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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MICHAEL GVILDYS AND OTHERS

Grievors

and

TREASURY BOARD
(Health Canada)

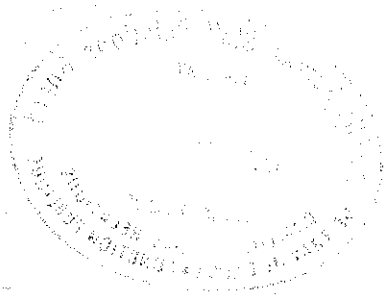
Employer

Before: Guy Giguère, Deputy Chairperson

For the Grievors: Marija Dolenc, Professional Institute of the Public Service of Canada

For the Employer: Richard E. Fader, Counsel

Heard at Toronto, Ontario,
August 13, 2002.



[1] Michael Gvildys, a product safety officer (SG-SRE-03), grieved on March 22, 2001 that he has been performing the duties of a higher classification level (TI-06) and asked to receive acting pay at the higher level as of October 1, 1997. Mr. Gvildys also requested as a corrective measure that employees performing the same duties be classified at the same level.

[2] The grievance was denied by the employer, who indicated that a Classification Grievance Committee examined the issue of the classification of the SG-SRE-03 Product Safety Officer position on October 5, 2000, and determined that it was properly classified at the SG-SRE-03 group and level. The employer also specified that the classification of the Product Safety Officer positions at the TI-06 group and level applied only to the present incumbents and that, once vacant, the positions would be deleted.

[3] Similar grievances were filed during the same period by the following employees: Douglas Gill, Jane Goebel, Walter Golebiowski, Susan Haddad, Tyronne Henley, Udo Mehner, Wendy McNalley, Alan Morrow, Isabelle Sauvé, Christine Simpson, Grace Sheaves, Leslie Smith, Rein Vasara, Mark Veitch, Joyce Carol Woron and Christine Yorke. The employer also denied these grievances.

[4] Both parties agreed to use the Gvildys grievance documentation as being representative of all the other grievances, and that the decision in the Gvildys grievance would apply to all the grievors. This was confirmed by both representatives at the beginning of this hearing.

Evidence

[5] The positions of Product Safety Officer used to be at Consumer and Corporate Affairs Canada until the restructuring of federal departments, when they were transferred to Health Canada in April 1994. Thereafter, in October 1997, the duties of a product safety officer were increased and in November 1998, the positions, which had been at the PM-04 group and level, were reclassified based on the revised job description of the duties as of October 1997.

[6] The incumbents, who have university degrees, were reclassified to the SG-SRE-03 group and level. However, four product safety officers did not meet the minimum standard in education to be able to hold a position in the SG group, as they did not have a university degree in a specialization related to the position (Exhibit G-3).

[7] Roger Pilon, Senior Policy and Project Officer in Human Resources at Health Canada, explained that management faced a dilemma with respect to these four product safety officers who did not meet the minimum criteria for education, as their positions had been reclassified to the SG-SRE-03 group and level. The Public Service Commission (PSC) was consulted by the employer to see if the positions could be grandfathered to SG-SRE positions for these incumbents without the minimum education criteria. The PSC, nonetheless, refused.

[8] The employer then relied on the directive on this issue that had been prepared in 1981 in conjunction with the Treasury Board. This directive entitled "Allocation to the Scientific and Professional Category and Incumbent Qualifications" (Exhibit E-4) states that when an incumbent does not meet the qualification requirements, the position cannot be classified in the Scientific and Professional category. However, if management is satisfied that the employee is able to carry out the duties, the position will be allocated to the appropriate group (normally in the Technical category).

[9] Mr. Pilon explained that the EG group was considered by management as a possible group for those incumbents and an informal evaluation of the level was done (Exhibit G-17). However, it was determined that the TI-06 group and level was a better option.

[10] Mr. Pilon testified that when management chose the TI-06 group and level as a better option, the maximum rate of pay at that time for TI-06 was $1500 less than the SG-SRE-03 group and level. This decision was formalized by a memorandum dated April 30, 1999, from J.Z. Losos, Assistant Deputy Minister, Health Protection Branch (Exhibit G-4). Mr. Losos wrote that he authorized a special classification action for those PM-04 product safety officers who did not have the prerequisite university degree and therefore could not be reclassified to the SG-SRE-03 group and level. The five listed employees were therefore to be reclassified to the TI-06 group and level effective October 1, 1997. He also specified that this classification action was undertaken in response to a unique operational situation, which should not be construed as a precedent, and that this TI-06 reclassification was applicable to the

present incumbents only. Once the present incumbents leave their respective positions, the vacant positions are to be staffed at the SG-SRE-03 group and level, where incumbents are required to have a university degree.

[11] At the same time that this decision was formalized, the TI group was into extensive collective bargaining and as a result of this collective bargaining, salary rates increased and the product safety officers at the TI-06 level ended up making more money than their colleagues at the SG-SRE-03 level.

[12] Mr. Gvildys explained that when he and his colleagues heard that the product safety officers without a university degree were now classified at the TI-06 level and were being paid more than they were, several of them filed classification grievances (Exhibit E-1). As a result of these grievances, a Classification Grievance Committee was convened on October 5, 2000. The Committee recommended that the Product Safety Officer position be classified at the SG-SRE-03 group and level. This decision, which was effective October 1, 1997, was final and binding (Exhibit E-2) and no review of the decision was filed in the Federal Court.

[13] Mr. Gvildys stated that there is no difference in the duties of a product safety officer at the TI-06 level and one at the SG-SRE-03 level; the work descriptions (Exhibits G-7 and G-8) outline the same duties.

[14] Mr. Pilon, the employer's witness, also testified that the product safety officers at the SG-SRE-03 level are performing the same duties as those at the TI-06 level. Mr. Pilon also explained in cross-examination that TI-06 is a higher classification than SG-SRE-03 for purposes of acting pay.

[15] Mr. Gvildys testified that the concerns of the employees at the SG-SRE-03 level with respect to the salary difference were brought to management's attention in June 1999. He pointed out that it is a question of equal pay for equal work. Initially, the difference between the salaries was a few hundred dollars but this increased subsequently and has had an impact on the future pensions of the grievors as many are approaching retirement. Mr. Gvildys stated that the salary difference at the present time between the maximum rate of pay at the TI-06 level and at the SG-SRE-03 level is $4,899. (Exhibit G-5). However, in cross-examination, Mr. Gvildys conceded that this gap could become narrower as a result of collective bargaining, as the current SG-SRE-03 rate of pay is in effect only until September 30, 2002.

Arguments

For the Grievors

[16] Ms. Dolenc submitted that she recognizes that classification is outside the jurisdiction of an adjudicator appointed under the *Public Service Staff Relations Act* (*PSSRA*). However, as has been established by jurisprudence, an adjudicator has jurisdiction in remuneration.

[17] Clause 46.08 of the collective agreement between Treasury Board and the Professional Institute of the Public Service of Canada for the Applied Science and Engineering group, with an expiry date of September 30, 2002, reads as follows:

> ***Acting Pay***
>
> ***46.08*** *When an employee is required by the Employer to substantially perform the duties of a higher classification level on an acting basis for the required number of consecutive working days, the employee shall be paid acting pay calculated from the date on which the employee commenced to act as if the employee had been appointed to that higher classification level for the period in which the employee acts.*

[18] The TI-06 classification is a higher classification level and the grievors are entitled to be paid at this higher level since they perform the same duties as those at the TI-06 level. The grievors are requesting acting pay as of October 1, 1997, which is the date that their positions were retroactively classified at the SG-SRE-03 group and level, and to continue to be paid acting pay until all the TI-06 positions become vacant.

For the Employer

[19] Mr. Fader submitted that this case is different from other acting pay grievances. Usually, in an acting pay grievance, the grievor will claim that he/she is performing additional duties of a higher classification level for a certain period of time. The instant grievances deal with a situation where the grievors are performing the duties of their positions but are really challenging the classification of their positions.

[20] Mr. Fader submitted that in clause 46.08 of the collective agreement the words "perform the duties of a higher classification level on an acting basis" (emphasis added) are there for a reason. Acting pay should reflect a situation where the

employer requires extra duties of an employee but is not willing to pay appropriately. This is to be distinguished from a situation where an employee is not happy with his/her position's classification. The classification grievances went through a classification review committee and they were not appealed to the Federal Court. The decision is therefore final and binding.

[21] Mr. Fader reviewed the jurisprudence on acting pay grievances and submitted that in those decisions where it was found that acting pay was warranted, there were always additional duties of a higher classification level performed by those grievors.

[22] Mr. Fader submitted that the evidence is clear that the TI-06 positions were classified to accommodate five employees and this was an exceptional measure where the employer did not foresee the gap in rates of pay between the TI-06 and the SG-SRE-03 levels. There are three employees remaining at the TI-06 level and the exception should not become the rule.

[23] Mr. Fader submitted that, in the alternative, if the grievances were granted, acting pay would be paid only for 25 days preceding the grievances being filed as stipulated in the collective agreement at clause 35.09.

[24] In support of his arguments, Mr. Fader relied on the following decision: *Brochu v. Canada (Treasury Board),* [1992] F.C.J. No. 1057, *Charpentier* (Board files 166-2-26197 and 26198), *Dougherty* (Board files 166-2-25137 to 25142 and 166-2-25162) and *Canada (National Film Board) v. Coallier*, [1983] F.C.J. no. 813.

Reasons for Decision

[25] Under section 7 of the *PSSRA*, an adjudicator does not have jurisdiction relating to classification matters in the absence of a provision to the contrary in the collective agreement. There is no such provision in the relevant collective agreement. Section 7 of the *PSSRA* reads as follows:

> ***7.*** *Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*

[26] Likewise, under paragraphs 7.1(e) and 11.29(c) of the *Financial Administration Act,* the responsibility for the classification of positions rests with the Treasury Board

and the Department that is authorized to exercise such responsibility. (See *Brochu* (*supra*).)

[27] The undisputed evidence before me is that the incumbents at the TI-06 level and those at the SG-SRE-03 level all perform the same duties. The position of Product Safety Officer was classified at the SG-SRE-03 level for all incumbents except those who did not have a university degree in the relevant field. These employees had been performing their duties well and the employer felt that they should be paid an amount similar to the incumbents with a university degree, as they were performing the same duties. Initially when the employer made the decision, there was little difference between the maximum rates of pay for both groups. However, as a result of collective bargaining, the difference between the rates of pay increased and has fluctuated along the years.

[28] It is established case law that when grievors are found to have substantially performed the duties of a higher classification they are entitled to acting pay at the higher classification level. (See *Stagg v. Canada (Treasury Board)*, [1993] F.C.J. No. 1393, *Beaulieu,* 2000 PSSRB 76 (166-2-28973 to 166-2-28982) and *Macri* (Board file 166-2-15319).)

[29] Nevertheless, it is also recognized that an adjudicator does not have jurisdiction as it pertains to classification when grievors are performing the duties of their positions but are grieving that the same duties are classified at a higher level in other positions, as the classification decision of the employer can only be revised by the Federal Court. (See *Dougherty and Others* (Board files 166-2-25137 to 25142 and 166-2-25162), and *Charpentier* (*supra*).)

[30] The instant grievances clearly fall in the second category of case law. The grievors are performing their duties. These duties have been classified at the SG-SRE-03 level. The employer has decided to classify the same duties at the TI-06 level for those incumbents who do not possess a university degree. If I was to grant the instant grievances, I would in fact be reviewing the decision of the employer to classify differently these positions.

[31] As Chairperson Tarte wrote in *Charpentier* (*supra*), "...Although the wording of the grievances concerns the acting pay and makes no mention of 'classification', granting the redress that has been requested would be the same as a reclassification."

[32] I must, therefore, conclude that this is a classification matter over which I have no jurisdiction.

[33] It is an unfortunate situation that employees who have a university degree receive less pay for doing the same work than their colleagues who do not have the same education level. I have carefully reviewed the evidence and case law to see if there are other solutions to correct this situation. I found the *Macri* (*supra*), *Costain* (Board files 166-2-18508 to 18511) and *Gray* (Board file 166-2-28685) decisions interesting in this regard. However, these cannot be applied in the instant grievance, as there was no evidence that the employer had promised the grievors that their positions would be classified at the TI-06 group and level.

[34] For all these reasons, the grievances are therefore denied for want of jurisdiction.

Guy Giguère,
Deputy Chairperson

OTTAWA, September 18, 2002