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File: 166-34-35441

Citation: 2005 PSLRB 71



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

LAKHVINDER KHINDA

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Indexed as

Khinda v. Canada Customs and Revenue Agency

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

REASONS FOR DECISION

Before: D.R. Quigley, adjudicator

For the Grievor: Steve Eadie, Professional Institute of the Public Service of Canada

For the Employer: Victoria Yankou, Counsel

Heard at Toronto, Ontario,
May 24 to 26, 2005.

REASONS FOR DECISION

Grievance referred to adjudication

[1] On December 22, 2004, the grievor, Lakhvinder Khinda, referred the grievance she had filed on July 22, 2003, to adjudication. It reads as follows:

I grieve that I have been unjustly dismissed from my position as CS-01 in Canada Customs and Revenue Agency.

CCRA Staffing policy as it relates to students has not been followed.

I was assured on numerous occasions that I was a CS01 and that the paperwork, while it may have been held up, was being processed to that effect. Past practice indicated that my position would be an indeterminate one. The paperwork indicated my position would be an indeterminate one. I grieve that I was misled and made a term employee rather than an indeterminate employee, contrary to past practice, policy, and assurances from employer representatives.

[2] The grievor seeks the following corrective action:

I be returned to the employ of CCRA as an indeterminate CS-01 and I be paid all monies and benefits lost as a result of this termination.

[3] Counsel for the employer called three witnesses and introduced one exhibit, which contained eight tabs. The grievor's representative called one witness, the grievor, and introduced 10 exhibits. Both parties made brief opening remarks.

[4] Counsel for the employer raised a preliminary objection in respect of my jurisdiction to hear this matter under section 92 of the *Public Service Staff Relations Act (PSSRA)*. I took note of the objection but reserved judgment and proceeded to hear the merits of the case. I will address counsel's objection in my reasons.

[5] On April 1, 2005, the *Public Service Labour Relations Act (PSLRA)*, 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 this reference to adjudication, which must be dealt with in accordance with the provisions of the *PSSRA*, R.S.C., 1985, c. P-35 (the "former Act").

Summary of the evidence

[6] Patrick Chow was appointed the Team Leader of the CCRA'S Southern Ontario Region Information Technology (IT) Service Desk, in Mississauga, Ontario, on May 13, 2002. He reports to Carol Webster, the Assistant Director, Central Operations. His duties include supervising 18 employees, managing the IT Service Desk, and receiving and shipping IT equipment across the region.

[7] The witness testified that in an effort to maintain CCRA's indeterminate workforce, it entered into a Co-op program with Seneca and Sheridan Colleges (the "Student Bridging Program" (SBP)). The program was designed to provide employment and learning opportunities for students in such areas as taxation, customs and IT, and to develop a pool of qualified future CCRA employees. Potential students were referred to the CCRA by the colleges. The students had to pass written and oral interviews at the entry level.

[8] The witness noted that a student could be offered an indeterminate position within the CCRA upon completion of his/her studies and provided that the student received satisfactory evaluations while working at the CCRA. In furtherance of this possibility, the Team Leader completed an evaluation every four months.

[9] In May 2001, while attending Sheridan College, the grievor began participating in the Co-op program. She completed two Co-op work terms and also worked full-time and part-time hours on the following basis:

- May to August 2001: Co-op work term; full-time hours
- September to December 2001: Part-time hours
- January to April 2002: Co-op work term; full-time hours
- May to August 2002: Part-time hours
- September 2002 to June 2003: Full-time hours

[10] Although the grievor graduated in August 2002, she did not provide the employer with a copy of her college diploma until October 2002.

[11] The witness noted that in July 2002, he met with the grievor and another student and spoke to her about student bridging. At that time, it was his belief that the IT Service Desk would be increasing in size and that more resources would be forthcoming.

[12] The witness stated that on January 30, 2003, he completed the final draft of the SBP request in respect of the grievor and submitted it to Ms. Webster for approval, with an effective date of April 7, 2003 (Exhibit E-1, tab 4). He stated that the grievor was a very competent employee who worked well with her peers. He explained that this was the first time he had completed such a request and that he had used a template created in October 2002 for a previous student. On February 28, 2003, Ms. Webster agreed with his assessment and request and forwarded her recommendation to Peter Colby, the then Director of the region. The witness stated that the authority to approve the request or recommendation rested solely with the Director. He observed that it was his belief that the Department had up to one year after the student obtained his/her diploma to appoint the student to an indeterminate position.

[13] The witness testified that when he completed the SBP request, he proposed that the grievor be struck off strength as a student on April 4, 2003, and then taken on strength on an indeterminate basis as of April 7, 2003. However, he maintained that in discussions with the grievor, he never informed her as to the date the process would be completed, as it was not his decision to make. Until an indeterminate appointment was made, he could either send the grievor home without pay or keep her on strength as a student.

[14] Exhibit E-1, tab 5, is a letter dated October 12, 2002, offering the grievor a specified period of appointment, from September 3 to December 27, 2002, at the SU-06 group and level. Tab 6 is a second letter of offer for a specified period of appointment, from December 28, 2002, to April 30, 2003, at the same group and level, and tab 7 is a third offer for a specified period of appointment, from May 1 to June 27, 2003, again at the same group and level.

[15] The witness testified that on May 9, 2003, he met with the grievor to inform her that although initially the prognosis for an increase in the IT budget looked promising, the funds were no longer available and therefore students and term employees in the region would have to be let go. He explained to her that due to budget constraints, her last day of employment would be June 27, 2003, the end of her specified period of

appointment. He testified that he felt very disappointed that his attempt to bridge her from a student into an indeterminate position had failed.

[16] The witness noted that since then, there has been no more hiring of students as the Co-op program has been discontinued. He noted that the appointment of another student, John Hodgins, who completed his Co-op work at the same time as the grievor, was also not extended.

[17] In cross-examination, the witness stated that he was shocked that the grievor could not be bridged to an indeterminate position, as she was a good employee. However, he noted that each letter of offer for a specified period of appointment contained the following paragraph: "It is important to note that nothing in this letter of offer should be construed as an offer of indeterminate employment, nor should you in any way plan on or anticipate continuing employment...with the Canada Customs and Revenue Agency."

[18] When asked if he had ever told the grievor that the SBP request would not be approved, he replied that he had not, as he expected that it would be. He hoped for the best and that is why he never suggested that she be sent home without pay until an appointment to an indeterminate position was made. It was his belief that when the grievor completed her Co-op program, she would be hired as a term CS-01, as she would no longer be a student. He stated: "My position was that she should be made a term, as she was no longer a student. However, I was following my manager's direction."

[19] The witness noted that a competition was held in June 2002 to hire term employees. These positions were to supplement the number of employees in the local regional offices. The term employees started their employment with the CCRA in February 2003. He acknowledged that not all the term employees hired in February 2003 were laid off; in his section, four were kept on. When asked whether the grievor would have been considered in the downsizing of the term employees if she had been hired as a term employee on completion of her Co-op program instead of being hired as a student for specified periods of appointment, he replied that she would have. When asked whether he would welcome her back into the workplace, he stated that as a result of her performance and being one of his reports, he would not hesitate to do so.

[20] The witness identified Exhibit G-1 as an e-mail he sent to Ms. Webster on June 9, 2003, following meetings he had with some students whose employment was being terminated. In reply to the grievor's inquiry as to why senior management preferred to hire new term employees (CS-01s) to graduate students who possessed current and qualified experience, he indicated that he had explained that the current staffing decisions were based on employment status. In this case, term employees at the CS-01 group and level were considered employees, whereas students were not.

[21] Carol Webster is the Assistant Director, Central Operations, Southern Ontario Region Information Technology, a position she has held for the past six years. She reports to John Vethanayagam, the Director of the Region; in 2002, she reported to Peter Colby, the then Director.

[22] The witness identified Exhibit E-1, tab 1, as CCRA's "Staffing Program Policy". Annex J to the Policy is a directive on student employment. Mechanism 2 ("Without selection process") is used to facilitate the bridging of students into the CCRA. Mechanism 2 states that authorized persons (in this case, the Director) can appoint persons who were initially hired under the student employment programs without a selection process if they have successfully completed their post-secondary education or vocational training in the 12-month period preceding the without selection appointment date. She explained that the CCRA had up to 12 months to appoint a student to an indeterminate position.

[23] The witness stated that it was her belief that the Co-op program benefited both the CCRA and the community colleges; it offered training, coaching and employment opportunities to students and in return, the CCRA benefited when they entered the workforce fully qualified and competent.

[24] The witness testified that Exhibit E-1, tab 3, was a model she developed to explain the Co-op student cycle. Basically, a student was selected following a competitive process and offered three Co-op work terms of approximately four months' duration with full-time hours. Thereafter, a recommendation for student bridging would be made to the Director. The final step was an appointment as a CS-01 indeterminate employee.

[25] The witness testified that in June 2002, the region's financial situation looked bright. A competition was held to staff term positions to increase the local IT workforce. In December 2002, approval was received to hire 23 term employees, effective February 2003.

[26] The witness stated that to use Mechanism 1 ("Internal selection process") to hire the grievor as a term, she would have had to post an opportunity notice for the position and make it available to all students in the Ontario region, which at that time numbered approximately 20 or more. Mechanism 1 states:

Mechanism 1 (Internal Selection process)

This mechanism permits students to apply in selection processes when the following conditions apply:

- *persons appointed within Student Employment Programs are included in the area of selection determined for the internal selection process being held;*
- *the student meets the criteria of the area of selection; and,*
- *the student is able to demonstrate that he/she is capable of completing the post-secondary program or vocational training program in which he/she was registered at the time of his/her most recent appointment within the Student Employment Programs, within the time-frame indicated on the selection process notice.*

[27] She noted that she did not have the authority to use Mechanism 1; that authority rested with the Director.

[28] The witness stated that the approximate timeframe for the completion of an SBP request was seven to eight months. In January 2003, she received Mr. Chow's SBP request in respect of the grievor and in February, she forwarded her recommendation to the then Director. However, in April 2003, she was notified by the Director that the budget for her region would be reduced by approximately one million dollars from the previous year. In an effort to meet these budget constraints, term employees and students had to be let go. Of the original 23 term employees hired, only nine were kept on strength in the entire region.

[29] The witness prepared a budget for Mr. Vethanayagam's approval and provided several scenarios. The final decision was that the students would be kept on strength until the end of their specified periods of appointment but the term employees would be let go earlier. In making this decision, she consulted with the Professional Institute of the Public Service of Canada (PIPSC) and CCRA's human resources and pay and benefits specialists. The PIPSC local union leadership agreed that the grievor would be paid at the CS-01 group and level, retroactively from September 3, 2002, to June 27, 2003.

[30] In conclusion, the witness noted that there has been no more hiring of students, as the program has been discontinued. As well, there have been no indeterminate appointments in the region.

[31] In cross-examination, the witness reiterated that Mechanism 1 was used exclusively to hire term employees, while Mechanism 2 was used exclusively in respect of the SBP. Mechanism 2 gave an authorized person up to one year to offer a student a CS-01 indeterminate position. In the grievor's case, until the SBP request was approved, she was kept on as a student, at the SU-06 group and level, for specified periods of appointment.

[32] The witness stated that in June 2002, a competition was posted to fill term positions. Approximately 55 applications were received and following a selection process, 23 applicants were successful. In November 2002, security and reference checks were initiated. In December 2002, the Director gave approval for the appointment of the term employees, who commenced employment in February 2003. However, in April 2003, she became aware of a budget shortfall. She held a series of meetings with Mr. Chow and her other direct reports in May 2003, in order to devise a plan of action.

[33] The witness stated that this exercise was very stressful, as it soon became apparent that the term employees hired in February 2003, as well as the students, would have to be let go. In the entire region, only nine of the 23 term employees hired were kept on strength. Nine were retained because managers could justify, through planning and budgeting, that the need and resources were available.

[34] The witness stated that she met with the grievor and Mr. Chow on June 19, 2003. She explained to the grievor that although she was a great employee, she did not have the resources or the Director's approval to offer her an indeterminate position.

[35] In an effort to compensate the grievor for the difference in salary between the SU-06 level and the CS-01 level for the period from September 3, 2002, to June 27, 2003, the witness first met with local PIPSC representatives and the CCRA's human resources and pay and benefits specialists. She explained that in order to finalize this compensation package, she needed the Director's approval. It was agreed that the grievor would be paid the difference in salary between the SU-06 level and the CS-01 level, through a retroactive term appointment. The grievor accepted this offer (Exhibit E-1, tab 8) on June 27, 2003, but added the following handwritten note: "I sign this paper without prejudice to my rights to file a grievance regarding my status and conditions of employment with Canada Customs and Revenue Agency - Computer Systems." This package not only gave the grievor a pay increase of \$7.00 per hour, but also entitled her to union representation and to file a grievance, which rights she did not have when she was hired as a student.

[36] The witness also stated that the grievor could have been made a term employee after the completion of her Co-op program; however, a staffing freeze came into effect at the CCRA, although she could not remember the exact date.

[37] The witness noted that the Department was not obligated to pay the grievor the additional monies by giving her a retroactive term; however, she felt that it was the right thing to do. When asked by the grievor's representative if this was fair to the grievor, the witness replied that it was all relative and that she had done the best she could for the grievor. She stated that her options were limited: compensate the grievor by making her a term retroactively or not do anything. Only the Director has the authority to hire term employees or make indeterminate appointments.

[38] John Vethanayagam is the Executive Director, Southern Ontario Region Information Technology. He began acting in the position on April 17, 2003, and was appointed Director on August 17, 2004. His duties include overseeing budgets and staffing needs for IT support services for the Canadian Border Service Agency (CBSA) and the CCRA. He is the delegated authority for all staffing matters in the region (term and indeterminate employees). The number of employees that he manages today is

approximately 215. In March 2003, however, that number was approximately 255, as it included term employees and students. He reports to the Assistant Commissioner.

[39] The witness testified that he only had a few days of transition in March 2003 to confer with the former Director, Peter Colby. Upon his arrival, the Branch was very busy, budgets were adequate to support the student and indeterminate positions and 23 term employees had been hired in February 2003.

[40] The witness explained that when reviewing a SBP request, five factors had to be considered before he could approve it:

1. successful completion by the student of post-secondary education or a vocational training program;
2. the student's performance;
3. vacancy availability;
4. diversity factors; and
5. budget factors.

[41] Although the witness never met the grievor, he testified that the feedback he received on her performance was very good.

[42] The witness stated that at the end of March 2003, approximately nine SBP requests were brought to his attention; however, at the same time, he was made aware by National Headquarters that an allocation deficit of \$750,000 was projected for his region. In an effort to secure more funds, he travelled to Ottawa, but was unsuccessful in his attempt. The budget allocation was as follows: 2003-04, 14.1 million dollars; 2004-05, 13.4 million dollars; and 2005-06, 12.1 million dollars.

[43] The witness testified that he met with his senior managers and a decision was made that a workforce reduction was required. He then met with the local PIPSC union representative and they consulted on the approach that he intended to take. The witness said that, to his knowledge, in a downsizing students would be the first to be let go followed by term employees and, if required, indeterminate employees. However, it was his decision that the term employees would be kept on for a total of 12 weeks to help them secure Employment Insurance (EI) benefits and that the students, some of whom had four to six months left, would be kept on until the end of

their specified periods of appointment. In the end, some term employees were retained based on job performance and where local budgets could support them.

[44] The witness stated that these decisions were supported by Norm Barnoff, an officer with the PIPSC local executive.

[45] On June 13, 2003, the witness communicated the budget scenario to all staff.

[46] When referred to Exhibit E-1, tab 8, the witness stated that it was a mistake to have retained the grievor on student status after she completed her Co-op program. He stated that he realized a mistake had been made and therefore decided to correct the mistake and give the grievor back pay at the CS-01 group and level. He stated that he thought it was the right thing to do. He noted that he was not involved with the decision to keep the grievor on student status, as he was not the Director at the time.

[47] In conclusion, the witness stated that since the grievor's departure there has been no indeterminate staffing of students, as the SBP has not been used since and the program itself is defunct.

[48] In cross-examination, the witness stated that it was not until May 1, 2003, that he received his final budget. He also stated that in March 2003, the CCRA started a horizontal review of its operations and a staffing freeze came into effect.

[49] Lakhvinder Khinda testified that she started working at the IT Service Desk in May 2001, while a student at Sheridan College and as part of the Co-op program. As of September 2002, she was hired on a student basis with full-time hours.

[50] The grievor testified that her Team Leader, Mr. Chow, assured her that she would be bridged to a CS-01 indeterminate position, as had previous students who had worked at the IT Service Desk.

[51] The grievor referred to Exhibit G-10, an "Employee Performance Management Report" for the period from October 1, 2002, to September 30 2003, which she signed on November 5, 2002. She stated that this report identifies her position at the CS-01 group and level and not at the SU-06 group and level. It was her belief that she was a CS-01; as such, she informed her family and friends and began finalizing her wedding plans.

[52] The grievor testified that Mr. Chow had assured her that she would be bridged to a CS-01 indeterminate position and that it was just a matter of getting the Director's signature. He was her Team Leader and she trusted him. It is for that reason that she accepted the series of specified appointments at the student level.

[53] The grievor noted that upon being informed that her employment would end on June 27, 2003, she was very upset and shocked; she could not understand why the CCRA would treat her in that fashion.

[54] The grievor described the meeting she had with Ms. Webster to sign a contract (the retroactive term appointment) that would pay her the difference between her student level (SU-06) and the CS-01 level for the period from September 2002 to June 2003. Ms. Webster put down the contract and a pen in front of her and stated: "It would be best for you to sign it now so that human resources could process the pay." There was a discussion about union representation. Ray Lazzara, of the PIPSC, was contacted by telephone and he advised her to sign. The grievor testified that she signed it without prejudice (Exhibit E-1, tab 8).

[55] The grievor referred to the fact that 23 term employees were hired in February 2003. She stated that had she been made a CS-01 term employee in September 2002, she would have had an opportunity to compete in the downsizing, based on her performance. However, she was not able to because she was on student status. She also stated that at no time did Mr. Chow or Ms. Webster offer her another position within the CCRA.

[56] The grievor testified that the delay by management in bridging her to a CS-01 indeterminate position was a guise to use her as cheap labour by paying her at the student rate.

[57] In cross-examination, the grievor agreed that although she was performing the duties of a CS-01 position when she was no longer a student, the "Employee Performance Management Report" (Exhibit G-10) did not come with a letter of offer for a CS-01 indeterminate position.

[58] When referred to the SBP request, she stated that Mr. Chow assured her that everything would be fine and that it was only a matter of getting the Director's signature. She stated that she was always in the equation when it came to being a part

of the IT Service Desk, as she was needed. When asked by counsel for the employer if that was when management thought it had the budget, she replied: "I guess."

[59] The grievor agreed that she had read and signed the letters of offer for specified periods of appointment (Exhibit E-1, tabs 5, 6 and 7) and understood the paragraph that states: "It is important to note that nothing in this letter of offer should be construed as an offer of indeterminate employment..." However, she stated that former students had received the same type of letter and they were bridged.

[60] She also agreed that she was aware that Mr. Chow did not have the authority to approve a SBP request. As well, she agreed that she gained experience and skills while employed at the CCRA

[61] The grievor also agreed that on her departure she was paid for a retroactive term (September 2002 to June 2003), received terminable allowance and the relevant pay increments. She conceded that at no time did the Director inform her that she would be bridged to an indeterminate position.

[62] The grievor concluded her testimony by stating that it was not just the money associated with the CS-01 indeterminate position, but the fact that she enjoyed her job.

Summary of the arguments

For the employer

[63] The employer's counsel noted that Mr. Chow never assured the grievor that she would be bridged, nor did he claim to have the authority to do so.

[64] Ms. Webster testified that the CCRA had always used Mechanism 2 in respect of the SBP, which allowed the CCRA up to one year to bridge a student to an indeterminate position. As well, counsel stated that Ms. Webster was not obligated to offer the grievor retroactive pay.

[65] Both Ms. Webster and Mr. Vethanayagam testified that after the 23 term employees were hired, a staffing freeze was announced by the CCRA. Mr. Vethanayagam testified that due to budget constraints, some term employees, who were initially hired for one year, were laid off in June 2003 instead of February 2004,

but the grievor was kept on until June 27, 2003, and was then given retroactive pay from September 2002 to June 2003, at the CS-01 group and level.

[66] Counsel argued that the grievor was never given a letter of offer for an indeterminate position. All the letters of offer she received were for specified periods of appointment and contained a paragraph that stated: "...this letter of offer should not be construed as an offer of indeterminate appointment..." The grievor's employment status as a student did not give her seniority over the term employees.

[67] Counsel also argued that I do not have jurisdiction in the instant case, as the grievance does not involve disciplinary action resulting in a financial penalty. The burden of proof rested with the grievor to prove there was disciplinary action resulting in a financial penalty or termination of employment, as contemplated by section 92 of the *PSSRA*. Counsel argued that an adjudicator does not have the authority to appoint a person to a position within the CCRA.

[68] In conclusion, counsel referred me to *Dansereau v. Canada (National Film Board)*, [1979] 1 F.C. 100 (QL); *Pieters v. Treasury Board (Federal Court of Canada)*, 2001 PSSRB 100; *Pieters v. Canada (Attorney General)* 2004 FC 342; *Foreman v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 73; *Amaratunga v. Treasury Board (Revenue Canada - Customs, Excise, Taxation)*, PSSRB File Nos. 166-2-28385 to 28407 (1998) (QL); *Laird v. Treasury Board (Employment & Immigration)*, PSSRB File No. 166-2-19981 (1990) (QL); and to the definition of bad faith found in *Black's Law Dictionary*, Sixth Edition.

For the grievor

[69] The grievor's representative argued that the CCRA acted in bad faith even though there is no evidence of dishonesty or fraud. The grievor should have had the right to be evaluated as a term employee and she could then have been one of the nine term employees whose employment was retained. She had the right to be evaluated by Mr. Chow.

[70] The grievor relied on information she received from Mr. Chow. Although he did not have the authority to bridge her, she believed that she would be as a result of the growth in operations in the IT Service Desk, because her fellow peers had been bridged

and because Mr. Chow had told her that it was only a matter of obtaining the Director's signature.

[71] The grievor completed her studies and graduated seven months prior to being advised that she was to be laid off. In that time, management could have bridged her but it did not do so.

[72] The grievor was laid off whereas nine term employees, who had only been working at the CCRA for 12 weeks, were kept on. The employer did not show good faith, as it did not give her an opportunity to be evaluated by Mr. Chow for one of those term positions. Accordingly, the bargaining agent argued, the employer was in contravention of estoppel. This, it was argued, is a failure of natural justice. Mr. Chow agreed that if the grievor had been hired as a term employee, she would have been considered to be kept on strength.

[73] The fact that the employer had a reduction in its budget and had to lay off staff is not an absolute answer or defence; there were alternatives. Her termination of employment is disciplinary in nature because as a student, she had no recourse. This is bad faith.

[74] The grievor's representative referred me to the definition of bad faith found in *Oran's Dictionary of the Law*, 3rd Edition, and *Re Windsor Western Hospital Centre Inc. (I.O.D.E. Unit) v. Ontario Nurses' Association* (1989), 8 L.A.C. (4th) 116.

Reasons

[75] The grievor alleges that she was misled and unjustly dismissed from her CS-01 position at the CCRA. In reviewing the evidence put before me and the testimonies of the witnesses, including the grievor's, I am satisfied that at no time was she appointed to or offered an indeterminate CS-01 position.

[76] The grievor was offered student employment with the CCRA pursuant to the joint Co-op program with the community colleges. She worked at the IT Service Desk for two Co-op work terms (May to August 2001, and January to April 2002) and continued working part-time while attending Sheridan College (September to December 2001, and May to August 2002).

[77] In August 2002, she completed her studies, although she did not provide the employer with her diploma until October 2002. On October 11, 2002, she accepted an offer for a specified period of appointment, from September 3 to December 29, 2002, at the SU-06 group and level. On January 16, 2003, she accepted a second offer for a specified period of appointment, from December 28, 2002, to April 30, 2003, at the same group and level, and on May 28, 2003, she accepted a third offer for the period from May 1 to June 27, 2003, again at the same group and level. Each letter of offer for a specified period of appointment contained the following paragraph:

It is important to note that nothing in this letter of offer should be construed as an offer of indeterminate employment, nor should you in any way plan or anticipate continuing employment with the Canada Customs and Revenue Agency.

[Emphasis added]

[78] In January 2003, Mr. Chow, a relatively new Team Leader, prepared several drafts requesting that the grievor be bridged from the SU-06 level to a CS-01 indeterminate position. It was not until February 28, 2003, that Ms. Webster agreed and recommended to the Director that the grievor be bridged.

[79] Both Mr. Chow and Ms. Webster testified that the final decision rested solely with the Director and the grievor testified that she was aware of this also. Ms. Webster also testified that past practice had been to only use Mechanism 2 (“Without selection process”) for the appointment of students. Mechanism 2 reads as follows:

Mechanism 2 (Without selection process)

With this mechanism, Authorized Persons can appoint, without a selection process, persons who were appointed within Student Employment Programs within the Agency, who have successfully completed their post-secondary education program or vocational training program in the 12-month period preceding the without selection appointment date and in whom the Agency has made significant investment.

[80] I accept Ms. Webster’s uncontested testimony that the appointment process for bridging a student to an indeterminate position took seven to eight months to complete, as there were a number of considerations to be taken into account as well as internal consultations to be held. As well, I accept Mr. Vethanayagam’s testimony that

in order to appoint a student to an indeterminate position, he, as the signing authority, had to consider the following five factors:

1. successful completion by the student of post-secondary education or a vocational training program;
2. the student's performance;
3. vacancy availability;
4. diversity factors; and
5. budget factors.

[81] In the instant case, the grievor met the first factor: she graduated in August 2002. She also met the second factor, as she had received very good assessments. The grievor also met the diversity factor. However, in respect of the budget factor, because of a horizontal review of the CCRA's operations and a shortfall of approximately one million dollars, term employees and students had to be let go.

[82] The grievor maintains that she was to be appointed to a CS-01 indeterminate position through the SBP. She believes that the employer acted in bad faith by not appointing her to a CS-01 indeterminate position.

[83] The onus was on the grievor to prove that she had been unjustly terminated from an indeterminate position or that the employer had so acted in bad faith. At no time during this hearing was any evidence adduced, either through the testimony of the employer's witnesses or by the grievor herself, that she was promised or offered a CS-01 position.

[84] In my view, Mr. Chow and Ms. Webster acted in good faith while waiting for the Director to approve the SBP request. As in the past, SBP requests took many months to complete. However, in the meantime, and unbeknownst to Mr. Chow and Ms. Webster, a shortfall of one million dollars to the region's budget was announced by National Headquarters. Mr. Vethanayagam testified that he met with officials at National Headquarters to solicit more funds but was unsuccessful. Faced with a number of difficult decisions, staff, notably term employees and students, were affected by downsizing.

[85] Ms. Webster and Mr. Vethanayagam met with PIPSC officials and the CCRA's human resources and pay and benefits specialists. It was agreed that term employees

would be kept on strength until they qualified for EI benefits and that students, including the grievor, would remain employed until the end of their specified periods of appointment.

[86] In respect of the judgement rendered in *Pieters v. Canada (Attorney General)* (*supra*) referred to by counsel for the employer, I would note the following at paragraph 14:

[...]

Again, the Administrator agreed with the adjudicator's decision. His letter to Mr. Pieters states "your employment was not a 'dismissal' but rather the expiration of a 'specified term' under section 25 of the Public Service Employment Act". His decision is supported by considerable case law: Mireille Dansereau v. National Film Board and Pierre-André Lachapelle, [1979] 1 F.C. 100 (QL) (C.A.); Eskasoni Board/Eskasoni Band Council v. MacIsaac, [1986] F.C.J. No. 263 (QL) (C.A.); Marta v. Treasury Board (Royal Canadian Mounted Police), [2001] C.P.S.S.R.B. No. 21, 2001 PSSRB 31, File No. 166-2-29643.

[...]

[87] In respect of *Dansereau v. National Film Board and Pierre-André Lachapelle* (*supra*), I note the following at paragraph 5:

[...]

An employee hired for a specific term is not laid off when this term expires, since the termination of his employment at that time is not due to lack of a work but to the terms of the contract under which the employee was hired...

[...]

...As for the question of whether the freelancers in the case at bar were hired in order to "terminate [the] employment of applicant, the Adjudicator replied that they were not because in his opinion the evidence presented to him did not establish "any casual relationship between the hiring of the freelancers and the termination of Mrs. Dansereau's employment which might have indicated that the employer had intended, in hiring the freelancers, to terminate Mrs. Dansereau's employment". I see nothing to add to this part of the Adjudicator's decision, which is based on a finding of fact, which, according to the record, is accurate.

[...]

[88] In the instant case, it is clear that the grievor willingly signed the letters of offer for specified periods of appointment in anticipation of being bridged to an indeterminate CS-01 position when her specified period of appointment expired on June 27, 2003. This is clearly not a case of dismissal or a lay-off, as has been confirmed by the Federal Court (*supra*). Although the grievor may have believed that she was an indeterminate CS-01 or that she was to become an indeterminate CS-01, no evidence was put before me to prove that she had in fact been appointed to a CS-01 position or that the employer had wrongfully led her to believe that she was now an indeterminate CS-01.

[89] The hiring of term employees in February 2003, as was the right of the CCRA, was not, in my opinion and based on the evidence adduced at the hearing, an attempt to terminate the grievor's employment. Although the grievor claims that she had a right to be evaluated as a term employee by Mr. Chow, I note that she has never pointed to any collective agreement article or legislative provision which confirms this right, primarily because no such provisions exist. While the grievor might have, due to the very particular circumstances of this case, been advantaged by having been made a term employee, she had no right to be made a term employee. Indeed, had the employer pursued this route, she would have had to compete for one of the term positions. Instead of forcing her to compete, the employer utilized Mechanism 2 instead and, at the time that it did so, this route was in fact the preferable one for the grievor. Briefly, the grievor has failed to show that the right which she claims in fact exists.

[90] I do not find that the doctrine of estoppel finds application in this case. While Mr. Chow certainly conveyed to the grievor his honest intention to have her appointed to a CS-01 position using Mechanism 2, there was never any promise such as to raise the issue of estoppel, given the grievor's own testimony that she was aware that only the Director had the power to appoint. The grievor was aware that Mr. Chow did not have the authority to guarantee her a position. His statements were therefore nothing more than a statement of intention and desire and the grievor was aware of this. Therefore, the reliance which would need to be present on the part of the grievor in order for estoppel to apply is not and cannot be present.

[91] As well, and as stated earlier, I see no evidence of bad faith on the part of the employer. In fact, the grievor, who had no rights to file a grievance as a student, was

given the opportunity for recourse by the employer when she was given the retroactive term appointment. The grievor used these rights, which is how she came to be before this Board. I do, however, see evidence of poor staffing practices in several areas, specifically with respect to the amount of time which normally elapsed between a request being made under the SBP and the actual appointment of an individual to an indeterminate position, as well as the fact that the employer continued to pay the grievor at the SU-06 group and level after she had graduated. In retrospect, perhaps it would have been wiser to have laid her off until the Director offered her an indeterminate CS-01 position, although this would have been to the grievor's detriment.

[92] I see no malice intended in the continuation of payment to the grievor as a student after she graduated from Sheridan College. The employer's options were either to let her go at the end of her specified period of appointment until the Director approved the SBP request or to keep her on strength at the SU-06 group and level until the paperwork caught up. Mr. Vethanayagam recognized and admitted to the mistake made by the previous Director and agreed to pay the grievor retroactively as a CS-01, from September 3, 2002, to June 27, 2003.

[93] Unfortunately, the grievor was a victim of circumstances over which she had no control. The management personnel involved in settling her employment status were also in the same position.

[94] With respect to the preliminary objection raised by counsel for the employer, I agree that this case is outside the ambit of section 92 of the *PSSRA*.

[95] For all of the above reasons, I make the following order:

(The Order appears on the next page.)

Order

[96] This grievance is dismissed for lack of jurisdiction.

July 11, 2005.

**D.R. Quigley,
adjudicator**