Date: 20020204

File: 166-2-30856

Citation: 2002 PSSRB 15

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

KATHY BUNKA

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs and International Trade)

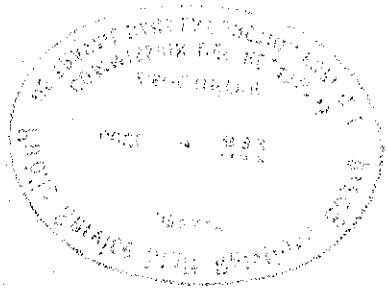
Employer

Before: D.R. Quigley, Board Member

For the Grievor: Ron Cochrane, Professional Association of Foreign Service Officers

For the Employer: Colleen Edwards, Counsel

Heard at Ottawa, Ontario,
December 17, 2001.



[1] This decision deals with a grievance submitted by Ms. Kathy Bunka who alleges the employer has violated the collective agreement signed on August 31, 2000 between the Treasury Board and the Professional Association of Foreign Service Officers (PAFSO) (Code: 312/00; expiry date: June 30, 2001) by denying her acting pay for the full period she was acting as an FS-2. She is seeking to be paid retroactive acting pay starting the day she began her acting appointment, July 31, 1999.

[2] Ms. Bunka was not present during these proceedings, and no witnesses were called. The parties submitted an "Agreed Statement of Fact" (Exhibit E-1), which states:

Agreed Statement of Fact
In the Matter of Kathy Bunka Versus Treasury Board
(Department of Foreign Affairs and International Trade)
PSSRB Reference 166-2-30856

The Parties have agreed to submit the following information concerning the above noted grievance for consideration by the Board. The information contained herein is not in dispute. Furthermore, this Agreed Statement of Facts is provided without prejudice.

1. *the grievor is a foreign service officer with the Department of Foreign Affairs and International Trade (DFAIT);*

2. *the employee is classified at the FS-01 group and level;*

3. *on April 26, 2001 Ms. Bunka grieved management's decision to deny her acting pay at the FS-02 level for the entire period she was performing the duties of a higher level position i.e. FS-02;*

4. *Ms. Bunka claims that management's decision not to pay her for the entire acting period constitutes a contravention of her collective agreement;*

5. *as corrective action, the grievor requests that she be paid acting pay retroactively to the time she commenced her acting duties i.e. July 31, 1999;*

6. *the Employer confirms that Ms. Bunka has acted substantively at the FS-02 level since July 31, 1999;*

7. *the grievor has been paid acting pay at the FS-02 level back to the date of signing of the collective agreement i.e. August 31, 2000;*

8. *the material collective agreement in effect at the time Ms. Bunka submitted her grievance was the "Agreement between the Treasury Board and the Professional Association of Foreign Services Officers" signed by the parties on August 31, 2000 with an expiry date of June 30, 2001;*

9. *the provisions in dispute before the Board are clause 42.08 and clause 44.02 of the previously referred to collective agreement.*

Dated:

Ilan Rumstein	*Ron Cochrane*
for the Treasury Board	*for PAFSO*

[3] Clauses 42.08 and 44.02 read as follows:

**

42.08 Acting Pay

An employee who is required by the Employer to substantially perform and performs the duties of a position which is classified at a higher classification level on an acting basis for a period in excess of four (4) consecutive working days shall be paid acting pay calculated from the date on which he commenced to act as if he had been appointed to the higher classification level for the period he acts.

When an acting assignment is in an Executive (EX) position, the employee is excluded from the application of Article 12 (Overtime).

When a day designed as a paid holiday occurs during the qualifying period, the holiday shall be considered as a day worked for the purpose of the qualifying period.

. . .

44.02 *Unless otherwise expressly stipulated, this Agreement shall become effective on the date it is signed.*

[4] The following items were also presented as exhibits:

Exhibit E-2: clauses 42.11 and 44.02 of the collective agreement between the Treasury Board and the PAFSO (Code: 312/99; expiry date: June 30, 1999) and

Exhibit E-3: the collective agreement between the Treasury Board and the PAFSO (Code: 312/00; expiry date: June 30, 2001).

Submissions of the Parties

For the Grievor

[5] Mr. Cochrane stated that on August 31, 2000, the PAFSO and Treasury Board signed a collective agreement. As a result of the negotiations, clause 42.11, which states:

> **
>
> ***42.11 Acting Pay***
>
> *An employee who is assigned to a posting abroad or an assignment in Canada, pursuant to a rotational pattern, is not entitled to acting pay pursuant to this clause by virtue of such assignment. However, if in the course of such an assignment he is required by the Employer to substantially perform and performs the duties of a position which is classified at a higher classification level on an acting basis for a period in excess of fifteen (15) consecutive working days he shall be paid acting pay calculated from the date on which he commenced to act as if he had been appointed to that higher classification level for the period he acts.*

was changed to clause 42.08 (Exhibit E-3), which states:

> **
>
> ***42.08 Acting Pay***
>
> *An employee who is required by the Employer to substantially perform and performs the duties of a position which is classified at a higher classification level on an acting basis for a period in excess of four (4) consecutive working days shall be paid acting pay calculated from the date on which he commenced to act as if he had been appointed to the higher classification level for the period he acts.*
>
> *When an acting assignment is in an Executive (EX) position, the employee is excluded from the application of Article 12 (Overtime).*

> *When a day designed as a paid holiday occurs during the qualifying period, the holiday shall be considered as a day worked for the purpose of the qualifying period.*

[6] Mr. Cochrane explained that the reason for the change was to ensure that all employees who acted in higher level positions and substantially performed the duties of the position were entitled to acting pay. The question concerning the rate of pay and the retroactivity was not altered from the previous agreement, i.e. (the employee) "...shall be paid acting pay calculated from the date on which he commenced to act as if he had been appointed to the higher classification level for the period he acts."

[7] Mr. Cochrane said that the employer denied the grievance on the basis that the provision would only take effect as of August 31, 2000, the date of the signing of the new collective agreement, because the parties had not otherwise expressly stipulated a different date.

[8] The grievor's representative agreed in part with the employer, as it was not until the signing that "an employee who is assigned to a posting abroad or an assignment in Canada, pursuant to a rotational pattern" becomes entitled to acting pay by virtue of that assignment, if the assignment is to a higher classification level. The only other change to this clause, which became effective August 31, 2000, affected the qualifying period for acting pay.

[9] The employer is required to pay employees in acting pay situations, who meet the threshold requirements, acting pay calculated from the date on which the employee commenced to act as if he/she had been appointed to that higher classification level for the period he/she acts. Therefore, in effect, the calculation of the acting pay and the period to be compensated did not change from the old agreement to the new agreement. In other words, the coverage and the qualifying period changed but not the calculation of acting pay.

[10] Whether it was 15 consecutive days qualifying in the old agreement or now four consecutive days, employees who qualified were entitled to be paid for the period they acted in the higher classification and not just for the period that began after August 31, 2000.

[11] If the Treasury Board had intended to restrict the calculation of acting pay to those who met the criteria regardless of when it was signed, it would have to change the phrase "...calculated from the date on which he/she commenced to act..." as well as qualify the words "for the period he/she acts".

[12] The PAFSO's view is the language clearly supports that if an employee on the date of signing is in an acting assignment and meets the revised criteria of "consecutive days", then acting pay would be calculated from the date the employee commenced performing the substantial duties and for the period he/she acts.

[13] Mr. Cochrane alleges that any employee who was acting on or after the expiry of the old collective agreement and who met the criteria is entitled to acting pay for the period he/she acts and not commencing on the date the collective agreement was signed.

[14] In his view, there was no need to identify an earlier date as the revision to clause 42.11 (Exhibit E-2) was meant to capture those employees who were currently acting in higher level classifications or would act in higher level positions and not those who acted but had ceased to act during this period, which could have been the case if the parties had expressly stated an earlier date. This would have been an administrative burden.

[15] Mr. Cochrane tendered many cases and jurisprudence that have dealt with the interpretation of collective agreements. As well, he referred to *The Object of Construction: Intention of the Parties* and others such as *Canadian Labour Arbitration,* Third Edition, Brown and Beatty, 4:2100 and *Massey-Harris-Ferguson Ltd.* (1955), 5 L.A.C. 2123 (at page 2124.), where a number of points are made to assist arbitrators and adjudicators in interpreting collective agreements.

[16] I was asked to consider the jurisprudence that was submitted and apply it to this case with these five points in mind:

(1) the intent of the parties was to include a group of employees who had previously been excluded from the provisions of acting pay, as they were rotational employees assigned to higher classifications, and to reduce the qualifying period for acting pay;

(2) the parties did not intend to change the method of calculation or the period covered, because the language in the previous collective agreement in that regard was not changed;

(3) as an adjudicator, I am not faced "with a choice between two linguistically permissible interpretations";

(4) the PAFSO's interpretation views the language in its normal or ordinary sense; and

(5) there is no conflict between recognizing broader coverage in the clause, while at the same time recognizing that the calculation which was left unchanged would reach backwards for those who were newly covered.

For the Employer

[17] Ms. Edwards, counsel for the employer, argued that this is the "typical classic union retroactivity case". The grievor wishes to obtain a new benefit when she was not entitled.

[18] Clause 42.08 removed the exclusion provisions effective to the date of signing. There is no right under this agreement prior to signing of the agreement.

[19] Ms. Edwards drew my attention to clause 44.02, which states: "Unless otherwise expressly stipulated, this Agreement shall become effective on the date it is signed."

[20] Ms. Edwards asked me to look at clause 42.03, "Pay Ranges", and Appendix "A", which read as follows:

> ***42.03 Pay Ranges***
>
> *(a) The pay ranges set forth in Appendix "A" shall become effective on the dates specified therein.*
>
> *(b) Where the rates of pay set forth in Appendix "A" have an effective date prior to the date of signing of the Agreement the following shall apply:*
>
> *(i) "retroactive period" for the purpose of sub-paragraphs (ii) to (v) means the period commencing on the effective date of the retroactive upward revision in rates of pay and*

ending on the day the Agreement is signed or when an arbitral award is rendered therefore;

. . .

***APPENDIX "A"*

FOREIGN SERVICE GROUP

PAY RANGES

(in dollars)

A) ***Effective July 1, 1999***
B) ***Effective July 1, 2000***
C) ***Effective August 1, 2000 – Restructure***

Level		***Minimum of Range (Annual)***	***Maximum of Range (Annual)***
FS – 1			
From:	*$*	*36210*	*49266*
To:	*A*	*36934*	*50251*
	B	*37857*	*51507*
FS – 2			
From:	*$*	*48278*	*68931*
To:	*A*	*49244*	*70310*
	B	*50475*	*72068*
	C	*50475*	*75423*

Developmental Pay Structure

From:	*$*	*36201*	*40074*	*44421*	*47514*
To:	*A*	*38605*	*42788*	*48765*	*50670*

PAY NOTE

Pay Restructure – FS-2 Level

Employees who have been at the maximum rate of pay for their level for more than twelve (12) months on August 1, 2000, will move to the new maximum rate of pay effective August 1, 2000.

[21] In the consideration of my decision, these clauses clearly demonstrated the fact that, unless it was expressly stipulated, as these clauses were, you cannot take a provision prior to the signing of the agreement as it states in clause 44.02.

[22] The grievor, therefore, on July 31, 1999, was covered by the terms and conditions of the prior collective agreement (Exhibit E-2). Under the provisions of the *Public Service Staff Relations Act* (PSSRA), the terms and conditions stay in effect (bridging) until a new collective is ratified and signed.

[23] Ms. Edwards noted that subsection 96.(2) of the PSSRA prohibits me as an adjudicator to amend the agreement and therefore I lack jurisdiction. Subsection 96.(2) reads as follows:

> *(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.*

[24] Counsel for the employer, for her part, recognized clause 42.08 and the negotiated changes. However, clause 44.02 is an overriding provision.

[25] Clause 44.01 states: "The duration of this Agreement shall be from the date it is signed to June 30, 2001." Therefore, it is implied that the agreement is effective on the date it was signed, not the date of expiry of the previous agreement.

[26] The expressed provisions on the date signed conclude the effects start at that point and as far as retroactivity for acting pay, it is not expressly stipulated to a prior date.

[27] Ms. Edwards introduced five decisions to support her position: *Leduc* (Board file 166-2-28701); *Desgagné and Others* (Board files 166-2-15503 to 15506); *Boyce* (Board file 166-2-13918); *Gagnon and Others* (Board files 166-18-17832 to 17834) and *Ward* (Board file 166-2-12638).

Reply

[28] Mr. Cochrane concluded that this acting pay clause is not only unique to the PAFSO but also unique in the Public Service. It has provisions for payment, and in this case acting pay is different from the duration clause. One could argue calculation of acting pay has been expressly stipulated.

[29] Mr. Cochrane submitted that the jurisprudence provided to me through the employer's counsel was irrelevant to the case at hand.

[30] In summary, the PAFSO's interpretation of the clause in dispute is a best fit when measured against the object of construction rules. The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as it is possible, and as the law will permit.

[31] Mr. Cochrane suggested that any member of the bargaining unit who was eligible for acting pay on the day the contract was officially signed was entitled to be paid acting pay for the entire period he or she was in an acting position and not just a portion of that period.

Reasons for Decision

[32] The parties are in agreement that the case in front of me rests solely on the interpretation of clauses 42.08 and 44.02.

[33] There is no dispute that Ms. Kathy Bunka is classified at the FS-1 group and level as a Foreign Service Officer with the Department of Foreign Affairs and International Trade (DFAIT).

[34] The employer confirmed that Ms. Bunka has acted substantively at the FS-2 group and level since July 31, 1999.

[35] The collective agreement in effect when Ms. Bunka submitted her grievance was signed by the parties on August 31, 2000, with an expiry date of June 30, 2001.

[36] It is clear to me that the decision of then Vice-Chairperson Philip Chodos in *Leduc* (*supra*), in which he determined that foreign service officers are entitled to acting pay only when they substantially perform the duties of a position which is at a higher classification level than that of the position they assume by virtue of a rotational assignment, prompted the parties to negotiate a change with respect to clause 42.11 (Exhibit E-2); hence, clause 42.08 (Exhibit E-3).

[37] The parties were able to achieve, through negotiations, (1) the removal of the entitlement prerequisite (the fact now that employees performing substantial duties at a higher classification level will be paid acting pay), and (2) that the number of days to

qualify for acting pay was reduced from fifteen (15) consecutive to four (4) consecutive days.

[38] The question of course is, when does acting pay for Ms. Bunka begin? The date of the start of her substantially performing the duties of an FS-2, specifically July 31, 1999, or August 31, 2000, the date the parties signed the collective agreement? My understanding of the jurisprudence on the retroactive application of the provisions of a collective agreement is that they only become effective on and from the date the collective agreement is signed unless some other date is expressed or implied.

[39] Neither party submitted any evidence, either through a Letter of Understanding or a Memorandum of Understanding that would demonstrate that they had reached an agreement specifically relating to clause 42.08 on the date retroactivity for acting pay begins. Evidence to demonstrate that in previous collective agreements that retroactivity was paid for acting assignments during the bridging period prior to the date of signing was not produced.

[40] Subclause 42.03(b)(i) clearly stipulates that the "retroactive period" means the period commencing on the effective date of the retroactive upward revision in rates of pay and ending on the day the agreement is signed or when an arbtiral award is rendered therefore. Appendix "A", Foreign Service Group Pay Ranges, all have effective dates for pay purposes. The pay restructure at the FS-2 level also has an effective date of August 1, 2000, the date of signing, to move to the new maximum rate of pay.

[41] The decision of the Federal Court of Appeal in *Doyon v. PSSRB* [1978] 1 F.C. 31 deals with a situation where the adjudicator admitted extrinsic evidence of past practice to assist in the interpretation of an article in the collective agreement. The Court found that the article was not ambiguous or unclear and as such the adjudicator erred in admitting extrinsic evidence to assist in its interpretation.

[42] In the instant case, I find that the language of clauses 42.08 and 44.02 is not ambiguous or unclear. Accordingly, it would be inappropriate to consider extrinsic evidence in their interpretation.

[43] When the parties are in collective bargaining, it is incumbent upon them to be clear with their positions in terms of retroactive pay entitlements, whether they are acting pay, overtime, dirty work allowance, etc., and particularly on what date specially those clauses take effect.

[44] Ms. Bunka was an FS-1 acting as an FS-2 on a rotational assignment as of July 31, 1999 and until the change through negotiations she was not entitled to acting pay due to the rotational aspect of her position. On the basis of the language of the relevant articles of the collective agreement, I find that they have no retroactive application.

[45] In this case, Ms. Bunka is not entitled to acting pay prior to the date of signing of the collective agreement (August 31, 2000).

[46] Accordingly, for the above reasons, this grievance is denied.

D.R. Quigley,
Board Member

OTTAWA, February 4, 2002.