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Citation: 2005 PSLRB 90

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

FRED BROEKAERT, APRIL HOGAN (SMITH), CHRISTOPHER P. GILBERT, CHAD EDDY, KELLY VOLLANS (GUYATT), LEANNE M. BERGERON, STEPHANE MARCEL BERGERON, BILLIE-JO STUART, SCOTT P. McNAUGHT, SCOTT D. HOGAN, PATRICIA PRESTON, MICHAEL R. KELLY, SHAUN A. ROZIC, GARY EDWARD PRINGLE AND THOMAS W. HADWEN

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Broekaert et al. v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Guy Giguère, adjudicator

For the Grievors: Michel Bouchard, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN

For the Employer: Drew Heavens, Employer Representation Officer

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Heard without an oral hearing, written submissions December 3, 2004, January 31, 2005, and February 17, 2005.

Grievances referred to adjudication

[1] On April 22, 2001, Mr. Broekaert grieved that the employer subjected him to discriminatory staffing practices with respect to his "prior casual employee status". As corrective measures, Mr. Broekaert requested the following:

> *(i) adjustment to sick leave credits;*
>
> *(ii) adjustment to annual leave credits;*
>
> *(iii) adjustment to increment dates;*
>
> *(iv) pay adjustment due to recalculation of salary increments; and*
>
> *(v) purchase back pensionable time.*

[2] The other grievors presented similarly worded grievances. Later on, some of the grievors presented a second grievance, which is essentially the same as their first grievance. The parties agreed to refer these grievances to the final level of the grievance process.

[3] On February 25, 2002, Jacques M. Pelletier, Assistant Commissioner, Human Resource Management, Correctional Service, wrote to the grievors to indicate his decision regarding the grievances. He informed them that the sick leave credits, service start date and incremental dates would be adjusted. However, the annual leave credit would not be adjusted with respect to their casual status, as they had received pay of 4% of their regular pay at the time. Also, as they had been employed at the time on an "as required basis" and/or "averaging less than 12 hours per week", the time they had worked was not elective for the superannuation pension plan and could not be counted or bought back.

[4] In July 2002, the grievances were referred to adjudication by the bargaining agent. On January 9, 2003, both parties requested that the Board hold the hearing in abeyance as the parties were discussing this matter in view of a settlement.

[5] The grievances were put back on the hearing schedule as no settlement had occurred. The parties wrote to the Board requesting that mediation take place instead of a hearing on the scheduled date.

[6] As parties continued their discussion after the mediation, they signed an agreement to settle the grievances on August 12, 2004. However, a narrow question remained to be resolved and on October 4, 2004, Mr. Bouchard wrote to the Board:

> *. . . The memorandum of settlement included a mutually agreed upon mode of resolution for a narrow question. A copy of the memorandum of settlement is attached for reference. The relevant sections of the memorandum of settlement between the parties are reproduced below:*
>
> > ***The parties agree to refer to a PSSRB Adjudicator the issue of how to calculate the increment period for the above referenced grievors. The parties agree to make a joint request to the PSSRB to have the matter determined through written submissions by Deputy Chairperson Giguère, who had acted as mediator for these cases.***
> >
> > ***Following the PSSRB decision, the Employer will make all necessary adjustments to the personnel pay files of the grievors in keeping with the PSSRB decision and this agreement.***
>
> *Consequently, we are signalling [sic] this joint request to the Board to initiate a forum for a ruling on the matter that remains unresolved, namely the appropriate increment period to be applied to the grievors files.*

[7] On October 8, 2004, Mr. Drew Heavens sent an email to the Board, indicating that:

> . . .
>
> *The employer agrees with the bargaining agent's request to have Mr. Giguère determine the increment period issue, which is the only outstanding issue in these cases.*

[8] On October 29, 2004, the Board wrote to the parties to indicate that the adjudicator would entertain the parties' written submissions on the following question: "How should the calculation of the increment period be calculated?"

[9] 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 this reference 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*").

Summary of the evidence and arguments

[10] On December 3, 2004, Mr. Bouchard submitted the following arguments:

> *On August 12, 2004 the parties signed an agreement to settle the subject files. The memorandum of settlement included a mutually agreed upon mode of resolution for a narrow question. A copy of the memorandum of settlement is attached for reference* ***(Appendix 1)****. A relevant section of the memorandum of settlement between the parties is reproduced below:*
>
> > ***The parties agree to refer to a PSSRB Adjudicator the issue of how to calculate the increment period for the above referenced grievors. The parties agree to make a joint request to the PSSRB to have the matter determined through written submissions by Deputy Chairperson Giguère, who had acted as mediator for these cases.***
>
> *The parties agree on the issues of the grievors' continuous service and their right to increments for their continuous service while they were considered casual employees. The question to be decided by the Board is the length of the pay increment period for the grievors, all formerly classified as casual employees. The employer has prorated the grievors' pay increment periods for the periods during which they were considered casual employees. The employer has based its calculation on the grievors' hours of work prior to appointment as term or indeterminate employees. The employer has then compared the grievors' hours of work with the normal hours of work for full time employees during a twelve month period and prorated the pay increment period accordingly.*
>
> *It is the grievors' position that the pay increment period should be twelve months, regardless of hours worked, for all employees. In support of this position, we refer to the collective agreement* ***(Appendix 2)****. At Article 50, section 50.01,*
>
> ***50.01*** *Except as provided in this article, the terms and conditions governing the application of pay to employees are not affected by this agreement.*

[11] Since pay increments are not dealt with at Article 50, the rules governing pay increments will be found elsewhere. A provision such as that found at 50.01 has been

found to incorporate, by reference, the pay administration of the Terms and Conditions of Employment Policy **(Appendix 3)**. This view is supported by the following precedents: *Adamson vs. Treasury Board*, 1998 PSSRB 41 **(Appendix 4)** (at REASONS FOR DECISION ON JURISDICTION) and *Canada vs. Jones,* 1978 2 FC 39 CA **(Appendix 5)** (paragraphs 19 and 42).

> *The Terms and Conditions of Employment Policy **(Appendix 3)**, Appendix A – Public Service Terms and Conditions of Employment Regulations, section 31:*
>
> *Pay increments*
>
> *29. Subject to these regulations and any other enactment of the Treasury Board, an employee holding a position for which there is a minimum and maximum rate of pay shall be granted pay increments until he or she reaches the maximum rate for the position.*
>
> *30. Subject to any other enactment of the Treasury Board, a pay increment shall be the rate in the scale of rates applicable to the position that is next higher than the rate at which the employee is being paid.*
>
> *31. When the relevant collective agreement is silent, the pay increment period shall be 12 months, calculated as follows.*
>
> *As seen previously, the Correctional Services collective agreement is silent on the issue of the pay increment period length for the grievors. Therefore, according to section 31 above, all other employees' pay increment period shall be 12 months.*
>
> *Consequently, we ask that you rule in the grievors favour.*

[12] On January 31, 2005, Mr. Heavens sent the following arguments:

> *This is further to Mr. Bouchard's submissions dated December 3, 2004 and represents the employer's written submissions in the above noted matters.*
>
> *[1] The bargaining agent has filed the memorandum of settlement (MOS) between the parties as **Bargaining Agent Appendix 1**. Paragraph [3] of said MOS sets out the <u>sole</u> remaining issue in dispute between the parties which is the subject of these submissions:*
>
> > *The parties agree to refer to a PSSRB Adjudicator the issue of how to calculate the increment period for the above referenced grievors.*

[2] As Mr. Bouchard correctly points out, the parties have agreed on the determination of the grievors' continuous service for the periods of casual employment, as per paragraph [2] of the MOS.

[3] However, it is incorrect that the parties agree on the right of the grievors to increments for their period(s) of continuous service while they were employed on a casual basis. This is precisely the issue in dispute.

[4] Rather, the employer submits that the issues to be decided are as follows:

1. *Were the grievors employees for the period(s) of time in question? If not, it is the employer's submission that the Adjudicator is without jurisdiction to determine the matter.*

2. *If the grievors were employees, did the employer violate the collective agreement in determining the grievors' increment period(s)?*

*[5] Before proceeding to the substance of the employer's arguments, it would appear that the bargaining agent submitted the incorrect collective agreement with its submissions. It provided, as **Bargaining Agent Appendix 2**, the Agreement between the Treasury Board and the Union of Canadian Correctional Officers for the Correctional Services Group (codes 601 and 651) came into force on April 2, 2001.*

*[6] However, the issue involved in these grievances occurred during periods prior to April 2, 2001. Included in **Employer Annex A**, are the grievors' pay cards. The period(s) of casual employment in issue all occurred at or near the beginning of the employment relationship show* (sic) *in the pay cards. While the dates vary from grievor to grievor, all of the dates are prior to April 1, 2001, some going as far back as 1995.*

[7] I have therefore included the following collective agreements. However, it would appear that the wording of the relevant portions of the collective agreements has remained unchanged:

> ***Employer Annex B:*** *Terms and Conditions of Employment and their duration for Employees in the Correctional Groups, Codes 601/99 and 651/99 with an expiry date of May 31, 2000. This agreement came into force*

> *on March 30, 1999 and remained in force until April 2, 2001.*
>
> ***Employer Annex C:*** *Correctional (supervisory and non-supervisory), Group Specific Agreements between the Treasury Board and the Public Service Alliance of Canada, Codes 601/89 and 651/89 with an expiry date of May 31, 1991, and the corresponding Master Agreement". They expired on May 31, 1991. However, they were extended by legislation to May 31, 1995 and again to March 30, 1999.*

[8] Therefore, while I will argue below that no collective agreement applied to the grievors during the relevant periods, if one or more did apply, it is not the agreement submitted by the bargaining agent.

Issue #1:
The grievors were not "employees" for the period(s) of time in question

[9] It is not in dispute that during the relevant period(s), all of the grievors were employed on a casual basis. The bargaining agent admits this fact twice in the last paragraph of page one of it (sic) *submission when it refers to the grievors as "formerly classified as casual employees" and when it refers to the issue in dispute being the "pay increment periods for the periods during which they were considered casual employees."*

*[10] The parties' agreement at paragraph [2] of the MOS (**Bargaining Agent Appendix 1)** deals with which periods of work would be included in the calculation of "continuous service". This does not change the fact, nor could it, that all the periods in question were periods of employment on a casual basis.*

[11] PSSRA Section 2, defines "employee" as:

> *"employee" means a person employed in the Public Service, other than*
>
> *…*
>
> *(g) a person employed on a causal [*sic*] basis. [emphasis added]*

[12] An Adjudicator's jurisdiction is legislatively governed by PSSRA s. 92. An Adjudicator either has jurisdiction or does not. The parties cannot agree to confer

jurisdiction upon an Adjudicator. These grievances have been referred to adjudication under PSSRA s. 92(1)(a).

[13] PSSRA s. 92 reads:

> *Reference of grievance to adjudication*
>
> *92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> > *(i) disciplinary action resulting in suspension or a financial penalty, or*
> >
> > *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

[14] However, it is the employer's submission that since the grievors were "employed on a causal [sic] *basis" [a fact not in dispute] they were not employees during the relevant period(s).*

[15] Therefore, no collective agreement or arbitral award would apply in respect of the grievors. Consequently, it is the employer's submission that none of the conditions of PSSRA s. 92 apply in these cases, leaving the Adjudicator without jurisdiction to decide these matters.

Issue #2:
<u>If the grievors were employees, did the employer violate their collective agreement in determining the grievors' increment period(s)?</u>

[16] If it is concluded that the grievors were employees for the relevant period, the employer submits in the alternative, that no violation of their collective agreement has occurred.

[17] The bargaining agent has submitted that all employees, whether full-time or part-time, are entitled to a pay increment after a period of 12 months, regardless of the number of hours actually worked over that period.

[18] For the reasons below, it is the employer's position that a part-time employee is required to work 1956.6 or 1957 hours before being entitled to the increment. This equates to the number of hours a full-time employee works over a 12-month period.

[19] It is agreed that the collective agreement is silent with regards to increment periods for part-time employees. It is therefore necessary to look elsewhere to determine the rules for pay increment periods for part-time employees.

*[20] One such source is the Treasury Board Secretariat Terms and Conditions of Employment Policy (submitted as **Bargaining Agent Appendix 3**).*

*[21] The bargaining agent argued that Article 50.01 of the collective agreement incorporates this policy, by reference. (**Bargaining Agent Appendix 4** - Adamson vs. Treasury Board, 166-2-16207). For the purpose of this case, the employer accepts such a proposition.*

[22] It is therefore necessary to examine the policy itself. The "Policy Statement" reads:

> *The terms and conditions of employment of employees, including casual, terms, part-time workers and excluded and unrepresented employees, are as set out in the relevant collective agreement and as supplemented in the Public Service Terms and Conditions of Employment Regulations (Appendix A) <u>and other relevant policies</u>. [emphasis added]*

[23] The portion of the policy dealing with pay increments states:

> ***Pay increments***
>
> *29. Subject to these regulations and any other enactment of the Treasury Board, an employee holding a position for which there is a minimum and maximum rate of pay shall be granted pay increments until he or she reaches the maximum rate for the position.*
>
> *30. Subject to any other enactment of the Treasury Board, a pay increment shall be the rate in the scale of rates applicable to the position that is next higher than the rate at which the employee is being paid.*
>
> *31. When the relevant collective agreement is silent, the pay increment period shall be 12 months, calculated as follows. [emphasis added]*

[24] The bargaining agent argued that s. 31 above is determinative in and of itself in reaching its conclusion that the grievors are entitled to a pay increment period of 12 months, regardless of the number of hours actually worked by the part-time employee.

[25] However, if the policy is read as a how [sic]*, this view ignores the over-arching policy statement noted above which expressly provides that the terms and conditions of employment contained in collective agreements are supplemented by "the Public Service Terms and Conditions of Employment Regulations (Appendix A) <u>and other relevant policies.</u>*

[26] Therefore, one must expand the inquiry to determine whether "other relevant policies" exist which deals with the particular issue at hand. It is in this regard that the employer submits its "Pay Administration Volume – Chapter 4 – Pay Rate Change" as ***Employer Annex D****.*

[27] It is the employer's submission that an adjudicator can also refer to the pay administration manual in determining the issue before him, since "other relevant policies" are referenced in the "Policy Statement" of the Terms and Conditions of

> *Employment Policy, the latter being incorporated by reference into the collective agreement.*
>
> *[28] Section 6 of this Chapter deals specifically with increments. In fact, Section 6.3.11 deals precisely with the issue of increment periods for part-time employees. It states:*
>
> > *If the collective agreement is silent, the increment period shall be that period over which the part-time employee has been paid for the same number of straight-time hours as required by a full-time employee.*
>
> *[29] As we already know, the collective agreement is silent on this issue. A full-time employee is required to work 1956.6 hours over 12 months in order to earn a pay increment. Section 6.3.11 provides that part-time employees must also work 1956.6 hours before becoming entitled to a pay increment.*
>
> *[30] This is precisely what the employer has done in the case of these grievors. It has properly applied the pay administration manual, in the face of silence in the collective agreement on the entitlement of part-time employees to a pay increment.*
>
> *<u>Conclusion:</u>*
>
> *[31] The burden of proof in these matters lies with the bargaining agent to demonstrate that the employer violated the collective agreement.*
>
> *[32] For all of the above reasons, it is the employer's submission that this burden has not been met and respectfully requests that the grievances be denied.*

[13] On February 17, 2005, Mr. Bouchard submitted the following arguments in response to Mr. Heavens' submissions:

> *1. The 3rd paragraph of the Employer's submission infers, as I understand it, that the Employer does not agree that the grievors are entitled to have the time they worked as so called casuals, count towards pay increments. This **new** argument is contrary to the Employer's position throughout the grievance process and has not been raised at any point during the mediation which led to the Memorandum of Settlement (MOS) in question. The issue to be decided, as per the MOS, is how this increment is to be calculated, not whether or not the grievors are entitled to the*

increment during the period in question: i.e.: considered casual employees by the Employer. The evidence provided by the Employer at page 1 of its Annex A indicates that the grievor Mr. Broekaert has received pay increments that takes his casual period in account. In fact, the pay increments of all grievors have been adjusted based on the Employer's definition of continuous service, including "casual" continuous service.

2. *While we had not planned to adduce additional documents at this point, the Employer's reversal on this matter has come as a complete surprise. For that reason and in order to avoid confusion on the issue, we have included Appendices 6 to 12. Please note that the grievance (Appendix 6) requests adjustment to increment dates (with respect to prior casual employee status); the Employer responds (Appendix 7) that Increment Dates will be adjusted; in Appendix 8 are documents sent from Ms. Bazinet to Ms. Shawcross (now Hughes), both of whom represented the Employer at the mediation session where you acted as mediator. These exchanges further explain the Employer's position with respect to pay increments for "casual" time: employees are entitled to them; Appendix 9 is a message from Ms. Shawcross (née Hughes) to employees, outlining the Employer's position; Appendix 10 is a sample memorandum from Ms. Shawcross to grievor Broekaert explaining how the Employer's interpretation would affect the grievor; Appendix 11 is a memorandum to a Correctional Supervisor at Kingston Penitentiary (name covered for privacy) explaining the department's position, in conformity with the Employer's position at all times since February 25th 2002 final level grievance response to the grievor; Appendix 12 is an email from Ms. Hughes, part of it confirming the Employer representative's perspective, following the mediation, that "the outstanding issue was the pro-rating of the increment date."*

3. *In light of the above, the Union asks that you dismiss the Employer's argument with respect to the grievors' right to increments.*

4. *In the 4th paragraph of its submission, the Employer raises the issue of jurisdiction. These grievances date from mid-2001 and have been postponed, held in abeyance and removed from PSSRB schedules on several occasions to allow exchange and discussions between the parties. We submit that this issue has never been raised since the grievance was submitted. At mediation, the Employer did not raise any issues*

with respect to jurisdiction. Finally, the MOS upon which the present submissions are premised make no mention of jurisdiction. If the Employer wished to request a ruling on jurisdiction, it should have asked for it to be included in the MOS. As is usually the case in PSSRB mediation, the parties were asked to sign an Agreement to Mediate at the onset of the session. This Agreement includes a commitment to open and honest communications. In this context, it seems highly inappropriate to raise an issue of jurisdiction ***after*** *the mediation, in a forum created during mediation to resolve another distinct issue. The PSSRB mediation process, as I understand it, does not preclude the use of creative solutions to the issues opposing the parties. It has been my experience that successful mediations involve solutions that may or may not have been part of an adjudicator's decision in a conventional PSSRB adjudication. The solution arrived at in this mediation resolved all but one issue*: how should the increment period be calculated for the grievors. *Adding yet another issue amounts to an attempt by the Employer to renegotiate the settlement.*

5. *If the Employer were entitled to raise the issue of jurisdiction, its arguments should fail due to the continuing nature of the subject grievances. The grievors are grieving the Employer's method of calculating of their pay increment period. These calculations were effected after the so-called "casual" period, and the belated increments resulting from this calculation constitute recurring breaches of the collective agreement.*

6. *The Union agrees with the Employer that the wording of the relevant portions of the collective agreements has remained unchanged at all material times with respect to the issues at hand. In reviewing my original submissions, I noticed that following the statement "And at Appendix A of the collective agreement, pay notes:" I omitted the collective agreement quote. My apologies for the inconvenience. For convenience, I reproduce this section here:*

> *PAY NOTES*
>
> ***I Pay Increment (applicable to all employees)***
>
> *(a) The pay increment period for a full-time employee is twelve (12) months.*

> *(b) For the purpose of administering Pay Increment Note 1(a), the pay increment date for an employee, appointed on or after March 20, 1980, to a position in the bargaining unit upon promotion, demotion or from outside the Public Service, shall be the anniversary date of such appointment. The anniversary date for an employee who was appointed to a position in the bargaining unit prior to March 20, 1980, shall be the date on which the employee received his or her last pay increment.*

7. *At the 9th paragraph of its submission, the Employer erroneously concludes that the Union agrees with the Employer on the issue of the grieving employee's status during the period when they were classified (by the Employer) and considered (by the Employer) as casual employees. This was clearly stated at the onset of the mediation session. However, despite this difference of perspective, the parties were able to reach an agreement.*

8. *The logical conclusion of the Employer's arguments under **Issue #1**, is that the Employer agreed to mandate you to rule on an issue on which you cannot rule. It must be remembered that the Employer delayed signing the MOS for several weeks while it was studied at the highest echelon of the Employer. This is not a case where a lower level manager made an agreement beyond his authority. Until now, the Employer, with full knowledge of the agreement, never raised any issues with respect to the employees' right to receive increments or your authority to rule on the method of its determination. The Employer's current argument is the equivalent of asking to be released from some of the provisions of the MOS.*

9. *At the risk of appearing redundant, the issue which remains to be decided by you is not the status of the grievors, but rather: "how to calculate the increment period". This is not a classic adjudication. The parties in this case have deferred a decision to a mechanism borne of a mediated settlement, rather than utilizing the provisions of PSSRA s.92. Your mandate derives from this agreement, as opposed to PSSRA s.92.*

10. *The Employer's submissions under Issue #2 address the only issue on which you were asked to make a determination in the MOS.*

11. On January 12, 2005, the Employer representative Mr. Heavens, requested and subsequently obtained a retroactive extension of time to review its position in light of the Enns decision (Appendix 13). The following paragraphs (67-70 of the Enns decision are useful to shed some light on this matter.

"One of the factors that I must consider in deciding to relax the grievance is the strength of the merits. In my view, the grievor has an arguable point that the method used by the employer to calculate the pay increment period for her as a part-time employee violated the terms of the collective agreement. The collective agreement is silent on the method of calculating the entitlement for part-time employees. The pay increment period for full-time employees is set out in the pay notes (Appendix "A") and is twelve months. In the absence of a method set out in the collective agreement, clause 48.01 of the collective agreement provides that:

> *48.01 Except as provided in this article, the terms and conditions governing the applicable of pay to employees are not affected by this agreement.*

The Treasury Board Terms and Conditions of Employment Policy (Exhibit 3) were before me. The terms and conditions are set out in Appendix "A". These terms and conditions provide a definition of "employee" which includes the part-time employee. According to the Terms and Conditions of Employment Policy, the pay increment period means "in respect of a position, the period between pay increments for the position". Clause 31 of the policy provides:

> *When the collective agreement is silent, the pay increment period shall be 12 months.*

The bargaining agent relied on Kreuger (supra) as support for the proposition that where the collective agreement is silent on a point, it is necessary to look at the Terms and Conditions of Employment Policy to determine entitlements. The issue before the adjudicator in Kreuger (supra) related to whether consecutive or cumulative time spent in acting positions "counted" for the purpose of calculating increments. While this is a different issue from the one before me, Kreuger (supra) is some support for the proposition of reviewing the Terms and Conditions of Employment Policy where the collective agreement is silent on the point. ***The case cannot be extended, in my view, to incorporate the employer's pay administration manual.***

In my view, the employer arguably erred in applying the terms of the pay administration manual, when it should have applied the Treasury Board Terms and Conditions of Employment Policy." *(Emphasis added)*

12. *We agree with Adjudicator Love that the case cannot be extended to incorporate the Employer's pay administration manual.*

13. *We note that the Employer accepts that the proposition that the collective agreement in this case incorporates the Terms and Condition of Employment Policy (paragraph 21 of the Employer's submission)*

14. *The Terms and Conditions of Employment Policy (Appendix 3) state, under* ***Policy Requirements****:*

> *"The terms and conditions of employment will be applied on a mandatory or discretionary basis as indicated."*

Section 31 of the Policy is clearly mandatory when it states that "When the relevant collective agreement is silent, the pay increment period ***shall*** *(emphasis added) be 12 months, calculated….*

The word shall denotes a mandatory provision. The mandatory character of this provision precludes the choice of applying an alternate policy for increments.

15. *The Pay Administration Volume – Chapter 4 – Pay Rate Change (Annex D) is not policy. As stated by Mr. Heavens, it is a manual. Policy and manual are not synonymous words. Therefore the manual is not incorporated into the Terms and Conditions of Employment Policy or Regulations because it is not a "relevant policy". The Employer did not submit the whole document. However the section of the manual which constitutes the Employer's Annex D appears to be an attempt to translate policy into technical details for internal use. Nothing in the Employer's submission indicates from whence it derives authority, or that its instructions supersede either the collective agreement or the Terms and Conditions of Employment Policy. Consequently, we submit that this manual's contradictory instructions with respect to pay increments do not override the mandatory provisions of the Terms and Conditions of Employment.*

Reasons

Jurisdiction issue

[14] I will first deal with the issue of jurisdiction. As this issue is raised by the employer's representative, the burden of proof on jurisdiction on this issue falls on the employer. Mr. Heavens submitted that I was without jurisdiction to hear these grievances because the grievors were not employees for the period of time they are seeking to be included in the calculation of their increment period. Therefore, no collective agreement or arbitral award would apply in respect to the grievors.

[15] The grievor's representative submitted that the issue of jurisdiction had never been raised before and would have had to be included in the Memorandum of Settlement to be considered in this decision.

[16] I understand why the grievors' representative would be upset that an argument on jurisdiction would be submitted at this late stage. However, as an adjudicator appointed under the *PSSRA*, I have jurisdiction to make a finding only as far as the *PSSRA* gives me jurisdiction and this cannot be extended by agreement of the parties in a Memorandum of Settlement.

[17] To make a determination on this issue of jurisdiction, I have to first look at the *PSSRA*. Section 92 of the *PSSRA* reads as follows:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> > *(i) disciplinary action resulting in suspension or a financial penalty, or*
> >
> > *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*

> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> *(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.*
>
> *(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.*
>
> *(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(b) any portion of the public service of Canada specified in Part II of Schedule I.*

[18] We also have to look at the word "employee" which is defined in the *PSSRA* as:

> . . .
>
> *a person employed in the Public Service, other than . . .*
>
> *(g) a person employed on a casual basis,*
>
> *(h) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more,*
>
> . . .

Therefore, the instant grievances would not be adjudicable unless the grievors are employees as defined by the *PSSRA*, and the grievances concern the interpretation or the application of the collective agreement in respect of the employee.

a) Employee under the *PSSRA*

[19] The evidence that I have in the form of the grievors' pay cards and a summary of the status of employment for Mr. Broekaert (employer Annex A) indicate that all

grievors were employees when these grievances were lodged. The grievors met the definition of employees in the *PSSRA*, as they became term employees for a term of three months or more or were so employed for a period of three months or more. The grievors later were appointed to indeterminate positions.

[20] To illustrate this, we can look at Mr. Broekaert's situation. His first term was from October 13, 1998, to March 1999. He later became an indeterminate employee on December 1998. He relocated in January 1999 and found a term position in a different institution between February 1999 and February 2000, when he was appointed to an indeterminate position.

[21] Under Section 92(1)(a), for a grievance to be adjudicable, it must be from an employee as defined by the *PSSRA*. As well, it must concern "the interpretation or application **in respect of the employee** of a provision of a collective agreement or an arbitral award".

[22] The words "in respect of the employee" would indicate that an adjudicator is limited to the interpretation or application of the collective agreement as it affects **employees** as defined in the *PSSRA*.

[23] Thus, grievances presented by a casual employee would not be adjudicable because casual employees are excluded from the definition of employee in the *PSSRA*. As well, a casual employee who later becomes an employee as defined in the *PSSRA* cannot grieve issues that occurred when this employee had casual employment status.

[24] Nevertheless, a grievance by this employee would be adjudicable if it concerns how his or her pay is calculated today under the collective agreement.

[25] Therefore, I find that an adjudicator appointed under the *PSSRA* has jurisdiction to consider whether the grievors are at the appropriate salary level since they became employees. In order to do this, I will look at how salary increments are to be calculated under the collective agreement.

[26] However, I also find that granting a pay adjustment for the period of time that the grievors were casual employees would be beyond an adjudicator's jurisdiction under the *PSSRA*.

b) The collective agreement

[27] The grievors filed their grievances in April 2001 and after, under the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers, Codes 601 and 651, expiry date May 31, 2002 (collective agreement).

[28] Clause 50.01 of the collective agreement reads as follows:

> *50.01 Except as provided in this article, the terms and conditions governing the application of pay to employees are not affected by this agreement.*

[29] As both representatives have indicated, there is nothing in article 50 concerning pay increments, and therefore under clause 50.01, the collective agreement refers us to the terms and conditions governing the application of pay. In interpreting a similar clause, adjudicator Kwavnick, found in *Adamson* (*supra*), that the *Terms and Conditions of Employment Regulations* "have been incorporated into the collective agreement, to the extent that they are not inconsistent therewith". The Federal Court of Appeal ruled similarly in *Attorney General of Canada v. Raymond Keith Jones*, [1978] 2 F.C. 39. Justice Ryan specified, at paragraph 42, that a similar clause refers to "terms and conditions governing pay appearing principally, if not exclusively, in the Public Service Terms and Conditions of Employment Regulations".

[30] Therefore, a grievance is adjudicable under 92(1)(a) of the *PSSRA* with respect to the interpretation or application of the collective agreement, which incorporates by reference "the terms and conditions governing the application of pay".

Calculation of increment period

[31] The evidence before me is that the period of employment in casual status is now applied for purposes of determining the increment date provided that there has not been a termination of employment. To calculate the increment period, the employer relies on its interpretation of the terms and conditions of the application of pay.

[32] The employer at the final level of the grievance process granted the grievors' request to have the incremental dates adjusted. As well, in Appendix 7 of the bargaining agent's submission, there is also an e-mail from Ms. Bazinet, Director, Compensation Policy, Correctional Service of Canada dated May 10, 2002, where she indicates the following:

> *. . .Therefore, a casual can become entitled to a pay increment if certain conditions are met. The pay increment would be in accordance with the language of the collective agreement for the group and level to which the employee is being accorded benefits.*
>
> *As you advised me on March 21, 2002, casual employees of the CX group and other groups have had their pay increments calculated using their last hire date* ***not taking into account their period of service as casual*** *even though there was* ***no break*** *of at least one compensation day.*
>
> *Following the signing of several collective agreements effective November 19, 2001, and others signed after that date, the employees (belonging to those collective agreements) hired as casuals who work part-time hours are now entitled to have their pay increment calculated in the same manner as full-time employees (as long as there is no break in service of one compensation day).*
>
> *Please proceed with the appropriate calculations and adjustments required for employees who were subject to the above conditions and who are owed adjustments to their sick leave credits, pay increments and service start date.*

[33] The question that I have to determine next is how the increment period should be calculated under the collective agreement and the terms and conditions governing the application of pay. It should be noted that the issue of timeliness has not been raised and accordingly is not a limiting factor in my decision.

[34] The employer's representative has submitted that the grievor's increment period should be based on the increment period of a part-time employee. However, the casual employee status refers to the status of employment of an employee and not the fact that the employee might be working full-time or part-time. I was not provided with evidence of the hours that the grievors worked when they were casual employees. It might well be that the grievors were only working part-time for the period covered by the grievances, but they could have worked on a full-time basis from time to time or even longer. In the absence of evidence of the hours worked, I cannot assume that the grievors increment period should be based on the increment period of a part-time employee. Therefore, we have to look at what is the increment period, for both full-time and part-time employees.

a) Full-time employee

[35] As in many collective agreements, the pay increment periods are specified in the pay notes, which are found in Appendix A of the collective agreement. The pay notes do specify at Pay increment 1 "*The pay increment period for a full time employee is twelve (12) months*". Therefore, the collective agreement does specify that, for full-time employees, the pay increment period is 12 months. The pay notes are, however, silent on specifying the increment period for part-time employees and the answer must be found elsewhere. As we have seen earlier, clause 50.01 incorporates the terms and conditions governing the application of pay into the collective agreement.

b) Part-time employee

[36] The grievor's representative has argued that the pay increment period of a part-time employee is 12 months, since section 31 of the *Terms and Conditions of Employment Regulations* (the regulations) indicates that when the collective agreement is silent, the pay increment period shall be 12 months.

[37] The employer's representative submits that there is a broad policy statement in the *Terms and Conditions of Employment Policy* (the Policy) that indicates that the terms and conditions of employees, **which includes casual and term workers**, are as set out in the relevant collective agreement and are supplemented not only by the *Terms and Conditions of Employment Regulations* but also by other relevant policies. He then submits that an adjudicator can refer to the *Pay Administration Volume*, as it is a relevant policy dealing with the calculation of increments for part-time employees.

[38] The case law submitted by both parties specifies only that the regulations have been incorporated in the collective agreement by the effect of clauses such as 50.01. Even if it was argued successfully that this would extend to policies and specifically the *Pay Administration Volume*, the interpretation of the employer's representative would in effect render section 31 of the *Terms and Conditions of Employment Regulations* meaningless. Section 31 sets out quite clearly that, when the collective agreement is silent, the increment period **shall be** 12 months. Section 6.3.11 of the *Pay Administration Volume* specifies otherwise, by indicating that "if the collective agreement is silent, the increment period shall be the period over which the part-time employee has been paid for the same number of straight time hours as required by a full-time employee", which would be 1956.6 hours for this group.

Clearly, the regulations and the *Pay Administration Volume* are in contradiction. An adjudicator cannot set aside clear regulations because the policies specify otherwise. Regulations are mandatory and take precedence over policies that are contradictory.

[39] I therefore find that the increment period for part-time employees is 12 months, as with full-time employees. Accordingly, I find that the increment period for the grievors is 12 months for the period of employment in casual status, irrespective of whether they worked on a part-time or full-time schedule and their salary should be recalculated on this basis. As I explained before, I have jurisdiction under the *PSSRA* to consider if the grievors are at the appropriate level of pay since they became employees, but not to grant a pay adjustment for the period they were casual employees.

[40] Therefore, the grievors might be entitled to pay increments at different dates than they received them, or be paid at a higher pay level today, if they have not yet attained the higher salary level for their position.

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

(The Order appears on the next page)

Order

[42] These grievances are granted in part. I order that the current salary for the grievors be recalculated in accordance with my reasons; that as provided by the collective agreement, on the basis of an increment after 12 months. As well, any salary owed as a result of this recalculation should be paid to the grievors from the date on which they became employees. I will remain seized for 60 days, in the event that there is any difficulty in implementing this decision.

August 4, 2005.

Guy Giguère,
adjudicator