual grievances filed on behalf of every employee who alleges a breach.

PSAC argues that such an outcome undermines the agreement and future similar MOUs and harms the labour relations system as a whole.

[32] PSAC submits that, based on its cursory review of the *FPSLRA*, none of the grievance processes provided in the *FPSLRA* are available to it. PSAC further submits that even if the grievance process were available, it would not permit the grievance, which is about the alleged breach of the MOU, to be dealt with fairly.

[33] PSAC explains that it filed a policy grievance pursuant to Section 220 of the *FPSLRA* only to protect itself against the expiry of the time limit to do so, but argues that section 220 does not apply. In other words, PSAC does not expect the grievance to be processed. PSAC submits that section 220 allows bargaining agents to bring policy grievances only "in respect of the interpretation or application of the collective agreement or arbitral award." PSAC submits that ESDC's breach of the 2008 MOU does not fall within section 220 of the *FPSLRA* because the MOU is not part of a collective agreement or an arbitral award.

[34] PSAC argues that other provisions of the *FPSLRA* are also of no assistance. PSAC submits that it cannot file a group grievance on behalf of affected employees under section 215 of the *FPSLRA*, which provides for grievances about "the interpretation or application, common in respect of those employees [in a bargaining unit], of a provision of a collective agreement or an arbitral award", again because the MOU is not a provision of the collective agreement or an arbitral award.

[35] PSAC also submits that section 208 of the *FPSLRA* does not provide an option for individual employees to grieve the breach of the MOU. Section 208 addresses breaches of the terms or conditions of employment applicable to employees generally. PSAC argues that the MOU is an agreement between ESDC and PSAC, not individual employees. PSAC submits that, applying well-established principles of contract law, individual employees are legal strangers to the terms of the MOU and are unable to enforce it. (*Wray et al. v Treasury Board (Department of Transport)*, 2012 PSLRB 64 at para 23; *Cossette v Treasury Board (Department of Transport)*, 2013 PSLRB 32 at para 28.)

[36] PSAC further submits that even if individual grievances could be brought by affected employees pursuant to section 208, this would not be a fair process because ESDC would be the decision-maker with respect to its own alleged breach of the MOU.

[37] PSAC points to *Amos v Attorney General of Canada*, 2011 FCA 38 at paras 66-68, [2012] 4 FCR 67 [*Amos*] where the Federal Court of Appeal held that it was inappropriate to require individual employees to file fresh grievances under the *FPSLRA* with respect to a breach of a memorandum of agreement [MOA] that could not be referred to third-party adjudication under section 209 of the *FPSLRA.* As a result, grievers could face an unfair process because their employer (i.e. the party allegedly in breach of the MOA) would have full control of the grievance process.

[38] PSAC argues that it faces a similar situation: it would be unfair to require affected employees to file new grievances pursuant to section 208 because ESDC would have control of

that grievance process and would decide whether it had breached the MOU. PSAC argues that the present case is one of the rare circumstances where the Court may exercise its jurisdiction over an employment-related application, assuming section 208 could be relied on (which PSAC does not concede).

[39] PSAC submits that in *Bron v Canada (Attorney General)*, 2010 ONCA 71 at para 20, 99 OR (3d) 749 [*Bron*] the Ontario Court of Appeal found that the court may exercise its residual discretion to determine a matter despite the ouster clause of section 236 of the Public *Service Labour Relations Act* [*PSLRA*] (the title of the Act at the relevant time) if the grievance process could not provide an appropriate remedy. PSAC submits that in the present case, the grievance process would not provide an appropriate remedy and, as a result, the Court should accept jurisdiction.

[40] PSAC submits that in those cases where the Court has declined to exercise its discretion based on the ouster clause in section 236, the employees or bargaining agent otherwise had access to the grievance process. PSAC submits that it has no access to the grievance process. PSAC relies on *Salie v Canada (Attorney General)*, 2013 FC 122 at paras 67-68, 225 ACWS (3d) 1001 [*Salie*], where Justice Mactavish found that because the former employee did not have access to the grievance process, the Court had jurisdiction.

B. *The Respondent's Submissions*

[41] The Respondent submits that the Court should decline to exercise its judicial review jurisdiction and dismiss the present application because PSAC has not exhausted the grievance procedure available under the *FPSLRA*.

[42] The Respondent notes that the MOU is not the decision at issue in this Application, nor is it the subject of the grievance. The decision at issue is the restriction of the entitlement to retroactive pay as set out in the Q and As, and in particular, Q.12. The issue is the impact of the decision on those who left the position and did not grieve. The Respondent submits that once the decision is properly identified, it is clear that the decision is grievable and that the comprehensive labour relations regime in the *FPSLRA* applies. The fact that an employee is not a party to the MOU is not relevant, because the MOU is not the decision under review or the subject of the grievance.

[43] The Respondent submits that PSAC has acknowledged that the issue is employment-related and falls within the *FPSLRA* given that PSAC relied on section 220 and filed a policy grievance with respect to the February 22, 2019 decision.

[44] The Respondent further submits that the decision is about pay, remuneration and the retroactivity of pay, all of which are related to the collective agreement and as such, is grievable under the *FPSLRA*. The Respondent notes that PSAC does not argue that matters of pay and remuneration are not grievable.

[45] The Respondent points to the "ouster" clause, subsection 236(1) of the *FPSLRA*, which provides that the grievance regime is the mechanism to address all employment-related disputes at first instance. (*Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 54, 56 ACWS (3d) 94 [*Weber*]; *Amos* at paras 59-62; *Bron* at para 20).

V. The relevant provisions of the *FPSLRA* (excerpts)

208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the employee, of	a) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	b) par suite de tout fait portant atteinte à ses conditions d'emploi.
[…]	[…]
209 (1) An employee who is not a member as defined in subsection 2(1) of the Royal Canadian Mounted Police Act may refer to adjudication an individual grievance that has been presented up to and including the final level in the	**209 (1)** Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du*

grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

Canada, peut renvoyer à l'arbitrage tout grief individuel portant sur :

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

(c) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(d) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

[…]

215 (1) The bargaining agent for a bargaining unit may present to the employer a group grievance on behalf of employees in the bargaining unit who feel aggrieved by the interpretation or application, common in respect of those employees, of a provision of a collective agreement or an arbitral award.

(2) In order to present the grievance, the bargaining agent must first obtain the consent of each of the employees concerned in the form provided for by the regulations. The consent of an employee is valid only in respect of the particular group grievance for which it is obtained.

(3) The group grievance must relate to employees in a single portion of the federal public administration.

[…]

216 The bargaining agent may refer to adjudication any group grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to its satisfaction.

[…]

220 (1) If the employer and a bargaining agent are bound by an arbitral award or have

[…]

215 (1) L’agent négociateur d’une unité de négociation peut présenter un grief collectif à l’employeur au nom des fonctionnaires de cette unité qui s’estiment lésés par la même interprétation ou application à leur égard de toute disposition d’une convention collective ou d’une décision arbitrale.

(2) La présentation du grief collectif est subordonnée à l’obtention au préalable par l’agent négociateur du consentement — en la forme prévue par les règlements — de chacun des intéressés. Le consentement ne vaut qu’à l’égard du grief en question.

(3) Le grief collectif ne peut concerner que les fonctionnaires d’un même secteur de l’administration publique fédérale.

[…]

216 Après l’avoir porté jusqu’au dernier palier de la procédure applicable sans avoir obtenu satisfaction, l’agent négociateur peut renvoyer le grief collectif à l’arbitrage.

[…]

220 (1) Si l’employeur et l’agent négociateur sont liés par une convention collective

entered into a collective agreement, either of them may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally.

ou une décision arbitrale, l'un peut présenter à l'autre un grief de principe portant sur l'interprétation ou l'application d'une disposition de la convention ou de la décision relativement à l'un ou l'autre ou à l'unité de négociation de façon générale.

[…]

[…]

221 A party that presents a policy grievance may refer it to adjudication.

221 La partie qui présente un grief de principe peut le renvoyer à l'arbitrage.

[…]

[…]

236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

236 (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.

(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or

(3) Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou

misconduct. une inconduite.

VI. The Grievance Process Should be Exhausted; the Court Will Not Exercise its Discretion to Consider this Application

[46] PSAC's Notice of Application for Judicial Review characterizes the decision under review as the decision to restrict the remedy arising out of the job content grievance and reclassification – i.e., the decision of ESDC as set out in the Q and As and elaborated on in the Rationale. PSAC agrees that the MOU is not the decision. However, PSAC's arguments focus on whether the MOU can be the subject of a grievance under the *FPSLRA*.

[47] The issue is whether PSAC can grieve ESDC's decision, not the MOU on its own, and, if not, whether the Court should judicially review the decision. If judicial review is pursued, the MOU would be considered along with other information on the record before the decision-maker (and it is not apparent what that record contained) to determine if the decision is reasonable. Similarly, if the decision is grieved, as the Respondent contends it can be, the MOU should be a relevant consideration in the determination of the grievance.

[48] I agree with PSAC that the MOU is of little benefit if it can be ignored. Ignoring the MOU entered into between PSAC and ESDC undermines the role of PSAC in representing its members. PSAC advanced the interests of its members by entering the MOU in 2008. PSAC also brings this Application to advance the interests of members affected by the decision to restrict their entitlement to retroactive pay. However, it appears that the interests of affected employees can and should first be advanced in the grievance process.

[49] The Respondent argues that the decision can be grieved in accordance with the collective agreement because it is an employment-related matter – more particularly, about pay and remuneration – which is "related to" the Collective Agreement. The Respondent provided only excerpts of the Collective Agreement to PSAC and to the Court in its Rule 318 certificate. The Respondent noted Article 6.01, which states:

> Except to the extent herein provided, this agreement in no way restricts the authority of those charged with managerial responsibilities in the public service.

[50] The Respondent also included Article 18.02 regarding individual grievances and article 18.03 regarding group grievances, which reflect the provisions of sections 208 and 215 of the *FPSLRA*.

[51] The Collective Agreement for the PA group, which is publicly available, does not clearly indicate how decisions with respect to retroactive pay are to be addressed. Article 65 deals with Pay Administration. Article 65.01 states:

> Except as provided in this article, the terms and conditions governing the application of pay to employees are not affected by this agreement.
>
> With respect to new classifications – article 65.06 states:
>
> If, during the term of this agreement, a new classification standard for a group is established and implemented by the Employer, the Employer shall, before applying rates of pay to new levels resulting from the application of the standard, negotiate with the Alliance the rates of pay and the rules affecting the pay of employees on their movement to the new levels.

[52] Neither party referred to article 65.06. As a result, I decline to speculate on whether the requirement that "the Employer shall… negotiate with the Alliance [PSAC] …the rules affecting the pay of employees on their movement to the new levels" suggests that negotiation should have occurred. However, it does suggest that matters of pay arising from reclassification are, to some extent, related to the Collective Agreement.

[53] Given the Respondent's position on this Application that PSAC does have access to the grievance process and that PSAC must first pursue the grievance process in the *FPSLRA*, I would expect the Respondent to take the same position in the grievance process. It would be inconsistent for the Respondent to later argue that this decision does not fall within the *FPSLRA* and cannot be the subject of a grievance. Given the Respondent's position, it is curious why the grievance has been held in abeyance. No explanation was provided by either party. As noted, in Justice Pentney's decision dismissing the Respondent's motion to strike the Notice of Application, Justice Pentney assumed that the grievance process was underway.

[54] The jurisprudence relied on by the parties in support of their respective arguments is not directly analogous to the present circumstances. Nor have I found any other jurisprudence that has considered whether this type of decision – which is not an explicit provision of a collective agreement or an arbitral award – falls within the provisions of the *FPSLRA*. I have, therefore, relied on and extrapolated from the more general principles established in the jurisprudence. I have also relied on the Respondent's submission that the decision can be grieved, including by PSAC.

[55] In *PSAC v Canada (Treasury Board*) [2001] FCJ No 858, 205 FTR 270, Justice Tremblay-Lamer (the applications judge) considered arguments similar to those advanced by PSAC in this matter – that the Court should assume jurisdiction because there was no mechanism for independent and meaningful redress under the labour relations statute. Justice Tremblay-Lamer considered the Supreme Court of Canada's decision in *Weber*, which established the "exclusive jurisdiction model"; that disputes which in their essential character arise from the interpretation, application, administration or violation of the collective agreement should be dealt with by the arbitrator. Justice Tremblay-Lamer, found that the *Public Service Staff Relations Act* [*PSSRA*] (the legislation in force at that time) established a comprehensive regime for the resolution of employment-related disputes and should be relied on.

[56] The Federal Court of Appeal agreed in *PSAC v Canada (Treasury Board*), 2002 FCA 239, 229 FTR 160 [*PSAC FCA*], and stated at para 2:

> As noted by the application judge, the comprehensiveness of the *PSSRA* scheme for the resolution of employment-related disputes between employees of the federal public service and their employer has been affirmed by this Court in *Johnson-Paquette v.* Canada, [2000] 253 N.R. 305, [2000] F.C.J. No. 441 (C.A.).

[57] PSAC submits that *PSAC FCA* should be distinguished because it dealt with employees placed on off-pay status, who could have grieved but chose not to do so. PSAC argues that it does not have a choice as it cannot grieve the breach of the MOU because it is not a provision of a collective agreement or arbitral award and, therefore, it can only resort to the Court. However, PSAC's argument overlooks that the issue is not the breach of the MOU on its own, but the decision of ESDC. The principle enunciated in *PSAC FCA* and in the subsequent jurisprudence is that a liberal interpretation should be given to the labour relations statute (the *FPSLRA* and its

predecessors) and that employment-related disputes should be first addressed pursuant to those regimes.

[58] In *Vaughan v Canada*, 2005 SCC 11, 137 ACWS (3d) 942 [*Vaughan*], the Supreme Court of Canada considered whether an employee who had been denied Early Retirement Incentive (ERI) benefits, following his lay-off after several years of leave without pay while he worked in the private sector, could pursue a claim of negligence against the Crown or whether he was required to grieve the denial pursuant to the former *PSSRA*.

[59] The Supreme Court of Canada confirmed that as a general approach, employment-related matters, with a few exceptions where the Court has a residual discretion, should be dealt with in accordance with the labour relations regime mandated by Parliament.

[60] With respect to whether the Court should exercise its residual discretion to consider the claim, Justice Binnie found that the absence of recourse to independent adjudication was not a sufficient reason, on its own, for the Court to do so. Justice Binnie considered the wording of the former sections 91-92 of the *PSSRA*.

[61] At para 2, Justice Binnie summarized his conclusion as follows:

> Nevertheless, [referring to the absence of an explicit ouster clause] while the courts retain a residual jurisdiction to deal with workplace-related issues falling under s. 91 of the PSSRA, but not arbitrable under s. 92 , the courts should generally in my view, as a matter of discretion, decline to get involved except on the limited basis of judicial review. [which refers to judicial review of a decision of an arbitrator]

[62] Justice Binnie concluded that the wording of the *PSSRA* was not sufficiently strong to oust the jurisdiction of the Courts with respect to matters that were grievable but not subject to arbitration. Yet, he found that the Court should defer to the *PSSRA* grievance process based on consideration of several factors, including, as noted at para 39:

> Sixthly, where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.

[63] Since *Vaughan* was decided, a clear and robust ouster clause was enacted in section 236 of the *FPSLRA*.

[64] In *Bron*, the Ontario Court of Appeal upheld the Ontario Superior Court's decision to strike the plaintiff's statement of claim, which sought declaratory relief and damages for, among other things, defamation and breach of fiduciary duty arising from allegations of retaliation due to the plaintiff's whistleblowing activities. The Ontario Court of Appeal agreed that the plaintiff should pursue the grievance process in the *PSLRA* (now the *FPSLRA*). The Ontario Court of Appeal commented on *Vaughan*, noting that the *PSLRA* (unlike its predecessor, the *PSSRA*, which was considered in *Vaughan*) includes a clear ouster clause. The Court stated at paras 28-29:

> [28] The holding in *Vaughan* that the Superior Court retained a residual discretion to entertain a claim based on a grievable complaint turned on the language of the PSSRA, the legislation in force at the relevant time. The appellant's reliance on *Vaughan* assumes that the change in the statutory landscape, and particularly

> the enactment of s. 236 of the PSLRA, does not affect the basic holding in *Vaughan*. I think it does.
>
> [29] Parliament can, subject to constitutional limitations that are not raised here, confer exclusive jurisdiction to determine certain disputes on a forum other than the courts. It will take clear language to achieve that result: *Pleau*, at p. 381 D.L.R. Section 236 is clear and unequivocal. Subject to the exception identified in s. 236(3), which has no application here, s. 236(1) declares that the right granted under the legislation to grieve any work related dispute is "in lieu of any right of action" that the employee may have in respect of the same matter. Section 236(2) expressly declares that the exclusivity of the grievance process identified in s. 236(1) operates whether or not the employee actually presents a grievance and "whether or not the grievance could be referred to adjudication". The result of the language used in s. 236(1) and (2) is that a court no longer has any residual discretion to entertain a claim that is otherwise grievable under the legislation on the basis of an employee's inability to access third-party adjudication: see *Van Duyvenbode v. Canada (Attorney General)*, [2007] O.J. No. 2716, 158 A.C.W.S. (3d) 763 (S.C.J.), at para. 17, affd without reference to this point [2009] O.J. No. 28, 2009 ONCA 11; *Hagal v. Canada (Attorney General)*, 2009 FC 329 (CanLII), [2009] F.C.J. No. 417, 2009 F.C. 329 (T.D.), at para. 26, affd without reference to this point [2009] F.C.J. No. 1618, 2009 FCA 364 (C.A.). While the residual discretion may exist if the grievance process could not provide an appropriate remedy, there is no suggestion in this case that it could not: see Vaughan, at para. 30. Assuming that to be the case, disputes that are grievable under the legislation must be determined using the grievance procedure. [page759]
>
> [My emphasis]

[65] Although PSAC relies on *Bron* for the proposition that this Court should exercise its discretion to determine the Application because this is one of the rare circumstances where the grievance process does not provide a remedy, *Bron* does not strongly endorse this approach. *Bron* notes that there is no residual discretion for the Court to consider a matter based on the lack of access to third party adjudication. *Bron* suggests that the residual discretion is even more limited. The residual discretion would only arise if the issue is clearly not grievable and even

then, it remains a discretion to be exercised with the guidance of the jurisprudence. *Bron* sends the same message as *Vaughan*: that resort to the grievance process is the first recourse.

[66] PSAC also relies on *Salie* in support of its argument that where the grievance process is not available, resort to the Court is available.

[67] In *Salie*, Justice Mactavish considered whether a former employee could rely on the grievance process or resort to the Court. Justice Mactavish noted, at para 51 that *Vaughan* was decided under the former *PSSRA* and that Parliament had subsequently enacted the *PSLRA*, which "explicitly ousts the jurisdiction of this Court in relation to matters that are otherwise subject to the grievance process".

[68] In *Salie*, the Respondent argued that the issue was grievable pursuant to section 208 of the *PSLRA* because it related to the terms and conditions of Mr. Salie's employment. Justice Mactavish found that the jurisprudence which had determined that a former employee could grieve did not involve a dispute that arose long after the person ceased to be an employee. She concluded, at para 68, that Mr. Salie could not rely on the *PSLRA* and "as a result, this Court has jurisdiction".

[69] Contrary to PSAC's suggestion that *Salie* at para 68 provides guidance for the present case, I regard this passage as Justice Mactavish's finding on the specific facts of *Salie*. The jurisprudence that has found that resort to the Court may be available has been based on first finding that there is clearly no access to the grievance process.

[70] I have also considered Justice Pentney's decision (*PSAC 2019*) to dismiss the Respondent's motion to strike. Justice Pentney considered the jurisprudence and noted several factors in favour of the Respondent's position that this decision should be grieved pursuant to the *FPSLRA*. Justice Pentney noted, at para 16, that the dispute "is undoubtedly in relation to the terms and conditions of employment, a matter otherwise governed by the collective agreement". Justice Pentney noted several other relevant factors, at para 27, including: the "Weber line of jurisprudence", signalling that courts should defer to the comprehensive labour relations regime, now buttressed by the ouster clause in section 236; the jurisprudence that has found that most employment-related matters can be grieved under section 208 (e.g. *Bron* at para 15); the benefits of having a decision from labour relations experts on the grievance before resorting to the courts; the nature of the dispute, which is not only about the MOU but about the interplay of the MOU and the 2011 Treasury Board Bulletin; the lack of clarity whether PSAC could pursue its policy grievance or could bring a group grievance under section 215; and, the possibility that individual employees may be able to grieve the decision under subparagraph 208(1)(a)(i).

[71] As noted above, Justice Pentney ultimately concluded, based on the jurisprudence that imposes a very high standard to strike an application, that this Application should proceed on a full record as the issue raised was debatable. Regardless of the outcome, Justice Pentney's analysis of the jurisprudence reflects that employment-related matters are best left to the labour relations regime and that in this case, PSAC, or individual employees, may well have access to the grievance process.

[72] Although the decision at issue does not arise from a particular provision of the Collective Agreement, other than ESDC's reliance on Article 6.01, I would characterize the decision as a matter of pay and remuneration that it is clearly related to the terms and conditions of employment. In the words of Justice Binnie in *Vaughan*, it is "workplace related" and "arising out of labour relations". At para 1 of *Vaughan*, Justice Binnie noted the context:

> The terms and conditions of employment of the federal government's quarter of a million current workers are set out in statutes, collective agreements, Treasury Board directives, regulations, ministerial orders, and other documents that consume bookshelves of loose-leaf binders. Human resources personnel are recruited into the system, spend a career attempting to understand it and die out of it.

[73] The complexity of the labour relations environment underlines the importance of resorting first to the relevant labour relations statutes and administrative processes to resolve labor and employment related issues.

[74] Before determining whether to exercise any discretion to consider this Application, the Court must first be satisfied that the grievance process is not available and would not provide any remedy.

[75] PSAC argues that individual employees cannot grieve the breach of the MOU pursuant to section 208 because individual employees are not parties to the MOU. This argument ignores the fact that the grievance is about ESDC's decision, which clearly affects individual employees. Although it is burdensome for individual employees to bring another grievance, I am not convinced that this option is not available or that extensions of time could not be sought if that is an obstacle.

[76] Section 208 permits an employee to grieve, among other things, "a provision of a collective agreement or an arbitral award" or "as a result of any occurrence or matter affecting his or her terms and conditions of employment". If, as PSAC argues, the decision is not directly part of a collective agreement or arbitral award, the subsequent broader wording of section 208 encompasses the decision at issue.

[77] PSAC's argument that the wording of section 209, which appears to restrict adjudication to grievances arising from provisions of the collective agreement or an arbitral award, bars access to independent third party adjudication, does not support finding that section 208 is not available. First, in *Bron,* the Ontario Court of Appeal, in referring to section 236, clarified that the exclusivity of the grievance process applies whether or not the grievance can be referred to third party adjudication. The same principle should apply with respect to Sections 208 and 209. Second, the decision is related to the Collective Agreement as well as being a matter affecting the terms and conditions of employment.

[78] PSAC also argues that it cannot bring a group grievance pursuant to section 215 for the same reasons as section 208: that the breach of the MOU is not a provision of the collective agreement or arbitral award. However, section 215 may permit the decision to be grieved because the ESDC decision – not the MOU – is related to the "interpretation or application… of a provision of a collective agreement." The Rationale document, which elaborates on the decision set out in the Q and As, refers to article 6.01 of the Collective Agreement several times as the justification for its decision to limit retroactive pay to employees who grieved. The

Rationale indicates that the "[e]mployer is exercising their managerial rights under article 6.01 of the PA collective agreement."

[79] As noted above, in March 2019, PSAC filed a policy grievance pursuant to Section 220, which is being held in abeyance. The grievance refers to the decision communicated in the Q and As on February 22, 2019, which denies retroactive pay to former incumbents who left the position before September 13, 2018 and did not grieve. The policy grievance also alleges that this decision is in breach of the 2008 MOU.

[80] I am not convinced by PSAC's argument that section 220 does not apply because it is limited to policy grievances only "in respect of the interpretation or application of the collective agreement or arbitral award". For the same reasons noted above with respect to section 215, the decision is related to the Collective Agreement. The Collective Agreement addresses matters of pay, although not explicitly this particular issue of retroactive pay for past incumbents. Moreover, the Rationale repeatedly refers to article 6.01 to justify who would and would not receive retroactive pay. Query why the interpretation of article 6.01, regarding the exercise of managerial rights, to make this policy decision about who is entitled to retroactive pay would not also open the door to this matter being grieved.

[81] With respect to PSAC's argument that ESDC should not be the decision-maker with respect to its own breach of the MOU, the decision being grieved is, as noted above, not the alleged breach of the MOU. Whether the decision, as communicated in the Q and As and the

Rationale considered and applied the MOU, based on a particular interpretation, or ignored the MOU, remains to be determined.

[82] Moreover, PSAC's unfairness argument overlooks that any breach of natural justice or procedural fairness could be addressed in an application for judicial review at the end of the grievance process. Although this would further prolong the determination of the dispute, there is a remedy to address PSAC's concern.

[83] I find that the *FPSLRA* should be relied on to determine the scope of section 220 and any other provision that PSAC or employees could rely on to bring a grievance (noting that time limitations may be an obstacle). This finding is based on several considerations, including that: the jurisprudence establishes that the first resort in employment-related matters should be the comprehensive labour relations regime; the decision at issue is about pay and remuneration; ESDC relies on article 6.01 of the collective agreement to make this decision; and, the overall complexity of the *FPSLRA* calls for those expert in labour relations to first address the issues raised.

[84] PSAC's section 220 policy grievance should no longer be held in abeyance and should be expedited. At the conclusion of that process, the parties could consider whether to seek judicial review.

VII. Whether ESDC's Decision is Reasonable or Procedurally Fair Need Not be Addressed

[85] Given the finding that the Court will not exercise its discretion to consider this Application and that PSAC must first exhaust its recourse pursuant to the *FPSLRA*, it is not necessary to address the issues of the reasonableness or procedural fairness of the decision. However, a few observations are noted.

[86] There is no dispute between the parties that if the decision were to be judicially reviewed, the applicable standard of review would be reasonableness. The recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] SCJ No 65 (QL) [*Vavilov*] has confirmed that the presumptive standard of review is reasonableness and in the present case, there is no reason to displace the presumptive standard.

[87] In *Vavilov*, the Supreme Court of Canada provided extensive guidance about what constitutes a reasonable decision, and on the conduct of a reasonableness review. A hallmark of a reasonable decision remains that the decision is justified, transparent and intelligible. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (para 99). An otherwise reasonable outcome cannot stand if it is reached on an improper basis (paras 86-87). A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with respectful attention, seeking to understand the reasoning process followed by the decision-maker to arrive at a conclusion.

[88] In the present case, PSAC argues that the decision to deny retroactive pay to former incumbents who did not file an individual grievance is not reasonable because, among other things, the decision either ignored or misinterpreted the MOU, noting that the MOU constrained EDSC's discretion regarding entitlement to retroactive pay. PSAC notes that clause 8 refers to "incumbents", not "grievers", which indicates that the parties intended that any remedies apply to all incumbents, not just those who grieved.

[89] The Respondent takes the position that the decision is reasonable, based on: the almost unlimited discretion given to employers with respect to retroactive pay; the 2011 Treasury Board Directive on Retroactive pay; the reasons set out in the Q and As and the Rationale; and, the Respondent's interpretation of the MOU – in particular, clause 8 – as being limited in application to those who grieved and to incumbents of the finalized national work description.

[90] If the Court had found that the grievance process was not available and that it would exercise its discretion to review the decision, the principles of *Vavilov* would apply. The Court would consider, among other things: whether the reasons for the decision as set out in the Q and As and Rationale are sufficient to determine if the decision is justified, transparent and intelligible and justified in relation to the facts that constrained the decision-maker; whether the reasons disclose a rational chain of analysis; whether and how the MOU was considered by the decision-maker, other than the passing reference to the MOU with respect to the period of retroactivity at Q 13; if the decision is completely discretionary, what factors informed the exercise of discretion; and, what was on the record before the decision-maker at the time the decision was made. The Court notes that the Rule 318 certificate, which provided several

documents to PSAC and to the Court, is not necessarily the record that was before the decision-maker.

[91] With respect to PSAC's allegations that ESDC breached its duty of procedural fairness by not giving PSAC notice that it would be making a decision on the retroactive pay and not providing an opportunity to PSAC to make submissions, if the Court were to consider the scope of the duty of procedural fairness owed, it would be guided by the context and the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 (QL).

JUDGMENT in file T-465-19

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is Dismissed.

2. No Costs are awarded.

"Catherine M. Kane"
Judge

FEDERAL COURT

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DOCKET:	T-465-19
STYLE OF CAUSE:	PUBLIC SERVICE ALLIANCE OF CANADA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 15, 2020
JUDGMENT AND REASONS:	KANE J.
DATED:	APRIL 3, 2020

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