

Federal Court



Cour fédérale

Date: 08112018

Docket: T-1635-17

Citation: 2018 FC 1122

Ottawa, Ontario, November 8, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ALLAN BRADLEY ZALYS

Applicant

and

**THE ROYAL CANADIAN MOUNTED
POLICE P. LEBRUN (RESPONDENT) SUPT.
JENNIE LATHAM (ADJUDICATOR)**

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Allan Bradley Zalys, who was unrepresented, brings this judicial review application in respect of a decision [the Decision] made by a Level II Adjudicator appointed under the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10. That decision, dated June 8, 2017, being a *de novo* hearing of a Level I Recourse Adjudicator's decision dated March 13, 2016, dismissed the grievance filed by the Applicant in January 2013. For the reasons that follow, the application for judicial review is allowed.

I. Background

[2] On August 22, 2012, the Applicant retired from the Royal Canadian Mounted Police [RCMP] with just over 37 years of service at the rank of staff sergeant. Prior to retirement he had requested that he be discharged and that his unused annual leave be paid out, which he thought would include his accumulated service pay. The Applicant received payment for 1398 hours of annual leave; however the payout did not include any amount in lieu of accumulated service pay.

[3] Service pay is described as a retention allowance earned by members to award them for remaining in the RCMP. It is paid to RCMP members based on the length of their service and calculated as a percentage of their pay. It increases for every five years of service with the RCMP. It is normally paid out as salary when a member takes annual leave in which case it is pensionable. If a member does not use all of his or her annual leave, the annual leave is banked, as is the service pay. If accumulated annual leave remains at the time of retirement, it is always paid out as being in lieu of salary. However, the position of the Respondent is that service pay, may or may not be paid out with annual leave on retirement, depending upon the manner by which the annual leave is paid.

[4] After the Applicant retired by being voluntarily discharged, he was informed that a member was only eligible to receive service pay by remaining in service and receiving it as salary along with unused annual leave to be taken and exhausted up until the date of retirement. During this time prior to retirement while receiving salary for the accumulated annual leave, the member may also benefit by accumulating additional time and perhaps an increase in rank for

beneficial pensionable purposes. Conversely, the member remains available for recall to service while remaining in the service while exhausting his or her accumulated leave.

[5] The Applicant could not accrue further pensionable time. He was not aware that he would not be paid service pay or that it would not be applied to his pension. He did not wish to be in a position of being recalled. He therefore opted to receive only a lump sum amount representing his accumulated annual leave, which he thought would include his earned banked service pay. Only after choosing to be discharged did he discover that the payout did not include his accumulated service pay in the amount of \$7257.01.

[6] On January 2, 2013, after several months of email exchanges with National Compensation Services, the Applicant initiated a grievance alleging that he had been denied his earned service pay on discharge in the amount of \$7231.57, and which was not considered or calculated toward pensionable services.

[7] From discussions with compensation services employees of the RCMP, his understanding was that the crux of the grievance was the meaning of “substantive salary” as found in s. 7.1 of both the *Administration Manual*, [AM] and the *National Compensation Manual* [NCM]. If “substantive” was meant to include allowances, then the Applicant’s annual leave payout had been incorrectly assessed, whereas if the term was meant to exclude allowances, then the Applicant had received the correct amount for his payout on discharge.

[8] On March 13, 2016, the Applicant received the final decision of the Level I adjudicator concluding that he was not entitled to service pay on the payout of his annual leave. The Level I adjudicator found that service pay was reserved for serving members of the RCMP, i.e. only paid out with annual leave if taken prior to retirement. The Applicant, as a retired member, was no longer receiving a salary, which terminated his entitlement to service pay. Accordingly, the Level I adjudicator determined that the Applicant had not established that the Respondent acted contrary to legislation.

[9] On April 18, 2016 the Applicant presented a request for a review at Level II of the grievance process, in the course of which the adjudicator rendered a new (*de novo*) decision [the Level II Decision]. The Level II Decision is the subject of this judicial review.

[10] The Adjudicator considered the AM, as well as the NCM, to identify the relevant definitions, both of which referred to the same section 7.1. It provided that when a member dies or is discharged from the RCMP, an amount equal to the number of days of annual leave earned but unused, calculated at the member's "substantive salary" on the date of discharge or death will be paid out. However, the Adjudicator concluded that none of the policies in question provided a definition of the term "substantive salary". She then considered the definition of the term "Salary" – defined in the NCM as "an annual rate of pay which does not include any allowances or other types of compensation" concluding that it seemed "straightforward" that the service pay would not be included in the calculation. The Adjudicator nevertheless, then turned to the Oxford Dictionary definition of the term "substantive", concluding that it refers to "having separate and independent existence", suggesting a restrictive connotation rather than a broadening of the noun

it is describing. As such, the Adjudicator found that “substantive” could only denote the essential part of the salary or the base salary, rather than one that is dependent on the amount of allowances attributed to each individual employee. The definition of substantive salary, according to her could only denote a basic salary void of any other form of compensation.

[11] The Adjudicator also referred to section 6.1.1 in the same AM and NCM where the term “substantive salary” was used in respect of the payout of banked annual leave of officers that exceeded the carryover entitlement, and which specifically indicated “does not include performance awards or allowances”. The Adjudicator concluded that the term “substantive salary” was consistently applied for payouts of the member’s base salary devoid of any allowances or other forms of compensation, which should similarly apply to the Applicant’s situation.

[12] The Adjudicator thus, concluded that the Applicant had not demonstrated that the Respondent’s decision to provide him with the payout of his annual leave without the inclusion of service pay was contrary to legislation, RCMP or Treasury Board policies. Therefore, his grievance was denied for a second time.

II. Standard of Review

[13] When reviewing the decision of an RCMP adjudicator, the Court adopts the reasoning of Mme. Justice Strickland in the matter of *Su v Canada (Attorney General)*, 2017 FC 645 at paragraphs 42 and 43 as follows:

[42] This Court has previously held that when reviewing the decision of an RCMP adjudicator or the Commissioner, given

specialized expertise and broad powers with regards to the questions before him or her, a great amount of deference is owed, especially when an internal grievance process or internal RCMP policies are involved (*Mousseau* at para 15; *Boogaard* at paras 32-33; also see *Storozuk* at paras 24-27; *Schamborzki v Canada (Attorney General)*, 2015 FC 1262 (CanLII) at para 30; and *Camara v Canada*, 2015 FCA 43 (CanLII) at paras 6 and 19). I also agree with the Respondent that the interpretation of the Commissioner's Standing Orders or the Administration Manual are to be reviewed on the reasonableness standard as this concerns the interpretation by the RCMP of its own internal policies in which it has relative expertise (*Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII) at para 51 ("*Dunsmuir*"); *Alberta Teachers' v Alberta* at paras 30, 39 and 48; *Beaulieu* at paras 41-44; *Irvine* at para 27).

[43] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with the existence of justification, transparency and intelligibility within the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47; *Khosa* at para 59).

III. Analysis

A. *The RCMP has the onus of demonstrating that "substantive salary" excludes service pay allowances in section 7.1.*

[14] The Adjudicator agreed with the Applicant that the meaning to be attributed to the term "substantive salary" in section 7.1 regarding payout on the death or discharge of a member in the NCM or the previous AM is "the crux of the dispute". The Adjudicator stated more narrowly that she accepted that "if 'substantive' in section 7.1 is meant to include allowances, the Applicant's payout was incorrectly assessed".

[15] However, in the Court's respectful opinion, the Adjudicator initiates her analysis on the wrong foot when, after referring to the unambiguous definition of "salary" in the NCM to

exclude allowances, she concludes that it would appear to make the case seem “straightforward” that the service pay allowance is excluded when paid out in all circumstances.

[16] She thereafter, negatively discounts the Applicant’s arguments by noting that he “honed in” on the word “substantive” arguing that it must have some other meaning intended to broaden the defined term. Not only was the Applicant correct in his singling out the determinative issue, as the Adjudicator acknowledged. It is also a very reasonable argument that if additional words are added to the unambiguous defined term “salary” that excludes the allowances claimed, the additional words must be intended to have some impact on the meaning of the term, which could well include in the circumstances an intention to broaden the definition.

[17] It is assumed that each word used by drafters of documents establishing legal rights of persons have been deliberately chosen and are intended to contribute to the meaning of the purpose of the document. The legislature does not include unnecessary or meaningless language in its statutes: *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 87, *R v Kelly*, [1992] 2 SCR 170. This reasoning is equally applicable to the interpretation of policies governing important issues, such as payment of salary to employees. In this instance, the additional term “substantive” has, at a minimum, rendered the interpretation of the calculation of the payout of annual leave on death or discharge, ambiguous.

[18] Next, she proceeds to criticize, and in fact mischaracterize, the unrepresented Applicant’s submission as follows: “The issue with the grievor’s assertion is that he does not provide any policy or definition that would support his theory. In essence, he is arguing that without a

definition provided, his interpretation must prevail.” The Adjudicator appears to be suggesting that it was the Applicant’s onus to provide a policy or definition that would establish the meaning of “substantive salary” used in the Respondent’s manuals. I respectfully disagree with this assumption.

[19] Reading between the lines the Applicant’s argument is quite correct. Without the Respondent providing a clear definition of “substantive”, he should succeed.

[20] If the unambiguous defined meaning of “salary” has been rendered ambiguous by the wording of the employer, as applied to the circumstances of the Applicant, it is surely up to the employer to provide a clear definition or explanation for materials available to members to guide them in exercising their options on leaving the Force.

[21] The Court is of the view that this is a case where it is important to distinguish between the situation of a party who has the legal onus to demonstrate that the decision-maker’s decision was unreasonable, and the onus on any party, at any time, of demonstrating any given issue, including one that may determine the matter.

[22] In the Court’s view, the RCMP cannot avoid its obligation to provide clear and non-confusing direction to its members on a matter as significant to them as their conditions on retirement, and as simple to express, such as the calculation of payout of accumulated annual leave. This was after all done in sections 6.1.1 and 6.1.2 with regards to the Officer Cadre.

[23] The Court agrees with the Applicant that it is significant that service pay is earned banked remuneration. Policies or directives eliminating something that has been earned and is agreed can be banked and paid in the future must be expressed in the clearest of terms. This means that clear wording indicating the contingent nature of service pay on discharge ought to have been provided, most evidently in the provisions governing the accumulation of service pay, and clearly repeated in the conditions of payout on death or discharge. Moreover, it should have been followed up by some form of retirement protocol, requiring the Applicant to sign off on abandoning his right to receive service pay. It is comparable to an insurance company, which would not dare eliminate some form of previously provided coverage, unless specifically brought to the attention in some highly prominent, or preferably having it expressly endorsed by the signature of the insured.

[24] This is consistent with the general principle of interpretation which favours interpreting benefits-conferring legislation, such as employment protections in such a way as to be generously read in favour of the claimant and reading provisions which limit or interfere with the rights created in such legislation in a strict manner: *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, at para 36. In other words, explicit statutory language is required to divest persons of rights they otherwise enjoy at law: *GMAC Commercial Credit Corporation – Canada v TCT Logistics Inc*, [2006] 2 SCR 123 at para 51.

[25] Thus, the onus should rest with the RCMP to advance a clear definition of the term “substantive salary” such as to exclude earned service pay, particularly inasmuch as section 7.1 appears to be the only notice provided members about their rights regarding payouts on

discharge. On this point, the Court concludes that if there exists evidence of any accompanying directives or a discharge protocol to assist retiring members instruct them on this issue, none was introduced in evidence before the Adjudicator to support the fairness and consistency of the application of the provision.

[26] A misstatement or understatement of the employer's onus in providing a clear definition of the meaning of "substantive" in section 7.1 is probably sufficient to set aside the decision and send it back to be considered by a different Adjudicator. However, because the Court is ultimately satisfied that the clear meaning of "substantive" has nothing to do with allowances, and ultimately orders that that the matter be sent back with directions to adopt an interpretation upholding the Applicant's position, it will proceed with the remainder of its analysis in support of its final order.

B. The Adjudicator's contextual interpretation of sections 6.1.1 and 6.2.2 in relation to section 7.1 is unreasonable

[27] The Court is critical of the Adjudicator's contextual interpretation of section 7.1 based on the phrase "base substantive salary" found in sections 6.1.1 and 6.2.2. These provisions govern the payout of excessive yearly banked annual leave of members of the officer cadre. Both provisions expressly exclude allowances from the payout of excessive banked annual leave.

[28] The Court agrees that "substantive" should have the same meaning in sections 6.1.1, 6.2.2 and 7.1. However once the term "base" is factored into the interpretation, the Court concludes that the most reasonable contextual construction of sections 6.1.1 and 6.2.2 is that the term "base" is intended to convey the exclusion of allowances, and not the term "substantive".

[29] The three provisions with the Court's emphasis, are as follows:

6. Payout of Annual Leave to the Officer Cadre

6.1. On Mar. 31, a member in the officer cadre whose annual leave bank exceeds his/her yearly annual leave entitlement will be automatically paid the excess leave credits to a maximum of one year's entitlement.

6.1.1. The payout is calculated using the member's base substantive salary in effect on Mar. 31 of the current leave year. This does not include performance awards or allowances.

...

6.2.2. The voluntary payout is calculated using the member's base substantive salary in effect on Mar. 31 of the previous leave year. This does not include performance awards or allowances.

7. Payout of Annual Leave on Discharge/Death

7.1. When a member is discharged from the RCMP or dies, the member or his/her estate will be paid an amount equal to the number of days of earned but unused annual leave to the member's credit, calculated at his/her substantive salary on the date of discharge or death.

[30] At paragraph 71 of the Adjudicator's reasons, after pointing out that members in the officer cadre whose annual leave exceeds their carry-over entitlement will have the balance paid out at the "base substantive salary" without the inclusion of any allowances or performance pay, the Adjudicator concludes without reasons as follows:

[71] The payout of leave is consistently applied for serving and retiring members of the RCMP. Furthermore, the term substantive is explained, denoting that the payout must be based on the member's base salary void (sic) of any allowances or other forms of compensation.

[emphasis added]

[31] Thus, in the Adjudicator's view, the terms "substantive" and "base" should add the same attribute to the noun "salary", both intending to exclude allowances. At a minimum, the Court finds the Adjudicator's contextual comparison to be lacking justification and transparency in simply giving the same meaning to two terms that supposedly are both intended to convey the same attribute to the term "salary", contrary to ordinary interpretive principles.

[32] This avoids the actual and obvious interpretive issue as to which of the two terms is intended to convey the particularized passage excluding performance awards or allowances. In the Court's view, "base salary" more clearly indicates the exclusion of other forms of pay from salary, then does "substantive salary".

[33] Indeed, the Adjudicator has to rely on the term "base" to give meaning to the term "substantive", which it does very well. Conversely, the term "substantive" conveys little extra meaning to the meaning of "base" as regards the concept of excluding allowances from salary, which it does very readily by itself. The Adjudicator makes no attempt to define the term "base" or to apply its definition to "substantive".

[34] The fact that the term "base" and the passage excluding allowances in sections 6.1.1 and 6.2.2 travel together is further supported by the fact that both are not found in section 7.1. What other contextual meaning could be given to the fact that only "substantive" is found in section 7.1, other than that it conveys neither the meaning of "both" nor the passage excluding allowances. It stands on its own and must have some other meaning, which it turns out is obvious with further attention to the wider context discussed below.

[35] Moreover, if the intention was to have the meaning of “substantive” be the same as that of “base”, why not simply repeat all of the same wording as found in sections 6.1.1 and 6.2.2 in section 7.1?

[36] On this point, the Court finds the proximate and visual contextual distinction between the payout provisions in sections 6 and 7, all the more significant. Section 7.1 is placed immediately after the other sections that preceded it, suggesting that the two provisions were drafted and should be interpreted together. Even more so by the fact that the term “base” and the wording excluding performance awards and allowances from the meaning of “salary” are found twice in the officers’ payout provision (sections 6.2 and 6.2.2), but not included in the definition of salary for all members (section 7.1).

[37] If care and precision is needed to ensure unambiguous wording anywhere, it would more likely be with respect to section 7.1, a provision that has application to all members the RCMP with banked leave on death or discharge, in comparison with the more limited application of such wording to accumulated excessive annual leave of the officer core.

[38] The Court also points out that there does not appear to be any evidence as to whether other performance awards or allowances, besides that for service pay may accumulate, but are not paid out on discharge, (death being an entirely different situation discussed below). In other words, it is not clear to the Court what consequences follow from a decision favouring the Applicant that could apply in other circumstances of performance awards or allowances on discharge. As outcomes of decisions are highly relevant to their interpretation, and none having

been referred to by the Adjudicator, the Court concludes that only banked service pay is subject to elimination on discharge.

[39] In summary, the Court concludes that the contextual methodology adopted by the Adjudicator in accounting for the meaning of “substantive salary” in section 7.1 based on the same wording in sections 6.1.1 and 6.2.2 is unreasonable when it ignores the important term “base” and when read together appears to more reasonably support the opposite conclusion that the service leave allowance is included in salary, for the reasons described.

C. *The reference to dictionary definitions is unreasonable due to the failure of the Adjudicator to consider a related statutory meaning of “substantive” in the Royal Canadian Mounted Police Superannuation Act which identifies the term in relation to the rank of the member for the calculation of salary*

[40] The Court concludes that the Adjudicator’s recourse to dictionary definitions of “substantive” and related supporting comments is highly problematic when there exists a meaning found in related statute that identifies the term “substantive” in relation to “rank” on discharge. The adjudicator’s dictionary analysis is found at paragraphs 64 and 65 of her decision, with the Court’s emphasis, as follows:

[64] While policy may not define substantive, the Oxford Dictionary, second edition, provides a definition. It states: “having separate and independent existence”. When used as an adjective, it suggests a restrictive connotation rather than a broadening of the noun it is describing. For instance, when it is used to describe rank or position, substantive relates to the permanent position rather than any temporary position, akin to an acting role. When used to describe “right”, as in a substantive right, it relates to one’s basic right. If assigned the same relationship to salary, substantive can only denote the essential part of the salary or the base salary, rather than one that is dependent on the amount of allowances attributed to each individual employee.

[65] I find that the definition of substantive in this case denotes a basic salary void of any other form of compensation. ...

[41] The Court takes issue to some extent with the Adjudicator's conclusion that "substantive" has the same meaning as "base", i.e. "substantive can only denote the essential part of the salary or the base salary"[emphasis added] which is already problematic, particularly given the contextual analysis described above. There are two definitions that could apply to the term substantive found in the Oxford dictionary. The first, that of "having separate and independent existence" like some chemical compound based upon its components does not frankly jump to one's mind as the meaning of substantive. The second meaning in the Oxford dictionary relates to what is real, i.e. "Having a firm basis in reality and therefore important, meaningful, or considerable." In Webster's online dictionary it is expressed as "real rather than apparent". This could convey the real salary that is paid out, like for what is contributed to pensions, as opposed to the base salary only. Nevertheless, given the level of deference owed to the Adjudicator, the Court is not entitled to substitute its opinion for that of the decision-maker in this context.

[42] It can intervene however, in relation to the unreasonable analysis concerning the Adjudicator's second example allegedly supporting the meaning of "substantive", when she makes reference to its application to "ranks" in the service as when she says "when it is used to describe rank or position, substantive relates to the permanent position rather than any temporary position".[emphasis added]

[43] By this reference, the Adjudicator was clearly alluding to the term "substantive" found in the definition of "pay" in section 3(1) (a) of the *Royal Canadian Mounted Police Superannuation*

Act, RSC, 1985, c R-11, [RCMPSA]. This is significant, because it is a related use of the term “substantive” in circumstances analogous to considerations of “salary” relating to the attribute of “rank”. Furthermore, it is the only use of the term “substantive” found anywhere in the legislation or policies applying to the RCMP. This provision, with the Court’s emphasis, reads as follows:

3 (1) pay means,

(a) as applied to the Force, the pay of the substantive rank held by the person in respect of whom the expression is being applied, not including the pay of acting rank or extra pay for staff or similar temporary appointments, or, in the case of a person not holding a rank in the Force, the salary or other remuneration for the performance of the regular duties of that person as a member of the Force, together with such allowances by way of compensation or otherwise as are prescribed by the regulations, and

3 (1) solde

a) Relativement à la Gendarmerie, la solde du grade effectif détenu par la personne que vise l’expression, à l’exclusion de la solde du grade provisoire ou la solde supplémentaire pour les emplois temporaires dans les cadres ou autres emplois temporaires du même genre, ou, dans le cas d’une personne ne détenant pas un grade dans la Gendarmerie, le traitement ou autre rémunération pour l’accomplissement des fonctions régulières de cette personne à titre de membre de la Gendarmerie, ainsi que les allocations, versées au moyen d’indemnité ou autrement, que les règlements prescrivent;

[44] In passing, it might be noted that section 8 (1)(c) of the *Royal Canadian Mounted Police Superannuation Regulations* (CRC, c. 1393) [the Superannuation Regulations] under the heading Allowances to Be Included as Pay, includes in the definition of “pay” referring back to subsection 3(1) of the *Act* the following: “service pay received by a member of the Force after

October 1, 1966, as compensation for long service in the Force”. It is this provision of the Superannuation Regulations that renders just service pay pensionable. It is also a situation where “substantive rank” by the Superannuation Regulations includes service pay. This just adds to the concept that base salary must refer to exclusions, to reinforce the defined meaning of “salary”, but not in relation to the term “substantive”.

[45] The problem with the Adjudicator’s application of the term “substantive”, using the example of rank in the service is again twofold. First, she fails to point out that this example is taken from highly relevant legislation in respect of the term “pay” —a common synonym of “salary”—instead just pulling it out of the air without reference to the Act. Second, and more importantly, she overlooks the very relevant alternative definition of the term “substantive” that should apply to sections 6.1.1, 6.2.2 and 7.1, as intended to specify the rank to be used for the calculation of the salary on discharge.

[46] For example, in regard to sections 6.1.1 and 6.2.2, it appears that there are a number of factors that are required in order to be able to calculate the payout of excessive accumulated annual leave for salary. They are (1) the date of calculation of the officer’s salary, being that of the March 31 year-end, (2) the salary of the substantive rank of the officer on that date, being the permanent and not temporary or acting rank of the Officer, and (3) the officer’s base salary, being his or her salary, not including performance awards or allowances.

[47] In comparison, section 7.1 has no need for a salary date, being by definition the member’s salary at the date of death or discharge. But section 7.1, like sections 6.1.1 and 6.2.2,

requires the determination of the “substantive rank” of the member, being the permanent rank described at the date of death or discharge the member, and not that of any temporary or acting position the member was occupying at that date. Those words are not included in any of these sections however, because contextually it is clear that the term substantive refers to rank, as used solely for that purpose in section 8 (1) (c) of the *RCMPSA*.

[48] If “substantive” refers to the rank of the member at the date of death or discharge, then the term “base” found in sections 6.11 and 6.22 must be the sole descriptor of the contents of what constitutes “salary”. In this case, logically it would refer to the exclusions from salary for performance awards and allowances. Similarly, by converse logic it must follow that the absence of the term “base” in section 7.1 and of the related exclusions can only mean that salary on death or discharge of a member would include compensation for performance awards and allowances.

[49] It is not clear to the Court whether the Adjudicator’s failure to refer to the *RCMPSA* application of “substantive” to matters of rank, is demonstrative of a lack of transparency, or whether it is simply an unintended oversight on her part. However, whatever the explanation, the most reasonable application of the term “substantive”, as found in all of the sections where it is used would be in reference to rank at the time of the payout of annual leave, not the contents of salary.

[50] In conclusion, the Court finds that the only reasonable interpretation of the term “base” is for the purpose of excluding performance awards and allowances from salary in sections 6.1.1 and 6.2.2. The absence of the term “base” in section 7.1 and the accompanying language of

exclusion of performance awards and allowances strongly imply that the drafters of the two provisions intended that “salary” in section 7.1 include the payout of annual leave upon death or discharge of a member.

D. *Section 7.1 does not offer an option to members discharged on death to receive service pay thereby confirming that it must also be payable to members voluntarily choosing discharge*

[51] The Adjudicator concludes that section 7.1 presents two options to members on retirement for receipt of their banked annual leave. They may receive it as continuing bi-weekly salary taken as leave up to retirement, which includes the unused service pay, or receive it as a lump sum, absent their banked service pay. The passage from the Adjudicator’s reasons describing these options is found at paragraph 68, with the Court’s emphasis, as follows:

[68] The Grievor continues to attempt to link service pay to annual leave, when it is the member’s bi-weekly salary it is linked to. In his case, the Grievor could have observed the 1398 hours of leave, collected his salary with all of its allowances and been away from work on leave, thereby extending his discharge date. As stated, the other option is to request a payout. It is not offered as an equitable option. It is simply an option. Depending on the circumstances of the member, one option may benefit a person more than the other, but there is nothing to say that they are supposed to be equitable options.

[52] The Court disagrees that any intention to provide options can be attributed to section 7.1. No options are provided to members who are discharged by their untimely death while still employed with the Force. On the other hand, the Adjudicator is correct when acknowledging that the provision is not equitable by the fact that it treats service pay differentially for different members. When interpreted in the fashion the Adjudicator suggests, section 7.1 is not just inequitable, but patently unreasonably so for members discharged by death.

[53] Because no option is available to members on death, it would be unreasonable to interpret section 7.1 as being intended to offer an option to only one category of the two categories of members that the provision applies to, i.e. members discharged by death and those voluntarily discharged. The Adjudicator cannot interpret the word “death” out of section 7.1.

[54] The language of section 7.1 therefore, does not allow for any distinction concerning the payout of accumulated earned service pay to members based on their manner of discharge. Members discharged by death, voluntarily, or remaining in the service to expend their banked service pay must be provided the same option if one is said to exist, or none at all.

[55] The fact that it is not possible to offer “options” to members who die while employed with the RCMP persuasively corroborates the contextual and statutory interpretation of section 7.1 to mean that all members are entitled to their accumulated service pay regardless of their manner of leaving the RCMP on good conduct.

E. *The reasonableness of the decision is undermined by the failure to provide a justification for the differential treatment of members’ payout of banked service pay*

[56] The differential treatment of members on discharge is twofold. First, members who remain in the force receive their service pay, second this adds service time and perhaps rank to the calculation of their pensions, thereby benefiting them in retirement. The Applicant having 37 years of service could not benefit from the option of remaining employed to expend his accumulated service pay. That the employer provides these economic benefits for remaining in the force, but that these are not available on discharge, requires some explanation as to the purpose of the provision that would permit this to occur.

[57] Neither the Respondent nor the Adjudicator provide any explanation as to why members contemplating retirement should be treated differently based on how they choose to leave the RCMP. The Adjudicator appears to misstate the essence of the Applicant's argument, while providing a conclusion that lacks justification when she remarks that he attempts "to link service pay to annual leave, when it is the member's bi-weekly salary it is linked to." His submission was always that it was fundamentally unfair to treat service pay in a different manner based upon how one leaves the Force. Moreover, the fact that service pay is linked to annual leave when regularly paid out and not accumulated does not reasonably justify clawing it back after being earned just because the member does not want to remain in the Force because it offers no advantage.

[58] The absence of any discussion of the purpose of a provision is unusual given that construction of ambiguous provisions is for the purpose of determining the drafter's intention when not readily apparent. The real point however, is that an interpretation of section 7.1 as not necessarily being equitable in the treatment of members contradicts any tenet of reasonable construction that could apply to any provision of paying an employee for services rendered.

[59] The Court notes that in response to its questions there was some discussion during the hearing that the underlying purpose of section 7.1 was to benefit the RCMP by encouraging members to remain in the Force so as to be available on recall should an emergency arise requiring their return to work.

[60] If so, such an underlying and unexpressed intention of section 7.1 smacks of bad faith. The RCMP should not be harboring an ulterior purpose in section 7.1, which in effect adds an unstated condition to the disbursement of service pay that is only received by remaining on duty to benefit the employer.

F. *A failure to ensure that members were aware of the potential loss of accumulated service pay on discharge*

[61] The Respondent's deponent provided the following opinion in answer to written interrogatories said to describe the reasonable conduct of members contemplating retirement, with the Court's emphasis:

Therefore, and in my experience with National Compensation Services, prior to establishing an actual retirement and discharge date, RCMP members should carefully assess the advantages and disadvantages of taking their earned annual leave, thereby increasing pensionable service and improving future superannuation benefits, versus receiving a lump sum cash payment for their accumulated annual leave upon discharge from service.

[62] The problem with this advice is that despite the recommendation to carefully consider options on discharge, there is no evidence that the RCMP has any proactive discharge protocols that inform members contemplating retirement. All that the member may consult is an admitted ambiguous provision buried at section 7.1 in Chapter 19 of the NCM.

[63] That at least, is what the Court surmises from the Applicant, a 37-year veteran with the Force. He deposed in his affidavit that he only learned that service pay was not included in the lump sum payout of annual leave after opting for discharge when he saw that amounts on his salary payout would not include it. The Applicant confirmed as much during the hearing. Above

all of the Applicant's other qualities observed in doggedly following through on the unfairness of not receiving his earned service pay, the Court finds that he is someone who would think carefully about his options, if aware of them.

[64] After much questioning, the Applicant was ultimately directed to paragraph 7.1 of the NCM. Upon learning that the calculation was based upon the definition of "substantive salary", he sought a definition of the term that could help explain why it would exclude earned banked service pay. None was provided, tantamount to an answer that is just the way it is.

[65] In spite of the fact that Applicant was provided only with a peremptory answer when he took the matter to adjudication, the First Level adjudicator similarly did not provide any reason why earned banked service pay is lost upon discharge. The Level I adjudicator stated only that his "position was problematic as he focused his arguments on the definition of 'substantive salary', when the real issue was the status of the grievor upon payout of his annual leave." The Court concludes that the Applicant was again provided with a conclusion as opposed to reasons responding to a reasonable request to explain the purpose of section 7.1.

[66] He forged ahead because he considered the denial of his entitlement to his accumulated service pay unfair. He had no clear statement of what would occur on discharge, not only because of a highly ambiguous provision on payout of annual leave, but also because of an apparent absence of effort on the part of the RCMP to explain those options. As such he had no opportunity to make an informed decision regarding his retirement options.

[67] Ultimately, I agree with the Applicant that there is no reasonable, equitable or human resources basis which could account for the differential treatment of members being denied the same earned service pay of a fellow member contemplating retirement. This is all the more so when his uncontradicted evidence is that he had no option but to bank his service pay because the employer required him to forgo taking annual leave. The fact that his circumstances pale in comparison with those of a deceased member not being entitled to his or her banked earned service pay, only confirms a complete lack of fairness in the RCMP's application of section 7.1 that its drafters never intended.

IV. Conclusion

[68] The application is allowed, as the decision of the Level II adjudicator is unreasonable for the following reasons:

1. The decision unreasonably places the onus on the Applicant to provide reasons to demonstrate that the interpretation of the term "substantive salary" required the payout of accumulated service pay allowances on the death or discharge of the member;
2. The contextual interpretation of "base substantive salary" is unreasonable for the failure to consider the term "base" in sections 6.1.1 and 6.2.2, being the provision that most reasonably informs the contextual interpretation of section 7.1 by the term "base" being particularized to exclude performance awards and allowances from the calculation of salary, thereby contextually presuming that the term "substantive" must express a different purpose;

3. The decision unreasonably relies upon one of two possible dictionary definitions while failing to expressly state that a related meaning of the term “substantive” originated in the *RCMPSA*, and then not giving priority to the purpose of the statutory term “substantive” as an attribute of the meaning of “salary” in sections 6.1.1 and 6.2.2 pertaining to the rank of the member on the day of death or discharge, thereby further distinguishing the term “base” from “substantive” that leads to the conclusion that that the term “substantive” found in sections 6.1.1, 6.2.2, and particularly 7.1, relates to the rank of the officer or member when discharged, and not the content of “salary” to be paid out;
4. The decision unreasonably describes paragraph 7.1 as providing an “option” to members to choose to receive their service pay, when the provision clearly cannot be interpreted to provide an option to persons discharged by their death, and when the provision provides no basis to distinguish between voluntary discharge and involuntary discharge by death;
5. Paragraph 7.1 is unfair and unreasonable if interpreted to differentiate an entitlement to receive accumulated service pay based on whether it is payable on voluntary discharge, as opposed to being paid out as a component of annual leave by delaying discharge from the force, besides no explanation being provided for the differential treatment of receipt of service pay; and
6. The RCMP failed in its duty to inform members of the potential loss of service pay on discharge from the service.

[69] The application is allowed and the decision is set aside.

[70] The matter is to be returned to the Level II Adjudicator with directions to declare that the term “substantive salary” in section 7.1 of Chapter 19.1 of the NCM or AM includes the accumulated service pay allowance, based on the permanent position rather than any temporary position of the member payable on the date of member’s death or discharge.

[71] The Applicant is entitled to his Tariff A court fees and other reasonable disbursements incurred in the prosecution of this application payable by the Respondent.

JUDGMENT in T-1635-17

THIS COURT'S JUDGMENT is that:

1. the decision is set aside and the matter returned to the Level II Adjudicator with directions to declare that the term “substantive salary” in section 7.1 of Chapter 19.1 of the National Compensation Manual or Administration Manual includes the accumulated service pay allowance, based on the permanent position rather than any temporary position of the member payable on the date of member’s death or discharge; and
2. the Respondent is to pay the Applicant’s costs of his Tariff A court fees and any other reasonable disbursements incurred in the prosecution of this application.

"Peter Annis"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1635-17

STYLE OF CAUSE: ALLAN BRADLEY ZALYS v. RCMP ET AL.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: SEPTEMBER 26, 2018

JUDGMENT AND REASONS: ANNIS J.

DATED: NOVEMBER 8, 2018

APPEARANCES:

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(ON HIS OWN BEHALF)

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