File: 591-02-01

BINDING CONCILIATION UNDER SECTION 182 OF THE
FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT

(S.C. 2003, c. 22, s. 2)

Treasury Board ("**TB**")

("The Employer" or TB)

AND:

Association of Justice Counsel ("**AJC**")

("The bargaining agent" or AJC)

Determination of outstanding issues tied to the renewing the
2014-2018 collective agreement

DECISION

Binding Conciliation Board	: Serge Brault, Chairperson : Paul J. J. Cavalluzzo, member appointed by the AJC : Jean-François Munn, member appointed by the TB
Appearing for the Employer	: Martine Sigouin and Ted Leindecker (TB), representatives
Appearing for the Union	: Dougald Brown and Christopher Rootham (Nelligan O'Brien Payne), counsel

Hearing location	: Ottawa, ON
Last deliberation date	: July 5 2018
Decision date	: July 10 2018

I
INTRODUCTION

[1] This decision deals with a referral to binding conciliation made under s. 182 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*). The unit involved (the LP group) comprises about 2600 lawyers designated as “law practitioners” in the AJC’s certificate.

[2] Following notice to bargain on January 9, 2014 and the ensuing exchange of proposals the following February, parties held 11 negotiation sessions over 2014, 2015, and 2016. Certain points were agreed to, but others remained at issue.

[3] As per the parties’ Memorandum of Understanding concluded on February 28, 2017, I was designated an *eligible person* within the meaning of s. 182(1) of the *FPSLRA* (previously called the PSLRA), an agreement parties’ representatives had reached on April 20, 2017.

[4] The following issues, all of a pecuniary and economic nature, were still in dispute when the matter was sent to determination. The AJC challenges the legal basis on which rests this Binding Conciliation Board’s ability to decide the last issue, something I will return to later.

1- annual rates of pay (Appendix A);
2- hours of work: compensatory management leave (clauses 13.01 and 02);
3- hours of work: compensatory leave for travel on weekends and holidays (new);
4- hours of work: standby duty (“on-call duty”) (new);
5- including travel time in the definition of “work” (new art. 2); and
6- performance pay (Appendices B and C).

[5] A word about the proceedings. As per the parties’ agreement, the Binding Conciliation Board did not hear any witnesses; the matter was argued on record and briefing information.

II
SUMMARY OF THE PARTIES' SUBMISSIONS

[6] Shortly before our deliberations, some long-disputed issues were withdrawn and others settled. All the same, an examination of their final positions on remaining issues shows little evolution relative to those put forward at the start of the process, notably in respect of the subject of salaries, by far the overriding one here at issue. In that regard, the conciliation process seemed to have been of little effect with the parties more entrenched in their positions than inclined to actively reach a negotiated outcome.

[7] I will summarize the parties' respective positions, as well as some specific arguments advanced in support of them. Doing so, I am well aware of the challenge that represents summarizing or boiling down to a few lines arguments running over hundreds of pages.

Pecuniary and economic issues (rates of pay)

1. Annual rates of pay

[8] At the heart of the TB and AJC's salary dispute on this point is the significant market adjustment to the scales that the AJC demands, and that the TB challenges.

[9] Overall, all the settlements reached to date in this current round between the TB and public sector unions have been of a four (4) years duration including, save some exceptions, an annual economic increase of 1.25 %, preceded for some in the third year by a market adjustment of a percentage varying based on individual, factual circumstances.

[10] There is recognition as well, on the part of both the AJC and TB, of the factors underlying a market adjustment and its size. In essence, they are the existence of significant wage gaps between positions deemed comparable, including external ones occupied by lawyers primarily but not exclusively in the public service of other

jurisdictions, as well as significant recruitment and retention problems for lawyers in the federal system. Another one is the internal inequity.

[11] The adjustment claimed by the AJC is one based on a study it commissioned[1] which confirms that there exist significant gaps between the salaries of its members and of those in provincial jurisdictions or in the private sector. It cites as evidence a number of situations or references that I will briefly summarize.

[12] For the AJC and its expert, Ontario's public service is the key comparator, given that 56% of the federal workforce works there, most of which in the National Capital Region. In its view, the LP-2 level must be compared to Ontario's CC-3 level, which makes up 64% of the provincial workforce and represents the level into which a CC-2 on the Ontario scale would integrate after six (6) years. The AJC submits that its members' salaries are far behind those of that provincial group.

[13] For the AJC, even Quebec presents a negative difference, a region that accounts for 15 % of the whole unit. While recognizing the difficulty of comparing that province that has two negotiating units with distinct conditions, the Union still maintains that the difference it shows justifies a market adjustment. The specific salary conditions found there, such as overtime pay, or the payment of various bonuses whose value could reach as much as 12% of the base salary, adds also to the difficulty of that comparison.

[14] British Columbia, with about 11 % of the federal workforce is the third group of importance used by the AJC as a comparison. Lawyers' compensation in that province is based on their years of Bar admission. The AJC's research purports to show that the average salaries paid to BC's lawyers with comparable experience is higher, and with the AJC's far behind.

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1 *Market Analysis for Competitiveness of Salaries at the LP1, LP2 and LP3 levels*, Salopek & Associates, July 16, 2017.

[15] Based on an analysis of contractual documents, the study conducted for the bargaining agent claims that AJC members are at the bottom of the market everywhere, far behind the average salaries of all the reference groups. Whether classified LP-1, 2, or 3, according to the study, they all receive less.

[16] In sum, as established by the bargaining agent's consultant, the compensation average in the four identified provinces and the corresponding differences are as follows:[2]

Level	Weighted provincial average	Difference between LP and provinces	Percentage
LP-1	$114 200	$15 264	15.43 %
LP-2	$179 575	$41 709	30.25 %
LP-3	$199 080	$46 467	30.60 %

[17] On that basis, the AJC submits two alternative proposals to bridge the alleged gaps.

[18] The first involves levelling in essence the Toronto pay rates, and extending them to everyone, complemented by additional levels and an annual 2 % raise. The second, which maintains the Toronto levels, includes annual scale increases of the order of 4.7 %.

[19] In sum, the AJC estimates that its first proposal would amount to a 23.8% increase over four years, and the second, 29.1 %.

[20] The differences that the AJC's consultant calculated originate from a weighted average of certain salary data considered relevant and gathered in certain provinces, and with the smallest excluded. Simply put, the average was obtained by using as variables the demographic distribution of the AJC's workforce by province and other factors, some but not all of which were within the salary levels of those provinces. Thus, the relative weight of a given province in the calculated average will vary based on the percentage of federal lawyers working there.

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2 *Ibid*, note (1) p. 5; see also the AJC's Conciliation Brief, June 27, 2017, p. 67.

[21] According to the AJC, the weighted average method ensures a more reliable result than the simple straight average used by Deloitte, the expert consultant that the TB retained, and that such a method assigns too much weight to small provinces, again according to the AJC.

[22] In response to the Union's allegations about its using an arithmetical rather than a weighted average, the TB states the following:[3]

> "As outlined in section 4.1, TBS requested that Deloitte prepare a weighted average to determine National salaries. However Deloitte declined countering that a straight average of the results was methodologically more appropriate. To use a weighted average methodology in this case would inappropriately determine that Federal lawyers (generally solicitors located in the National Capital Region (Ottawa, ON, and Gatineau, QC)) are a "better-fit" match to the Province of Ontario Crown Counsel (generally prosecutors located in the Toronto, ON, region) simple based on Provincial location (while downplaying the Montreal, QC, market which is geographically closer) and not take into consideration the National scope of the work performed by Federal lawyers."

[23] The AJC views as incorrect the TB's claim put in its brief that the LP-2 group's salary is 8.4% higher than that of the provinces' corresponding groups. That claim, based as it is on an unweighted average, excludes Ontario from the sample, and rests on the false ground that the level of salaries paid in that province reflects the higher costs of living, especially in Toronto, as well as on the incorrect assertion that the professional practice of Ontario lawyers would be different. Rejecting that claim, the AJC submits that the majority of its members work in Ontario, in the National Capital Region, and that nothing justifies excluding Ontario from the equation.

[24] In terms of internal relativities, the AJC argues that lawyers at the LP-1 and LP-2 levels earn less than Canadian Forces judge advocates, who are also federal employees and who are classified as captains or majors. The TB dismisses that comparison as irrelevant.

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[3] The TB's *Submissions*, August 11, 2017, pp. 17 and 63.

[25] The AJC argues as well that the TB agreed to substantial raises or adjustments for other groups in this round, and that a similar correction is justified for the lawyers, the goal being precisely that the group's salaries remain competitive without placing them at a such a high level above the market that all would want to join. Among these groups, the AJC notes the following:

- Firefighters : 15 %
- Actuaries : 20 %
- others : Between 9 % and 15 %

[26] In sum, the AJC contends there is a need to keep federal lawyers' salaries competitive, something that requires a considerable scale increase and a significant adjustment.

[27] Conversely, the Employer is of the view that the more modest salary increases offered are justified and adequate. Treasury Board points out that this unit has received an unprecedented 15.25 % raise in the 2012 settlement, and that it is among the highest paid in the federal public sector.

[28] The data submitted by the Union are, in its view, unreliable and biased on their face. Referring to the analysis of its own expert Deloitte, the Employer states that it is the result of specific consultations carried out in different provincial and territorial administrations. All but two responded to an accurate and specific questionnaire on their lawyers' salary conditions. The TB refutes the claim that the group experienced recruitment or retention problems; its own data show these are at a below-average level.

[29] Based on the same study, the external relativities considered show that the maximums of the LP scales (1 to 4) are higher on average and, depending on whether Ontario is included, going from between 1.3 % and 14.7 % of the average of jobs and salary rates collected in other jurisdictions.

[30] Relying heavily on the model freely negotiated with over 85 % of the federal public service during this round, the TB proposal made in its submission (unnecessary to attempt to summarize in detail), identifies internal and external relativities. It therefore proposes the following increases:

- as of May 10, 2014 : 1.25 % salary increase
- on May 10, 2015 : 1.25 % salary increase
- on May 10, 2016 : 1.25 % salary increase
- on May 10, 2017 : 1.25 % salary increase[4]

[31] Furthermore, the employer proposes a 1 % market adjustment that should come into effect on May 10, 2016, before the economic increase scheduled to come into force the same day.

2. Compensatory management leave

[32] The issue concerns the application of a provision agreed to in the last negotiation to compensate through paid leave a lawyer called to work an excessive number of hours for a long trial, or a particularly complex matter, etc. (clauses 13.02 (e) and (f) of the current agreement).

[33] According to the AJC, the actual wording of clauses 13.02 (e) and (f) leads to an inconsistent and arbitrary application, depending on the manager who applies it. In the result, some managers grant it in certain circumstances, while others do not when they should. In addition, they seem to use it at times for a period unrelated to the actual number of excessive hours worked.

[34] To avoid that inconsistency, the AJC first proposes to give everyone universal leave of 45 hours per year, recognizing that the nature of the work frequently involves excessive hours. The Association submits that provinces have recognized that reality in precisely the format it suggests (for example, B.C., 8 days; Saskatchewan, 12 days).

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4 *The TB's submissions*, tab 4, page 38, section 4.1.2.

[35] In addition to such a general leave, the AJC requests that a lawyer called to work more than 180 hours, i.e., the equivalent of 24 days of work in a 4-week period, receive compensatory leave in accordance with the following scale, based on the number of additional hours worked beyond 150 (20 days) per 4-week period:

-	180 hours/4 weeks	=	1 day of leave;
-	200 hours/4 weeks	=	2 days of leave;
-	more than 215 hours/4 weeks	=	3 days of leave.

[36] In rejecting this proposal, the TB argues that it is a disguised way of bringing back into the collective agreement the provision (clause 13.01) that in the past allowed for paid overtime. It points out that such a provision was dropped in the previous round in exchange for a 2 % increase in the scales, and the right to compensatory leave as it is known now.

[37] According to the TB, granting non-discretionary universal fixed leave equal to 45 hours per year without considering hours worked has no equivalent elsewhere in the CPA[5] ; it represents an equivalent annual cost of the order of $ 8.4 million or 1.9 % of base remuneration, not to mention the loss of productivity.

[38] According to the TB, the AJC's two requests at issue here would represent a cost of $ 26 million, i.e., according to its estimate, or the equivalent of about 97.5 hours of additional leave per individual, or the equivalent of 6.1 % of base salary.

[39] That said, the TB recognizes that a certain degree of administrative inconsistency arises when applying the current provisions. It proposes the issuing of a directive to managers to promote a more equitable administration of compensatory management leave as it should be understood.

[5] Central Public Administration

3. Compensatory leave for travelling on weekends and holidays (clause 13.02 (c))

[40] The AJC requests that leave be granted to lawyers forced to travel for professional reasons, especially to the North, a request to be applied only to travel on statutory holidays or weekends. Such a leave would be one day per day of travel.

[41] Opposing it, the TB views this proposal as another roundabout way to reintroduce paid overtime, something the AJC denies.

4. Hours of work: standby

[42] The parties exchanged proposals on this subject with disagreement hardly ending; the issue is standby, a duty some lawyers are obliged to perform.

5. Including travel time in the definition of work

[43] Clause 13.01(a) stipulates that a lawyer will work 150 hours over 4 weeks. According to the AJC, that clause is not administered strictly and consistently. It claims that travel time in those 150 hours is counted by some managers, but not by others. As a matter of equity, the AJC also requests that a lawyer required to travel for work during hours that the Employer has determined be deemed to be working during that travel, and that the time spent travelling be deemed time worked. A new definition should therefore be added to article 2 of the collective agreement.

[44] The TB completely rejects this request for the reason already stated, namely that it amounts to requesting overtime pay.

6. Performance pay (Appendices B and C)

[45] This is a request formulated this time by the TB, and one that the AJC challenges deeming it inadmissible for lack of jurisdiction. The TB explains that, beyond correcting certain inconsistencies in the designation of the classifications, its proposal seeks to facilitate the implementation of the text by making it rest on certain principles and parameters.

[46] This request should be rejected, the AJC submits, for the Employer never presented a proposal to it on this point before the arbitration, during the negotiations, or in its response to the AJC's binding conciliation request. The AJC surely recognizes the TB mentioning that it would advance four principles aimed at managing the performance pay system now in place differently, but it never put forward any argument or text, or offered a reason to justify amending it.

[47] With supporting jurisprudence, the bargaining agent is essentially relying on the following rule in s. 150(2) of the *FPSLRA*:

> **150** (**2**) The arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested.

[48] The employer responds that its concerns with this form of compensation date to 2014, and that it shared them with the bargaining agent in the past. As to the AJC's point on lack of discussion, it claims that that its opportunity to discuss it more fully and specifically during the negotiations was impeded by the limited progress made in negotiating the economic and pecuniary provisions, and before the AJC abruptly decided to bring this matter to binding conciliation.

III
DECISION

[49] The golden rule in these circumstances is to attempt to replicate the likely outcome that the parties could have reached on their own given that they would have negotiated realistically and in good faith toward a settlement.

[50] The issues to be decided have been examined in that perspective. The decision maker's only task is therefore to try and determine the outcome the parties could have reasonably reached on their own, nothing more and nothing less.

[51] Arbitrator Ken Swan described in this way the framework involved, including in the public sector:[6]

> "It is, I think, fair to say that virtually all interest arbitrations in Canada are resolved by an appeal to a relatively limited number of criteria: the ability of the employer to attract and retain competent employees, internal relativities, external relativities, changes in the cost of living, changes in productivity, the ability of the employer to pay, and a general doctrine of fairness and equity. There is probably nothing exceptional in any of these criteria taken individually, and they should all bear, more or less, on the outcome of any public sector arbitration." [Emphasis added]

[52] Here, the process is further clarified by certain legislative guidelines taken from before 2013, and that are worth reproducing (see the *PSLRA*, s. 148):

> **Factors to be considered**
>
> **148** In the conduct of its proceedings and in making an arbitral award, the arbitration board must take into account the following factors, in addition to any other factors that it considers relevant:
>
> (**a**) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
>
> (**b**) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;
>
> (**c**) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;
>
> (**d**) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
>
> (**e**) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

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[6] K.P. Swan, "The Search for Meaningful Criteria in Interest Arbitration" in *Dispute Resolution: Public Policy and the Practitioner, Proceedings of the Fifth Annual Meeting, Society of Professionals in Dispute Resolution* (Washington, 1978) p. 343.

[53] In respect of this specific matter, it is worth remembering certain directives and guidance given to the parties in the interim decision rendered in this case in July 2017 and intended, it turned out eagerly in vain, to bring the parties closer:[7]

> *Pursuant to s. 182 of the FPSLRA and in accordance with their M.O.U. dated February 28, 2017, parties have chosen binding conciliation over conciliation strike as the method of resolving their dispute.*
>
> *Wishing to create proper conditions for open and meaningful discussions, parties have committed themselves to participate in this exercise in good faith and full transparency, and to actively collaborate in seeking a negotiated settlement.*
>
> *A number of decisive issues are currently still in dispute, and will require from both parties substantive exchanges prior to our next hearings. To help further that objective, the following process is set out.*
>
> *TB shall file no later than August 11, 2017 a detailed and costed response to the AJC's brief and the Salopek and Associates Report. Its response shall include its own detailed and costed proposals, together with the comparators it deems relevant to the issues involved.*
>
> *The AJC shall reply in similar manner to the TB's response no later than September 15, 2017. Thus, its reply will also be detailed and costed out with accompanying justifications, and will include, as well, a list of the relevant comparators it relies on.*
>
> *Any proposal by either party falling short of these requirements, namely that is not objectively framed and duly costed with relevant comparators, will not be considered by the Binding Conciliation Board.*

And finally:

> *(…) the Binding Conciliation Board wishes to strongly reiterate its view that a negotiated settlement is indeed possible, an outcome way more favorable to both parties as there is no premium for bringing the matter to impasse. However, if the Binding Conciliation Board is to make a final and binding determination in this matter, it will do so in accordance with all the standards and criteria applicable to such interest disputes.* [Emphasis added]

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[7] *Interim Award 647-14, Treasury Board and Association of Justice Counsel,* Mr. Serge Brault, July 27, 2017. At my request, editorial changes were made to this award.

[54] Each party raised till the very end many significant issues regarding each other methods, data, or statements, as well as their relevance or reliability. There were many good questions arising but that were left unanswered. In the end, the Binding Conciliation Board did not have access to data rigorous or compelling enough to rally the two sides, or that proved free from each other's criticism or suspicions. We will briefly return to this in the conclusion.

[55] The relevant case law identifies various factors designed to make the decision-making objective. Obviously, the decision maker cannot know or guess what the parties had in mind as an acceptable outcome. The task is to reconstruct a framework based on the fragmentary information received. That said, the exercise must ultimately rest on sufficiently persuasive, plausible, and sound information. One has to assume that articulate parties would not engage in direct negotiations and reach a settlement deprived of a sound rational basis.

[56] The following considerations, adjusted for differing circumstances, provide a useful framework for finding a path to the desired objective:

1. The solution must be balanced, namely, feasible for the employer and equitable for the employees as well as between them. The desired feasibility and equity are weighed against the economic, financial, and social environment found in the evidence filed in the record.
2. The rationality sought for is subject to a rigorous review of the relevant reference data — the famous "comparator groups". Their relevance and persuasive value will be appreciated as much for their size and nature as for their actual weight, based on their similarities and distinctions with and from the target group.
3. When faced with one unit that is part of a large group, the accepted solution must be a rational fit because a lucid negotiating party does not want to ignore or avoid an inescapable reality. To that end, the Binding Conciliation Board will take for granted that articulate parties negotiating in good faith would not knowingly opt for solutions that are possibly attractive at first sight but, on review and placed in context, are likely to appear dysfunctional or unfair.
4. Also to consider is whether it can be reasonably demonstrated that the workforce experiences recruitment or retention problems. It is difficult to conceive for instance the need to raise an offer beyond market conditions when, on review, there is no shortage or exodus of the individuals but a turnover of the regular variety.

5. Finally, the parties' contractual circumstances and practices, their negotiation history, and the work conditions under review are to be considered and taken into account. The parties do not negotiate in a vacuum, and their collective agreement is never more than a work that while legally final, practically remains on going and never finished.

[57] We will now turn to the issues in dispute.

1. Annual rates of pay

[58] After a review and an analysis of the submitted documentation, the negotiation history, and the parties' arguments, I find that the increase that the AJC evaluates at 23 to 29 % over four years lacks proper justification or demonstration, not to mention the pecuniary aspects of the other provisions still in dispute.

[59] It is not lost on this Board that certain federal public sector groups, such as the firefighters, obtained market adjustments or an economic increase above the overall general model. That said, those groups, very much in the minority within the whole, had special circumstances. Inversely, there is nothing in the information submitted that persuades us to exclude in the current round the law practitioners from the overriding rule that applies to more than 80% of the federal workforce.

[60] In any case, the groups benefitting in this round from increases that were beyond the norm are well identified in the documentation. They include dentistry (DS) (a 4 % adjustment on October 1, 2016); medicine (MD) (a 4 % adjustment on October 1, 2016); psychology (PS) (a 4 % adjustment, levels PS-3, 4, and 5); and, finally, firefighters (FR) (an increase of 15 % of the base salary on August 5, 2016).

[61] We know that the AJC benefitted from a similar exceptional increase in the last round, which had the effect, by its own admission, of raising it to the third highest of the external references, namely, the provinces. There was therefore at the time a need for correction above the norm, a result of direct negotiation between the parties. The AJC recognized the significance of that in its communiqué of June 27, 2012, stating: [8]

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[8] *The TB's Presentation Plan Submission*, October 25, 2017, p. 2; see also the AJC's *Conciliation Brief*, June 27, 2017, p. 26.

> Second, the 15.25 % increase allows us to play some quick catch-up with our provincial comparators. In national rankings, we will catapult from the bottom half of the table to third place. We aimed for second overall (which would have required more than a 20 % increase), but notably, the salary max for our LA1s will rank second overall by leapfrogging over their equivalent provincial counterparts in Alberta. This will be particularly welcome news in that province, where recruitment and retention concerns are in a state of full blown crisis. Only Ontario remains ahead of us at every working level. However, the sheer size of the 15.25 % increase will appreciably shrink the wage gap between us and them. This was our primary bargaining objective, and one that we can confidently say we achieved.

[62] Nothing indicates that the minority groups favoured this time benefitted from similar adjustments in the last round. The contrary is more likely. Bear in mind that during the preceding round, the overall average annual increase granted was about 1.9 % over 4 years, while the AJC received 15.25 %.

[63] With respect, the AJC's study indicating that the ranking of federal lawyers in all of Canada plummeted to the point that is at the bottom of the heap, despite its terse statements on that point, remains unconvincing, especially given the fact that the annual salary increases granted during the period in the provinces or territories would have been only 1.06 % on average.[9]

[64] This AJC's claim, the TB has effectively thrown in doubt. Based on the sample that its consultant considered, the TB accords its lawyers the highest rank, the only exception being the Toronto group. While not at the peak, this group would fall nevertheless within the more-or-less 10 % deviation range that is deemed to guarantee an acceptable level of competitiveness.[10]

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[9] *The TB's Submissions*, August 11, 2017, table 4, p. 16.
[10] *The TB's Submissions*, August 11, 2017, p. 18, table 7.

[65] It is ironic that the expert reports relied on by both sides place federal lawyers at opposite ends, one at the head of the pack, and the other trailing it. The silence or reticence of each party on certain points suggests that the truth must lie somewhere between the two.

[66] Clearly, the Toronto's specific rates came out of a free negotiation that took into account a specific geographic and economic reality, one that is well defined and circumscribed. For this reason, we do not see why it would be appropriate to abolish it or to apply it to all the scales. How the parties want to deal with that reality is something they will have to do through negotiation, or by arbitration based on the kind of compelling information that is missing here.

[67] On recruitment and retention, the most persuasive evidence is that internal transfers and retirement are the main reasons behind the primary movements of personnel that have been observed. Those facts, which clearly are such, prevail over survey responses, although they still need to be treated with care. All in all, the preponderance of the evidence is that no retention or recruitment problems justify an adjustment.

[68] The role of the decision maker is essentially to do a pastiche of the parties. Evidently, a close review of the evidence adduced leads us to consider unlikely that an adjustment exceeding the norm would have been negotiated.

[69] For all those reasons, we find acceptable the employer's position on the economic increase to the annual salary rates from 2014 to 2017 as it reflects more properly in our view the likely outcome of free bargaining :

– effective May 10, 2014: 1.25% salary increase
– effective May 10, 2015: 1.25% salary increase
– effective May 10, 2016: 1.00% wage adjustment
– effective May 10, 2016: 1.25% salary increase
– effective May 10, 2017: 1.25% salary increase.

2. Hours of work; **compensatory management leave**; **excessive hours**

[70] The proposals formulated by the AJC on this point, to the extent that they result in paid leave, have a clear pecuniary or economic aspect for they involve a decrease in actual working time.

[71] The fact that the parties agreed in the last round to waive paid overtime for a 2 % general salary rate increase, in addition to adopting compensatory leave provisions, is not here in dispute.

[72] The history of the negotiations that were concluded is relevant to this proceeding, and its significance not to be ignored. If this entire group still benefits from that compromise, one freely agreed to in negotiation, it is not appropriate to intervene or, by way of consequence, to accept this proposal; it would amount effectively to a unilateral step backward.

[73] This said, the TB has an interest in ensuring that the managers responsible for administering the relevant clauses interpret them in a way that ensures a consistent and fair implementation. If they fail, there is a risk that the bargaining agent could exercise its recourse in the presence of arbitrary, discriminatory, or abusive actions.

3. and 5. Hours of work: **travelling on weekends and statutory holidays**, **and including travel time in the notion of work**

[74] The earlier commentary about compensatory management leave applies here. There is no reason to modify the collective agreement on this point, nor to add a definition to article 1, for the same reasons.

4. Hours of work: standby (**clause 13.02**)

[75] The evidence submitted and the arguments heard justify introducing the following text at article 13 of the collective agreement:

> *(e) Where the Employer requires a lawyer to be available in standby during off duty, the lawyer shall be compensated at the rate of one-half (1/2) hour leave with pay for each four (4) hour period or part thereof for which the lawyer is required to be on standby duty.*

> *(f) A lawyer required by the employer to be on standby duty shall be available during his or her period of standby at a known telephone number and be available to return for duty as quickly as possible if called.*
>
> *(g) In requiring lawyers for standby, the Employer will endeavor to provide for the equitable distribution of standby duties.*
>
> *(h) No standby compensation leave shall be granted if a lawyers is unable to report for duty when required.*
>
> *(i) Leave under this Article can be carried over but must be used by the end of the next fiscal year.*

6. Performance pay

[76] After reviewing the circumstances in the record, the Binding Conciliation Board finds that the union's argument based on s. 150 of the *FPSLRA* is well founded.

[77] On this, we agree with the PSLRB's decision in *Research Council Employees' Association v. National Research Council of Canada*, 2012 PSLRB 115 at paras. 26 and following.

[78] Although the TB expressed concern about performance pay at the start of the discussions, there was nothing to prevent it from sending a proposal to the AJC well before the matter was referred to conciliation. The fact that the salary discussions did not progress at the pace it wanted is not a justification based on the requirements of s. 150. With respect, it should be kept in mind that the TB did not really respond to the AJC's pecuniary requests until August 11, 2017, and that it did not communicate certain decisive, economic, or pecuniary information until that late stage. It will be up to the TB to put its proposals forward at the next round, if they still wish to do so.

Coming into force

[79] As per the agreement of the parties on the last day of the hearing, the new, negotiated provisions, as well as those flowing from this decision, will come into force 120 days after this decision, as always due to the *Phoenix* system's implementation problems.

Final observations

[80] Had the parties had at their disposal more common tools, and shared data that was exhaustive and reliable for both of them, would have rendered their negotiations and our task more efficient and transparent. And we strongly recommend that for future negotiations, steps be taken to provide a reliable, thorough, and non-partisan study on the lawyers' overall compensation; this would include complete data on the relevant comparators and their justification.

[81] In the absence of reliable and objective data, chances are that in the next proceeding involving a similar case, it is likely the appointed board will find it appropriate and necessary to designate an expert for that purpose.

Montreal, July 10, 2018

Serge Brault, ADRIC, NAA, IMAQ
Chairperson

Adjudex – File Nº 15471
S-A : 655