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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS

Applicant/Bargaining Agent

and

TREASURY BOARD

(Department of Foreign Affairs and International Trade)

Employer

Before: [Marguerite-Marie Galipeau, Deputy Chairperson](#)

**For the Applicant/
Bargaining Agent:** Ron Cochrane

For the Employer : Richard Fader, Counsel

Oral hearing at Ottawa Ontario, July 20, with
written submissions completed on August 28, 2001.

DECISION

[1] This is an application by the Professional Association of Foreign Service Officers (PAFSO) under section 34 of the *Public Service Staff Relations Act* (PSSRA) requesting that the Board determine that successful candidates to the Foreign Service Development Program (FSDP) who are required to take language training (French/English) are “employees” under the PSSRA and are included in the bargaining unit certificate of March 11, 1968 as amended (Board file 142-2-326) on May 10, 1999 and issued by the Board to PAFSO.

[2] Since May 10, 1999, PAFSO is the exclusive bargaining agent for all employees of the employer in the Foreign Service Group as defined in Part 1 of the Canada Gazette, March 27, 1999. The definition of the Foreign Service Group set out in the Canada Gazette (Exhibit E-15) reads as follows:

Foreign Service Group Definition

The Foreign Service Group comprises positions that are primarily involved in the planning, development, delivery and promotion of Canada's diplomatic, commercial, human rights, cultural, promotional and international development policies and interests in other countries and in international organizations through the career rotational foreign service.

Inclusions

Notwithstanding the generality of the foregoing, for greater certainty, it includes positions that have, as their primary purpose, responsibility for one or more of the following activities:

- 1. commercial and economic relations and trade policy - the planning, development, delivery or management of policies, programs, services or other activities directed at Canada's economic, or trade relations with foreign countries, including the development, promotion or strengthening of Canada's economic or trade interests in bilateral or multilateral forums;*
- 2. political and economic relations - the planning, development, delivery or management of policies, programs, services or other activities directed at Canada's political relationships with foreign countries;*
- 3. immigration affairs - the delivery or management of immigration policies, programs, services or other activities in support of the Canadian immigration program abroad;*
- 4. legal affairs - the provision of legal advice to the federal government on Canada's international rights and obligations; the interpretation and application of international legal obligations; the negotiation of*

various bilateral and multilateral agreements, treaties and conventions; and the defense of Canada's position respecting those obligations and agreements including dispute settlements;

5. *communications and culture - the planning, development, delivery or management of communications and cultural policies, programs, services or other activities in Canada and abroad to promote Canada's foreign service role to Canadians and to promote Canada in the world; and*
6. *the provision of related advice.*

Also included are positions occupied by members of the group on assignments in Canada.

Exclusions

Positions excluded from the Foreign Service Group are those whose primary purpose is included in the definition of any other group or those in which one or more of the following activities is of primary importance:

1. *the provision of administrative or information services as described in the Program and Administrative Services Group; and*
2. *the representation in other countries of Canadian interests in a specialized field when the incumbent is not a career rotational Foreign Service officer.*

[3] Currently, the Foreign Service Officer group is comprised of employees in:

- 1) the Foreign Service Development Program (FSDP)
- 2) Foreign Service Officer Level 1 (FS-01)
- 3) Foreign Service Officer Level 2 (FS-02)

[4] The employer objects to the inclusion in the bargaining unit of Ab Initio candidates from outside the Public Service::

. . .

The Employer disputes the fact as alleged by the Applicant, in particular, the assertion that Ab Initio candidates from outside the Public Service are employees under the Public Service Staff Relations Act and that candidates recruited from inside the Public Service are members of the FS bargaining unit.

The Employer's position is based on the well-settled principle that the Board does not have the authority to determine who is or who is not an employee under the PSSRA, from a given situation of fact. In the absence of an appointment under the Public Service Employment Act, the persons subject of this application recruited from outside the Public Service cannot be "employees" under the PSSRA: Canada (Attorney General) v. P.S.A.C. [1991] 1 S.C.R. 614 (Econosult). In any event, s. 34 of the PSSRA cannot be used to determine whether a person is or is not an employee: Econosult ; S.G.C.T. v. Canada (National Film Board) [1992] F.C.J. No. 125 (F.C.A.). Likewise, an employee cannot be said to belong to a bargaining unit if that employee has not been appointed to a position in that bargaining unit under the Public Service Employment Act.

Thus, the Employer requests that the Board dismiss the Application forthwith for want of jurisdiction, on the basis of the material now before it, in accordance with s. 8 of the PSSRB Regulations and Rules of Procedures, 1993.

[5] In short, the employer objects to the jurisdiction of this Board to entertain this matter as well as to the inclusion in the bargaining unit represented by PAFSO of the persons defined as "Ab Initio candidates to the Foreign Service Development Program".

FACTS

[6] The Foreign Service Development Program (FSDP) was introduced in 1997. It is a five-year training program for new Foreign Service Officer recruits. During the five years, a participant to the Program is required to serve a minimum period of time on assignment abroad. At the end of the five-year Program, the successful participant is appointed to the FS-02 classification level.

[7] Candidates to the Program are recruited from outside and inside the Public Service. Therefore, initially, some are not employees in the Public Service and others are already employees and part of the Public Service.

[8] According to the employer's witness, Bruce Levy, Acting Director of Assignments Division, Human Resources, Foreign Affairs, entrance to the Foreign Service usually occurs according to two scenarios: (1) entrance by a current Public Service employee, and (2) entrance by a person who has fairly recently completed university.

[9] When the departments of Foreign Affairs and International Trade (DFAIT) and Citizenship and Immigration (CIC) posted the position (Exhibit E-3), the poster read:

...

Before an offer of employment is made, you must

- *have qualified for a security clearance;*
- *be medically certified as suitable for assignment anywhere in the world;*
- *attain the required level of bilingualism.*

...

[Emphasis added]

[10] There are between 4,000 to 6,000 persons who write an entrance exam. The Public Service Commission does an initial screening. Nine hundred (900) names are sent to the two departments. The departments proceed to a second screening and reduce the list to 450 persons. Ten teams representing both departments proceed to interviews. Approximately 80 persons are successful (60 DFAIT, 20 CIC) and will eventually get offers of employment. These 80 persons are informed by letter (Exhibit E-4) that they are on a short list of candidates and that they are still not employed.

[11] Before employment can be offered, security and medical clearances must be obtained by the candidates. In addition, their ability in both official languages must be ascertained. (All Foreign Service (FS) positions are bilingual imperative and this includes the positions in the FSDP.) If a person meets the bilingual requirements, once the medical and security checks are done, an offer of employment in the FSDP is made.

[12] If the person does not meet the language requirements, he/she is offered training, at public expense, in the Language Training Program (Exhibit E-5). Once this training is successfully completed, the person is offered (Exhibit E-6) indeterminate employment as a Foreign Service Officer (group level: FSDP) and is hired under the FSDP. During those five years, he/she is deemed to be on probation (Exhibit E-6).

[13] The scenario under which a person who is already an employee accedes to the FSDP is similar. Two internal competitions are held; they are designed to give an opportunity to non-FS group employees to do foreign service work, for instance, a person holding a Program Administration position (Exhibit E-8).

[14] If this employee is successful at the interview, but does not meet the language requirements, participation in the Language Training Program (maximum 52 weeks) is offered. The conditions of that person's substantive position (i.e. P.M.) (Exhibit E-10) continue to apply until language training is successfully completed and an indeterminate position as a Foreign Service Officer in the FSDP is offered and accepted (pursuant to a delegated authority of the Public Service Commission) (Exhibits E-9 and E-11).

[15] The FSDP Pay Plan (Exhibit E-14) provides guidelines in areas such as salaries and progression (the ranges of the salaries are set out in Appendix A of the collective agreement between the Treasury Board and PAFSO (Exhibit E-13)).

[16] The employer's witness, Bruce Levy, underlined that, during language training, the individuals study a language and do none of the functions of the positions included in the Foreign Service Group Definition (Exhibit E-15).

[17] According to Bruce Levy, the candidates recruited from outside the Public Service (*ab initio*) are still not employees of the Public Service until they successfully complete their language training and have accepted an offer of employment to a position in the Foreign Service Group within the FSDP, and those recruited from inside the Public Service (and within the two departments: DFAIT and CIC) retain their position (for example, PM) until they too complete their language training (if necessary) and meet the language requirements and, finally, accept an appointment with the Foreign Service Group.

[18] PAFSO's representative produced a witness, Sameena Querish, who, it is alleged, became an employee earlier than claimed by the Department.

[19] On October 6, 1997, the Public Service Commission advertised (Exhibit A-2) careers in the Foreign Service.

[20] The Foreign Service has two branches: the departments of Foreign Affairs and International Trade (DFAIT) and Citizenship and Immigration (CIC).

[21] The advertisement (Exhibit A-2) stated:

...

*Before an offer of employment can be made, successful candidates **must** qualify for a security clearance at the secret level and **must** be certified medically suitable for assignments anywhere in the world. Once hired, candidates **must** obtain top-secret security clearance. They **must** also attain the required level of bilingualism in both official languages within a specified period of time. Language training will be provided.*

[Underlining_added]

[22] Following this advertisement on October 6, 1997 (Exhibit A-2), Sameena Qureshi wrote an entrance exam to the Public Service and the Foreign Service.

[23] On April 6, 1998, following an interview, she was informed (Exhibit A-1) that she was on a short list of candidates. She was informed that she would need to undergo security and medical clearances. She was also told that “[This letter should not be construed as a letter of offer.” [Emphasis added]

[24] A few months later, Sameena Qureshi passed a language evaluation test.

[25] On July 8, 1998, she was accepted in the federal Public Service Language Training Program (Exhibit A-4). In the relevant letter (Exhibit A-4), she was informed that she could not become an employee before successfully completing language training:

...You must successfully complete language training in order to qualify for the Foreign Service Development Program (FSDP).

“Ab initio” (non-employee) status will be assigned to candidates like yourself who have agreed to take initial language training before appointment to FSDP-1 group and level, i.e. the Foreign Service Development Program.

On successful completion of the training, you will receive a letter offering you a position as a Foreign Service Officer in the FSDP....

[Emphasis added]

[26] The attached terms and conditions of employment read:

...

SITUATION OF "AB INITIO" (NON-EMPLOYEE) CANDIDATES

"Ab initio" (non-employee) status is assigned to candidates who agree to undertake initial language training before appointment to the FSDP-1 group of the FSDP.

The time spent on language training is not considered a period of employment in the public service; accordingly, you are not eligible for such staff benefits as insurance plans and a retirement pension.

EFFECTIVE DATE

Your language training will begin on September 8, 1998 at Asticou Centre at 08:00 A.M. You should report to the class at the following address:...

[Emphasis added]

[27] On July 24, 1998, Sameena Qureshi accepted those conditions (Exhibit A-4, page .5). Attached to the letter of offer of language training (Exhibit A-4), was a copy of the directive on "Domestic Relocation for New Recruits" (Exhibit A-5).

[28] On July 24, 1998 as well, Sameena Qureshi signed a "Statement of Agreement to Become Bilingual" (Exhibit A-6).

[29] The Department paid Sameena Qureshi's travel expenses (Exhibit A-7).

[30] On August 4, 1998, she met, in Ottawa, with Wayne Read. She was given a letter containing explanations (Exhibit A-8) on her allowance and entitlements as an "*ab-initio* (non-employee) candidate" as well as leave forms (Exhibit A-9). She was given an identity card under the Public Service Employees Dental Care Plan (Exhibit A-10). In the August 4, 1998 letter, it was stated:

...

PENSIONS AND INSURANCES

Under the "ab-initio" (non-employee) status regulations you are ineligible for pension, life insurance coverage or Health Care....

...

[31] She was notified (Exhibit A-11) that, effective September 8, 1998, she was a participant in the Supplementary Death Benefit Plan, and that she was required to contribute to the Superannuation Account. (In reality, no deductions were made from her paycheque (Exhibit A-15).)

[32] This coincided with her foreign language training: September 8, 1998 to June 10, 1999.

[33] On June 23, 1999, she received a memorandum from the Head, Official Languages Operations and Translation, DFAIT, stating that, effective June 1, 1999, she was entitled to a bilingualism bonus. This memorandum also gave her a Personal Record Identifier (PRI) stating that her group and level was FS-01 (instead of FSDP).

[34] On the same date, she was informed that she had passed her language training. After she finished language training, she did a few administrative duties then was assigned to Team Canada from June to October 1999.

[35] She claimed that she was not told that she was appointed to the FSDP. However, in cross-examination, she was presented with a letter of offer (Exhibit E-1), dated June 16, 1999, which she signed indicating that she accepted the offer of indeterminate appointment.

[36] On September 22, 1999 (language training was from September 8, 1998 to June 10, 1999), she received a memorandum (Exhibit A-13) informing her that she had been overpaid \$1920.40 as a result of a calculation error in March 1999 by the Pay System. She was told that, as an *ab initio* candidate, her salary was 80% of the FSDP entry rate; starting October 27, 1999, recovery was implemented. (Counsel for the employer admitted that this was a hardship.)

[37] According to Sameena Qureshi, this memorandum (Exhibit A-13) made it clear that *ab initio* candidates were part of the Foreign Service Development Plan.

[38] Sameena Qureshi and her colleagues brought up the matter to PAFSO and to the Assistant Deputy Minister, Human Resources, Suzanne Laporte.

[39] On November 2, 1999, Suzanne Laporte informed her (Exhibit A-14) that recovery action would be delayed until the new pay scales of the collective agreement upon which the *ab initio* scale is based would come into effect.

[40] In December 2000, clawback started.

[41] According to Bruce Levy, some of the documents filed in evidence contain errors. A poster (Exhibit A-16) setting out as “bilingual Non-Imperative” the language requirement of a Foreign Service Officer position (all Foreign Service relocation positions are “bilingual imperative”) is incorrect; it is a mistake to have sent Sameena Qureshi a document stating she must contribute to superannuation, and in fact she does not (Exhibit A-15). As well, it is a mistake to send *ab initio*s a Public Service Employees Dental Care Plan identity card (Exhibit A-10)

Arguments

[42] The representatives for both parties submitted written representations, which are on file.

[43] In summary, the representative for the bargaining agent argued the following in the case of recruits who were already employees in the Public Service:

...

The evidence reveals that adopting a pragmatic and functional approach to what the department did and not what it intended to do, a reasonable conclusion would be that it in fact altered the bilingual designation of the position from bilingual imperative to bilingual non imperative, to ensure that the candidates it had selected would be given an opportunity to meet the language requirements for the position. In so doing an appointment was made to allow these employees to come within the confines of the Treasury Board's policy on Language Training.

The appointment would have to be made to a position in the FSDP prior to the employee going on language training because the language training was necessary to meet the language requirements for the FSDP position. Therefore, the employee while on language training would be a member of the Foreign Service officer bargaining unit and would be subject to the terms of the collective agreement.

...

[44] In the case of recruits from outside the Public Service, it is what the Department has done in fact which should be considered and not simply what it intended to do.

[45] Counsel for the employer argued that internal recruits only became part of the bargaining unit after having successfully completed language training and having been appointed to the FSDP. As for external recruits, they only became part of the Foreign Service bargaining unit after having:

- (1) successfully completed language training; and
- (2) been appointed to the Public Service and Foreign Service.

Reasons for Decision

[46] I am of the view that both the testimonial and documentary evidence support the conclusion that candidates to the Foreign Service Group only become part of the Foreign Service bargaining unit after having successfully completed their language training.

[47] The advertisement (Exhibits A-2 and E-3) for the position, the letter (Exhibit A-1) informing candidates of their being on the short list, the letter of acceptance (Exhibit A-4) to the Public Service Language Training Program and the acceptance of the conditions of eventual employment (Exhibit A-4) consistently remind the candidates of the conditions precedent to an offer of employment. The Public Service Employees Dental Care Plan identity card (Exhibit A-10) and the notification (Exhibit A-11) that the candidate is a participant in the Supplementary Death Benefit Plan are administrative and bureaucratic errors which cannot override the clearly expressed conditions (Exhibits A-1, A-2 and A-4) preceding entrance to the Foreign Service. The expressed intention of the Department and the agreement, in fact, of both parties, (Exhibit A-4) was that employment in the Foreign Service group (and therefore bargaining unit) would only start once the language training was successfully completed. Sameena Qureshi became an employee in the Public Service as well as the Foreign Service group on June 11, 1999. Therefore, it is on that date that she became a member of the bargaining unit for which PAFSO is certified and it is on that date that she became entitled to the terms and conditions of employment set out in the Foreign Service Officers collective agreement.

[48] I draw the same conclusion with regard to recruits amongst persons who already are employees of the Public Service. They are included in the Foreign Service Officer bargaining unit only after having met the preceding conditions, including the

successful completion of language training, and after having accepted an offer of employment to the Foreign Service Officer group. Moreover, the evidence is uncontradicted that they do not perform any of the duties of positions included in the Foreign Service bargaining unit until they have successfully completed their language training.

[49] For these reasons, this application is denied.

**Marguerite-Marie Galipeau,
Deputy Chairperson**

OTTAWA, December 21, 2001.