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Citation: 2005 PSLRB 40



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

**DEBORAH BUNGAY, MARY LECLAIR
AND TRUDY CLEVELAND**

Grievors

and

**TREASURY BOARD
(Department of Public Works and Government Services)**

Employer

Indexed as *Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*.

REASONS FOR DECISION

Before: [Ian R. Mackenzie, adjudicator](#)

For the Grievors: [Alan Phillips, Professional Institute of the Public Service of Canada](#)

For the Employer: [Harvey Newman, counsel](#)

Heard at Halifax, Nova Scotia,
November 16 and 17, 2004.

REASONS FOR DECISION

Grievances referred to adjudication

[1] The grievors are purchasing officers with Public Works and Government Services Canada (PWGSC) in the Atlantic Regional Office located in Halifax, N.S. Deborah Bungay, Mary LeClair and Trudy Cleveland each referred an acting pay grievance and a statement of duties grievance to the Public Service Staff Relations Board (the “Board”). At the material times, the grievors were subject to the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada (PIPSC) for the Audit, Commerce and Purchasing Group, with an expiry date of June 21, 2000 (Exhibit G-1). By e-mail to the Board on September 23, 2003, the grievors’ representative, Alan Phillips, advised that the bargaining agent would only be proceeding with the acting pay grievances. At the hearing, he confirmed that the grievors were withdrawing their grievances on the statement of duties.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, I continue to be seized with these references to adjudication, which must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”).

[3] The grievors are classified at the PG-02 group and level. In their grievances, dated May 16, 2001, they grieve that they were substantially performing the duties of a higher level, namely the PG-04 level, since October 1, 1998, contrary to clause 45.07 of their collective agreement. The final-level response to the grievances was issued on August 18, 2003, and the grievances were referred to adjudication on August 26, 2003. Mediation was scheduled for April 29 and 30, 2004, and was unsuccessful.

[4] Mr. Phillips requested an order excluding witnesses. Counsel for the employer, Harvey Newman, requested that Mary Sliming, the grievors’ manager, be allowed to stay, as she was advising him. Mr. Phillips had no objection to this request. Accordingly, I ordered an exclusion of witnesses, except for Ms. Sliming.

[5] Mr. Newman raised a preliminary objection regarding my jurisdiction to hear these grievances, because the grievances related to classification and not acting pay. Mr. Phillips, relying on the Federal Court decision in *Chadwick v. Canada (Attorney*

General) 2004 FC 503, submitted that I did have jurisdiction. Mr. Newman recognized that evidence would need to be heard in order for me to determine whether there was jurisdiction. I noted his objection to jurisdiction and invited further arguments at the close of the hearing.

[6] During the hearing, Mr. Newman raised objections to the introduction of evidence of duties prior to the dates specified in the grievances (October 1, 1998 to May 16, 2001). I allowed the evidence and reserved both on the relevance and the weight to be given to that evidence. I have concluded that the evidence is relevant, in that it relates to the grievors' allegations that there was a change in their duties. Mr. Newman also objected to the introduction of evidence of duties after the date of the filing of the grievances. Mr. Phillips alleged that the evidence would show that the employer removed duties being performed by the grievors during the grievance process. I allowed the evidence and reserved on the relevance and weight to be given to the evidence. I have concluded that the evidence is relevant and have discussed it in the reasons below.

[7] Messrs. Phillips and Newman made brief opening statements. The three grievors testified and one other witness testified for the grievors. Ms. Sliming testified for the employer.

Summary of the evidence

[8] The grievors are all long-service employees with PWGSC: Ms. Bungay has worked with PWGSC for approximately 22 years, Ms. LeClair has worked for 30 years and Ms. Cleveland has worked for 28 years.

[9] As of April 1, 1998, the Nova Scotia Real Property Contracting (RPC) section of the Atlantic Supply and Services Directorate of PWGSC consisted of Mary Sliming, Chief of RPC, classified at the PG-04 level, four contracting officers (including the three grievors) classified at the PG-02 level, as well as a support coordinator, classified at the CR-03 level (Exhibit G-2).

[10] In the fall of 1998, a reorganization was announced. After the reorganization, Ms. Sliming's position title changed to Supply Team Leader and was reclassified to the PG-05 level (Exhibit G-42). Two PG-04 positions were created (Supply Specialist) and four PG-02 positions were maintained. The PG-02 positions were renamed "Supply Officers". In addition, a Supply Officer trainee position at the PG-01 level was created.

The Supply Coordinator position was reclassified to a CR-04 level, and a support clerk position at the CR-03 level was created.

[11] As a result of the restructuring of Supply Operations Services, the grievors' positions were replaced by a new generic position (Exhibits E-1 and E-4). The title of the position was changed from RPC Officer to Supply Officer. The point rating for the position was provided, stating that the new generic position was confirmed at the PG-02 group and level. The grievors were advised of the new generic position on February 9, 1999. The effective date was October 1, 1998.

[12] There was a competition for the two PG-04 positions in the fall of 1998. Ms. Cleveland testified that there was no discussion about the work assignments for the PG-04s, other than that a PG-04 would act for the Team Leader in her absence. All three grievors, as well as their fourth colleague, Jack Steele, competed for the positions. While the three grievors were unsuccessful, Mr. Steele was named a successful candidate; he became a PG-04 in April of 1999. The grievors testified that his responsibilities did not change when he won the competition. Herb Gibson was appointed to the second PG-04 position and he started near the end of 1999. Mr. Gibson had been in the Marine and Aerospace Division at PWGSC.

[13] Ms. Cleveland sent an e-mail to Ms. Sliming on December 10, 1998 (Exhibit G-4), outlining the results of a discussion that she and Ms. LeClair had had about workload issues. The e-mail proposed a division of work between Ms. Cleveland and Ms. LeClair. It also suggested that the proposed PG-04 positions should include in the job description the following: "Budget Control Report, proposal evaluations for Architecture and Engineering for the Atlantic region, liaison for consultants, preparation of contract requests for the Minister's office and answering Ministerial inquiries." Ms. Cleveland testified that the purpose of the e-mail was to get this part of the work being done by the PG-02s to go to the PG-04 positions, where she and Ms. LeClair felt it belonged.

[14] The position description for the PG-02 (Exhibit E-2) described the key activities of the position as follows:

Key Activities

Interprets and analyzes requirements and specifications of clients, including reviewing requisition documents, evaluating operational issues and policies, systems data, and quality standards, and initiates and processes requests. Negotiates with public and private sector institutions on assigned projects.

Verifies and analyzes issues for accuracy/ integrity/ compliance; updates information; analyzes trends and patterns and makes recommendations on improvements/ revisions; rolls up information for reporting and recommendation purposes; and resolves problems of compliance.

Prepares documents and/or segments of reports identifying errors and trends, in the assigned procurement and supply activities; generates and compiles data for reviews; consults with team/staff members and develops forecasts, options and recommendations; and markets improved techniques and methods of procurement activities for client departments and the designated sector of the business community.

[15] The PG-04 position also had a new generic work description with the same effective date of October 1, 1998 (Exhibit E-3). The key activities of the position were described as follows:

Key Activities

Plans, manages, and delivers assigned services, and monitors and analyzes the effectiveness of programs, services and initiatives to a defined client organization and/or in an operational, corporate or project environment. Negotiates with public and private sector institutions on assigned projects.

Defines the scope of business problems; identifies manageable components, trends and developments/linkages to other functions; compiles information; assimilates and analyzes data from various sources for impact; develops/evaluates options for resolution; summarizes business cases, resolves problems and analyzes their impacts; presents controversial issues to management with recommendations to influence decisions.

Consults with clients on a regular basis to anticipate and analyze evolving requirements; develops strategies and options to meet objectives; and provides advice on specific projects.

Participates in project teams, working groups, and provides subject matter expertise to them and managers and colleagues involved in analyzing, developing and co-ordinating strategies and initiatives for the assigned programs; prepares analyses, briefings and reports, and makes presentations.

Represents the organization with external clients on specific cases/programs and consults with central agencies on the interpretation and application of policies and procedures in order to provide input to operational and policy issues.

Researches and develops options for new policies, programs, procedures and information management systems, or revisions.

[16] Ms. Sliming testified that the main function of the Halifax Regional Office during the period between October 1998 and May 2001 was the tender and contracting process for construction-type projects. Ms. Cleveland testified that the duties of the PG-02 officers included doing the “Requests for Proposals” (RFPs), which set out the requirements for the design of buildings. The duties also included the evaluation of the statement of qualifications. In 1998, the process was a two-stage process with the second stage being a cost and technical evaluation. In 1999, the process changed to a one-stage, two-phase proposal. The major difference was that the scores from the evaluation of the statements of qualification were carried over to the evaluation of the proposal. A board was established to review each bid. The role of a PG-02 officer was to prepare the evaluation sheets, the board report, and to take notes for the debriefing. The board consisted of a chairperson, who was a professional from the Architecture and Engineering Section, and two others, all of whom were experts in their field. Up until 1999, the Halifax Regional Office was doing all of the work for the Atlantic Region on RFPs. After 1999, the other offices in New Brunswick and Newfoundland started doing their own RFPs. Ms. Cleveland testified that she was doing all the RFP work in the Halifax Regional Office in January of 1999.

[17] Ms. Cleveland and Ms. LeClair also testified that the grievors were provided with training on the revised RFP process (Exhibit G-5) in June of 1999. Ms. Sliming testified that this training was provided to all team members so that they would have an understanding of the new process and be able to work together as a team. The e-mail (from Bradley Brummel, a national manager in Real Property Services) announcing the training session (Exhibit G-5) referred to the training as “information sessions” with the purpose of explaining the revised process and “to work with project managers and

contracting officers nationally in ensuring a complete understanding of the material.” Mr. Brummel directed that “all staff expected to be involved in the consultant selection process should attend.”

[18] Excerpts from the ledger book used to record the assignment of work to officers were introduced as an exhibit (Exhibit G-6). Ms. Sliming used this ledger book to track the assignment of files. Ms. Cleveland testified that she was assigned the project of the Cape Spear Visitor Reception Centre and identified the second page of the contract pre-approval form (Exhibit G-7). Ms. Sliming signed the approval authority for the project. Ms. Cleveland testified that once this approval was signed, she had full signing authority for the project. She also testified that no one else worked on the file with her over the three or four months that she worked on the file.

[19] Ms. Cleveland also identified correspondence she had sent to Gordon MacLeod in November and December of 1999 (Exhibits G-8 and G-9) referring to an RFP for the Dalvay Project. The Dalvay Project involved the design of an administrative building for Parks Canada with an estimated cost of between \$100,000 and \$250,000. She testified that no one assisted her with the file. Ms. Cleveland also identified an RFP advance approval form for renovations to buildings at the Potato Research Centre in Fredericton, N.B. (Exhibit G-12), with a total estimated cost of \$4.9 million. The form indicated that Ms. Cleveland was the Contracting Officer.

[20] In Ms. Cleveland’s performance appraisal for 1998-99 (Exhibit G-14), Ms. Sliming noted that Ms. Cleveland was an “expert” on RFP procedures and provided guidance and assistance to her colleagues.

[21] Ms. Cleveland went on a two-year assignment to Parks Canada, as of April 1, 2000, and returned to RPC on April 1, 2002. She testified that when she returned from her assignment, she was not told of any changes in her duties. She was not assigned any RFPs, but she was not told that she was no longer responsible for RFPs. Ms. Cleveland agreed, in cross-examination, that she consulted with Ms. Sliming as required. Ms. Bungay testified that it was the practice to advise the Team Leader of any problems on a file. Ms. Cleveland testified that the PG-04s were doing regular construction contracts and that her projects were more complex.

[22] Ms. Bungay testified that up to October 1998, her workload was stable in terms of the assignments she was required to perform. She did construction contracts and RFPs before the PG-04 positions were created, and there was no change in assignments after the PG-04 positions were created.

[23] In September 1999, Ms. Bungay sent an e-mail to Ms. Sliming noting there were PG-04s in the Consultant and Construction sections in Ottawa, and questioned whether the PG-02 positions were being looked at: "...why would [we] be just PG-2's?" (Exhibit G-15). She testified that she filed her grievance because of her examination of the work in Ottawa: "We were entitled to a PG-04 just like they were."

[24] On June 26, 2000, Ms. Sliming forwarded a draft document outlining workload allocation to Ms. Bungay and to Ms. LeClair, among others (Exhibit G-16). The document set out two teams, each with one PG-04 and one PG-02. Ms. Sliming also noted:

[...]

Allocation of requisitions will therefore be based on the client/commodity, dollar value, complexity and current workload of Procurement Officer. To be consistent with the other regional offices, A & E [Architecture and Engineering] requirements will be handled as follows:

One-stage - two phase proposals - PG-4 - Supply Specialist

One-stage - one phase proposals - PG-2/PG-4 - Contracting Officer with Supply Specialist.

Although the One stage-two phase proposals will be allocated directly to the PG-4, I encourage the PG-2 of that team to become familiar with these requirements learning as much as possible about the process.

[...]

[25] Ms. Bungay testified that this draft workload allocation never came into effect and the PG-02s still did the work previously assigned to them.

[26] Ms. Bungay identified a contract amendment request for the construction of a new RCMP detachment building in Kingston, N.S., dated June 8, 2000 (Exhibit G-20). She is identified in the document as the contracting authority. Although it should have been a simple project, there were problems identified after the inspection of the building. Ms. Bungay also identified an e-mail from Mike Richard, a property manager

with PWGSC in Moncton, N.B., dated June 21, 2000 (Exhibit G-17), discussing an RFP for the Nova Institute in Truro, N.S. She testified that this was a regular, routine exchange on RFP work.

[27] Ms. Bungay and Ms. LeClair also testified that Alice Holmes, when she was the Acting Regional Manager, told them at a meeting that it was a “fine line” between where the PG-02s’ duties ended and the PG-04 duties began, and that she could not tell the difference between the two positions. Ms. Sliming disputed this in her testimony, stating that Ms. Holmes would know the difference.

[28] Ms. LeClair testified that she had been responsible for the Alternative Form of Delivery project for building maintenance and had set up the viewing room for potential contractors. She testified that she is no longer involved and the project was given to Mr. Gibson (a PG-04). She testified that she also used to do elevator maintenance contracts but these were now being done by a PG-04.

[29] Ms. LeClair was also assigned RFP work in 2000 (Exhibits G-26 and G-28), involving design and construction stage services for the Intensive Intervention Unit at the Nova Institution for Women in Truro, N.S. The mandatory requirements checklist for the project (Exhibit G-29) was verified by Ms. LeClair and Herb Gibson (the PG-04 Supply Specialist). Ms. LeClair testified that this was because he was becoming familiar with the RFP process. The Project Manager for this project was Mr. Richard. In an e-mail to Ms. Sliming dated June 22, 2000 (Exhibit G-30), he indicated that he had discussed the setting up of the Evaluation Board with Ms. LeClair and that she would be “handling RPC duties with the assistance of Herb Gibson.” In a subsequent e-mail (Exhibit G-31), he indicated that RPC personnel “overseeing the Evaluation Board will be Ms. Marylou LeClair and Mr. Herb Gibson.” Ms. LeClair testified that Mr. Gibson sat in on the Evaluation Board and observed only. His subsequent involvement in making decisions on the process (Exhibit G-33) was because he was Acting Team Leader in Ms. Sliming’s absence (Exhibit G-32). Mr. Richard continued to deal directly with Ms. LeClair on the process, including preparation of notification letters (Exhibit G-35). She also approved amendments to the consultant agreement (Exhibit G-36).

[30] In December 2001, Mr. Richard forwarded an RFP of an amendment to Mr. Gibson. Mr. Gibson notified Mr. Richard that this was Ms. LeClair’s file and that he had forwarded the documentation to her (Exhibit G-37). Again, in March 2002, a request from Gary Ames (who was replacing Mr. Richard) to amend a contract was sent

to Mr. Gibson. He forwarded it to Ms. LeClair, as she was the Contracting Officer for the file (Exhibits G-38 and G-39).

[31] Ms. Bungay received acting pay late in December 2001, for handling Mr. Steele's files in his absence from the office (Mr. Steele was a PG-04 Supply Specialist). Ms. LeClair received acting pay for doing RFP work from January 28, 2002, to the end of March 2002, again in the absence of Mr. Steele. After the acting assignment was over, the RFP file went to Mr. Steele.

[32] Ms. Sliming testified that during the period from October 1, 1998, to May 2001, there were only a handful of RFPs handled by the PG-02s. She stated that RFP work was not a major part of their duties and estimated that it constituted perhaps four or five percent of their time. The grievors testified that they spent a significant amount of time on RFPs. Ms. Sliming also testified that the introduction of the PG-04 positions was designed to take over a lot of the Team Leader's contract responsibilities.

[33] Ms. Sliming testified that she assigned files based on an assessment of the potential for problems and risks, and not usually on the basis of price alone. If the requisition was straightforward and of limited risk, it would be given to the PG-02s. If there was a potential for problems, she always allocated the file to a PG-04. Because of their background, the PG-04s were able to consult and technically advise the client on the specifications of a proposed project. If there was a contract dispute, the PG-04s were able to communicate directly with the lawyers and the industry with no direct involvement from her. She also testified that the files referred to in the testimony of the grievors all involved substantial input from her. She further testified that she had been involved in all the RFPs mentioned in the testimony.

[34] Ms. Sliming testified that the expectations of the PG-02s were different from those of the PG-04s. If the PG-02s ran into problems or complications on their files, they were to speak to her. The PG-04s were expected to perform their duties with little input from her. The delegated signing authority for the PG-04s was double that of the PG-02s. Also, the PG-04s were expected to act for the Team Leader when she was absent.

[35] Calvin Young was a PG-02 supply officer at the Newfoundland District Office in St. Johns. He spent 34 years with the Department and retired in March 2004. He had also been a member of the PIPSC Audit, Commerce and Purchasing group national

executive. He testified that a PG-04 was only assigned to the Newfoundland office in June 2000. Once that position was filled, the only duties that the PG-04 took over were acting for the Team Leader in her absence. This caused some complaining within the office and Mr. Young talked with the Team Leader and she decided to give all RFPs and any contracts over 2 million dollars to the PG-04. At a meeting with his Team Leader, Mr. Young said that the officers were advised that there was to be a review of duties within RPC in the Atlantic Region that would result in some distinction between PG-02 and PG-04 duties. He testified that his Team Leader, Ms. Holmes, told him that she could not distinguish between the two positions, other than a slightly higher signing authority. Ms. Sliming testified that she could not believe that Ms. Holmes had said this, and that Ms. Holmes would know the difference between the two positions.

[36] Mr. Young testified that because there was a vacant PG-04 position in the Newfoundland Office, he and his colleague at the PG-02 level complained to the Team Leader that they were performing all the duties of the PG-04. As a result, Mr. Young and his colleague were given six months each of an acting assignment at the PG-04 level. After the PG-04 officer arrived, only a couple of the duties performed by the PG-02s went to the PG-04. The PG-02s largely trained the PG-04 in his duties, especially on the RFP process.

[37] In cross-examination, Ms. LeClair was asked if she was assigned new duties after October 1998. She testified that after October 1998, "it was just a different way of doing things." Ms. Cleveland testified that there was no change in work assignments when the PG-04s started. Ms. Bungay testified that Mr. Steele's duties did not change once he became a PG-04. Ms. Cleveland testified that she filed a grievance because she realized she was doing PG-04 work and not getting paid for it. She stated that she did not see where the PG-04 work changed at all from that of the PG-02: "the scope of our job description had not changed." Ms. Sliming testified that the duties of the PG-02s did not change during this period.

[38] The grievors had filed classification grievances and later withdrew those grievances on the advice of their bargaining agent. All of the grievances contained the identical requested corrective action of acting pay from October 1, 1998, "until settlement date" at the PG-04 level. Ms. LeClair testified that the grievances went back to October 1998, "because that is how far back we could go." She testified that the grievors tried to go back before 1998. Ms. Cleveland testified that the grievors grieved

both their classification and their job descriptions but withdrew those grievances on the advice of their bargaining agent.

[39] Ms. Bungay testified that her duties never changed from before October 1998, until the filing of her grievance. Since the filing of the grievance, at some point during the grievance process, certain work was no longer being assigned to the PG-02s, such as RFPs and major construction projects. Also, bid depository work is now being done by the PG-04s. All the grievors testified that they believed that their work was now at the PG-02 level.

Summary of the arguments

For the Grievors

[40] Mr. Phillips submitted that the three grievors (all PG-02s) were assigned to the Halifax RPC and, prior to 1998, all work in the unit was performed by the incumbents. Someone decided that PG-04s should be assigned to the RPC offices in Halifax, as well as in Newfoundland and Labrador and New Brunswick. Mr. Steele was appointed to the PG-04 position in April 1999, and Mr. Gibson was appointed in November 1999. During the period up to when Mr. Gibson arrived, the work remained the same and the assignments remained the same. Mr. Steele continued to do the work that he did while he was a PG-02. During this period, the PG-02s realized that everyone was doing the same work, yet some were getting paid at the PG-04 level.

[41] Mr. Young faced similar circumstances in the Newfoundland office. He and his co-worker applied for an acting assignment until the PG-04 position was filled.

[42] When Mr. Gibson arrived in the Halifax office, the work that had been assigned to Ms. LeClair was taken away and given to Mr. Gibson. One day, miraculously the work became PG-04 work. There was confusion and doubt as to what was really PG-02 and PG-04 work. There was testimony that Ms. Holmes, the Acting Manager, did not know the difference between PG-02 and PG-04 work. This testimony has not been contradicted.

[43] The documents and testimony demonstrate that the grievors completed the work, as assigned. Ms. Sliming testified that she communicated by e-mail, giving direction to the grievors. The files are in the custody of Ms. Sliming or she has access

to them and the employer has failed to introduce one piece of advice to the grievors from Ms. Sliming.

[44] Mr. Phillips submitted that for an employee to claim acting pay, there does not need to be a vacant position. He referred me to *Beauregard et al. v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-2-26956 to 58 (1996), where the adjudicator held that the issue was not whether the grievors had performed all of the possible duties of the higher position, but whether the grievors had performed the duties normally carried out by an employee at the higher level. He also referred me to *Beaulieu v. Treasury Board (Federal Court of Canada)*, 2000 PSSRB 76 (QL). In this case, Mr. Phillips submitted that the evidence shows that the work assigned to the grievors was the same prior to October 1, 1998, as it was after October 1, 1998. When Mr. Gibson arrived in the PG-04 position, there was a grey area. The evidence also shows that RFP work is now PG-04 work.

[45] In *Chadwick v. Canada (Attorney General)* (*supra*), the Court held that the adjudicator had jurisdiction. This case is similar in nature.

[46] Two of the grievors (Ms. Bungay and Ms. Cleveland) acted in PG-04 positions from 2001 to 2002. Ms. Sliming testified that she believed they were only working at the PG-02 level, yet they were given acting pay. She also testified that the grievors were not doing the full range of duties of the PG-04 level, yet in the performance appraisals document, the grievors were considered to be “expert”. E-mails were produced indicating that the contract officer was the responsible officer. The e-mails from Mr. Gibson clearly indicate that Ms. LeClair was the contracting officer responsible for the file and for all amendments. It is clear from the evidence heard that the work one day was PG-02 work and that somehow it then became PG-04 work. The grievors have done the work; now those duties have been removed and the job descriptions are valid. However, when they did the work during the period in question, they should be paid for that work.

For the Employer

[47] Mr. Newman stated that no one disputes the value of the work being performed by the grievors. They are all exemplary employees and highly valued. The issue here is whether or not they were acting as PG-04s. The test is whether the grievors were “substantially performing” the duties of a higher level. Or, are the grievors contending

that their work was just as important or just as valued and they are improperly classified? None of the grievors did the work of PG-04s; they did not do the work of Mr. Steele or Mr. Gibson. At no time was there a material change in the nature of their duties. There was no evidence that the work fell into the PG-04 job description. It was not argued that the work they performed was outside the PG-02 job description. The fact that they may have performed some of the same duties some of the time is not relevant, as acting pay requires that the duties be “substantially” performed at the higher level. Ms. Sliming made a clear distinction between PG-02s and PG-04s. There are similarities in the jobs, but there are different levels of responsibility and complexity. She could expect more of them and had substantially less involvement in the files handled by the PG-04s.

[48] In *Beaulieu v. Treasury Board (Federal Court of Canada) (supra)*, it was clear that the grievor was performing all the duties of a PM-03. In this case, there is no evidence that the grievors were performing substantially all of the duties of the PG-04s. They were not “standing in their shoes” (*Beaulieu v. Treasury Board (Federal Court of Canada) (supra)*).

[49] The grievors did not file grievances for a three-year period. One grievor said she grieved because of the classifications in the Ottawa Office. After October 1, 1998, did their work change? The only thing that changed was the introduction of a generic job description. In 1999, the PG-04s came on-stream and two of the grievors received acting pay for periods in recognition of their added responsibilities during this period.

[50] The comments attributed to Ms. Holmes (that she could see no difference between PG-02s and PG-04s) are hearsay and there seems to be some confusion as to what was said. No weight should be given to these comments.

[51] In *Gvildys and Others v. Treasury Board (Health Canada)*, 2002 PSSRB 86 (QL), there was no dispute that the duties were the same as those of the higher level. This is not the case in the grievances here. In that decision, the employees were doing substantially the same type of work and others were getting a higher level of pay. They were working within the job description and doing different types of tasks and responsibilities. What the grievors are really asking for is a reclassification of their positions. Their job descriptions are rated and there is no evidence that they are anything other than PG-02s.

[52] Mr. Newman submitted that I should dismiss the grievances on the basis of a lack of jurisdiction or, in the alternative, on the basis that the grievors were not substantially performing the duties of a higher level.

Reply

[53] The evidence showed that Mr. Steele was doing the same work as that which the grievors were doing. There was no request for a reclassification by the grievors. The statement made by Ms. Holmes was not contradicted. The employer could have called Ms. Holmes as a witness but chose not to. The hearsay rule in hearings such as this is somewhat relaxed and Mr. Phillips asked that I give it the weight it deserves.

[54] There is a difference in responsibility and authority, but this was not the case until 2002. Until that time, there was a single signing authority level. Even if a PG-04 has a higher signing authority, the employee still needs the authority of the manager; it is the same clause being signed in each contract. The employer has recognized that the grievors were performing PG-04 level work because they removed those duties from the grievors.

[55] Mr. Phillips asked that I grant the grievances and remain seized for the implementation of the decision.

Reasons

[56] Ms. Cleveland, Ms. Bungay and Ms. LeClair have all claimed acting pay, commencing on October 1, 1998. They allege a breach of the following section of their collective agreement:

45.07 Acting Pay

When an employee is required to substantially perform the duties of a higher classification level on an acting basis for four (4) consecutive working days, the employee 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 in which he acts.

[57] Often in acting pay grievances, the issue of the jurisdiction of an adjudicator arises, and these grievances are no exception. The employer has raised an objection to my jurisdiction over these grievances on the basis that they are more properly considered as classification grievances. An adjudicator is clearly without jurisdiction

over classification grievances: section 7 of the *Public Service Staff Relations Act* (PSSRA). This has become a very confusing area of jurisprudence, given the similarity in the nature of the two types of grievances: in both acting pay and classification grievances, the grievor is alleging that he/she is performing duties at a higher level and not being properly compensated for the performance of those duties. The Federal Court has recently examined the distinction between acting pay and classification grievances: *Chadwick v. Canada (Attorney General)* (*supra*). The Court concluded:

[...]

In the present case, there is no evidence presented to this Court that the applicant had previously sought a re-classification of her position, either through informal inquiries or through a classification grievance. It does not appear, therefore, that her grievance for acting pay that was forwarded to the PSSRB pursuant to subsection 92(1)(a) was a backdoor attempt to achieve indirectly through adjudication that which could only be achieved through a different grievance procedure related to classification, pursuant to section 91 of the PSSRA. Furthermore, the applicant is not requesting acting pay up to the present time, but acting pay for a specific time period when she believes that she was required to substantially perform the duties of a VM-02 position for at least ten consecutive days. Such a request is clearly one for remuneration and grounded in...her collective agreement...

[...]

[58] In distinguishing the situation in *Gvildys and Others v. Treasury Board (Health Canada)* (*supra*) from the situation faced by Ms. Chadwick, the judge noted that those employees were not required or requested to take on new or expanded duties but continued to perform duties they had always performed when there was a change in classification levels in the workplace. The judge also distinguished Ms. Chadwick's circumstances from those in *Charpentier and Trudeau v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-2-26197 and 26198 (1997), by noting, among other factors, the grievors' belief that similar positions in other provinces were classified at a higher level.

[59] In summary, some of the indicators that a grievance is a classification grievance and not an acting pay grievance (and therefore where an adjudicator has no jurisdiction) are:

- the claim for acting pay is an ongoing claim and not for a specified period;
- the grievor has sought a reclassification, either informally or through a classification grievance;
- the grievor continues to perform the duties he/she has always performed and only the classification levels in the workplace have changed; and
- the acting pay grievance is based, in part, on a comparison with similar positions in other work areas.

[60] This is not an exhaustive list and, in my view, some of the factors considered alone cannot be determinative of jurisdiction.

[61] Given the difficulties in determining the proper avenue for redress in situations where an employee feels aggrieved by what he/she perceives as a lack of appropriate compensation for duties being performed, it seems incongruous to deny jurisdiction based on the filing of other grievances (i.e. classification grievances). This is especially so given the right to grieve contained in the *PSSRA*. Although there was evidence that classification grievances and statement of duties grievances had been filed, I draw no conclusions from this fact.

[62] When the grievances were filed, the grievors were seeking acting pay for an indefinite period (from October 1, 1998, to “settlement”). The evidence was that the employer changed the duties of the grievors after the filing of the grievances, so the grievances are now for a definite period of time. The temporal element of the test for jurisdiction is problematic, since whether the claim is for an indefinite period or not may depend on when the grievance is filed. For example, if an acting pay situation lasts for longer than 25 days, a grievance filed within the time limits might be considered acting pay for an indefinite period, or at least until the additional duties cease. In any event, by the time the matter was referred to adjudication, the claim by the grievors for acting pay was for a definite period.

[63] The grievors’ representative cited the decision in *Beaulieu v. Treasury Board (Federal Court of Canada)* (*supra*). In that case, the grievors were reclassified to a higher level without a change in duties and claimed acting pay for the period before their reclassification. In this case, the grievors have not been reclassified.

[64] There was evidence from Ms. Bungay that she felt that the PG-02s in Halifax were doing the same work as PGs in Ottawa, who were classified at the PG-04 level. There was no evidence presented that described the duties of PG Supply Officers in Ottawa. This is similar to the situation in *Charpentier and Trudeau v. Treasury Board (Environment Canada)* (*supra*), where the grievors looked at the duties being performed by others in a different work unit. This tends to support the view that the grievances relate to the reclassification of the positions. However, in my view, it is not correct to base a finding on jurisdiction on simply one element such as this. I prefer a purposive approach that looks at the overall foundation for the grievances.

[65] The foundation or essence of these grievances is that the grievors saw no difference in the duties being performed by PG-02s and PG-04s in the Halifax office. I have given no weight to the evidence of Mr. Young, who was working out of the Newfoundland office, as this relates to a different work unit. I have given little weight to the evidence that Ms. Holmes, as Acting Manager, said that she could see no difference in the duties of PG-02s and PG-04s. Ms. Holmes did not testify. Although I have little doubt that she made this comment, there was no testimony from her on the context of her comments. In any event, Ms. Holmes's comment does not assist the grievors in their claim because it relates to the appropriate classification of the duties and not to whether there was an entitlement to acting pay.

[66] The evidence shows that the grievors' duties did not change at the time that PG-04s were introduced into the workplace, although after the filing of the grievances certain duties were removed from the PG-02s and given to the PG-04s. The evidence did not show that the grievors performed duties outside their position description. Unlike the situation in *Chadwick v. Canada (Attorney General)* (*supra*), the reorganization of the workplace in 1998 did not result in additional duties for the grievors. Taking into account all the evidence, it is clear that the essence of these grievances relates to the appropriate classification of the duties being performed. This leads to the conclusion that the grievances are more properly viewed as classification grievances, as in *Gvildys and Others v. Treasury Board (Health Canada)* (*supra*). Accordingly, I find that I do not have jurisdiction.

[67] However, should I be incorrect, I will also address the merits of the grievances. The grievors bear the burden of proving that they substantially performed the duties of the higher position. They have not met this burden. On the merits, I find that the

duties of a PG-04 were sufficiently different from the work being performed at the PG-02 level to lead to the conclusion that the grievors were not substantially performing the duties of a PG-04. This is not a conclusion that the grievors are properly classified, as this is not within my jurisdiction.

[68] The test as to whether a grievor has been substantially performing the duties of a higher level has been articulated in a number of decisions of this Board. As stated in *Beaulieu v. Treasury Board (Federal Court of Canada) (supra)*, the grievor does not need to demonstrate that he/she performed every job function in order to receive acting pay. Rather, the grievor must demonstrate that, in effect, he/she performed a significant portion of the duties of the higher classification.

[69] The grievors gave extensive testimony on the work they did involving RFPs. The position description for the PG-02 position (Exhibit E-2) clearly contemplates this work:

[...]

Produces documentation in support of various service activities, including requests for proposals, contracts for products and/or services and correspondence for those participating in the process, who use this information to provide or bid for services...

[70] The evidence also showed that the PG-04 position was one that involved less supervision by the Team Leader. This higher level of autonomy is reflected in the position description of the PG-04 (Exhibit E-3). In her testimony, Ms. Sliming also testified that the PG-04 Supply Specialists were expected to have and use more technical expertise (e.g., engineering expertise) than the PG-02 Supply Officers. This is supported by the position descriptions (Exhibits E-2 and E-3). There was no evidence that the grievors provided such technical advice to PWGSC clients.

[71] As noted in *Moritz v. Canada Customs and Revenue Agency*, 2004 PSSRB 147 (QL), the jurisprudence is clear that overlapping responsibilities with a higher classification does not have the effect of transforming the work into substantial performance of the higher level.

[72] The fact that two of the grievors were paid acting pay for short periods of time is not relevant. In both instances, the grievors were responsible for the files of a PG-04 Supply Specialist while he was on leave.

[73] The grievors have failed to meet the burden of showing that they substantially performed the duties of a PG-04. I must, therefore, conclude that the grievances are denied.

[74] In conclusion, the grievances of Ms. Bungay, Ms. Cleveland and Ms. LeClair are dismissed for lack of jurisdiction. Also, on the merits, the grievances are dismissed.

Order

[75] The grievances are dismissed.

**Ian R. Mackenzie,
adjudicator**

April 27, 2005.