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Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

TONY RICE AND ANTHONY DEL VASTO

Grievors

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Rice and Del Vasto v. Treasury Board (Department of National Defence)

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

REASONS FOR DECISION

Before: Barry D. Done, adjudicator

For the Grievors: Alan H. Phillips, Professional Institute of the Public Service of Canada

For the Employer: Renée Roy, counsel

Heard at Fredericton, New Brunswick,
August 1 and 2, 2006.

Grievances referred to adjudication

[1] The grievors are employed as information technology support technicians at the Canadian Forces Base, Gagetown, New Brunswick, and are classified at the CS-01 group and level. The relevant collective agreement is the one between Treasury Board and the Professional Institute of the Public Service of Canada (PIPSC) (Exhibit 1) that expired December 21, 2004. At the outset of the hearing, a total of eight exhibits were submitted on consent, including:

- Exhibit 1: the collective agreement;
- Exhibit 2: an "Agreed Statement of Facts";
- Exhibit 3: a July 7, 2004, letter of reclassification to Mr. Del Vasto;
- Exhibit 4: a July 7, 2004, letter of reclassification to Mr. Rice;
- Exhibit 5: a "Classification Action Form" for Mr. Del Vasto;
- Exhibit 6: a "Classification Action Form" for Mr. Rice;
- Exhibit 7: the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (*PSSRA*); and
- Exhibit 8: the *Public Service Employment Act,* R.S., c. P-32 (*PSEA*).

[2] On August 17, 2004, both grievors submitted nearly identical (the only exception being the extent of the retroactivity requested) grievances. Essentially, the grievors want to be paid a terminable allowance (TA) retroactive to the effective date of their reclassification: in Mr. Del Vasto's case, October 21, 2003; in Mr. Rice's case, August 21, 2000.

[3] In addition to Exhibit 2, the "Agreed Statement of Facts", each party called one witness.

[4] 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*, these references to adjudication must be dealt with in accordance with the provisions of the *PSSRA*.

Summary of the evidence

For the grievors

[5] Mr. Del Vasto was not present at the hearing, but had provided written instructions to his representative to proceed in his absence.

[6] Mr. Rice began to work for the Department of National Defence on July 4, 2000, as a DA-PRO-04. Despite having three different classifications (DA-PRO-04 to GL-ELE-03 to CS-01) over a six-year period, there is no substantial difference in the duties he has been assigned. In approximately July 2002 he was reclassified to the GL-ELE-03 group and level. On May 6, 2004, the Classification Action Form (Exhibit 6) was signed authorizing a change to the CS-01 group and level.

[7] Mr. Rice received the reclassification letter (Exhibit 4) and signed it on July 8, 2004. The gist of this letter was that it informed Mr. Rice that he had been reclassified to the CS-01 group and level, effective August 21, 2000, as well as that his salary on appointment was to be determined in accordance with the *Public Service Terms and Conditions of Employment Regulations*, plus a monthly TA in accordance with the collective agreement (Exhibit 1).

[8] Mr. Rice received his pay increase retroactive to the effective date of his reclassification, August 21, 2000. The monthly TA, however, was not made retroactive, which is the subject of these grievances.

[9] Mr. Rice requested an explanation from his captain (Captain Saunders), who checked with the Base Civilian Human Resources office. Captain Saunders was advised that the TA was not retroactive. On August 17, 2004, Mr. Rice grieved.

[10] Mr. Rice concluded his evidence by stating that he does not believe he has ever been properly classified and would not be here today if he thought he was.

[11] There was no cross-examination.

For the employer

[12] In November 2005 Suzanne Marchand-Bigras became the manager of a Treasury Board unit called Compensation, Analysis and Statistical Services. She explained her employment history and identified Exhibits 9 to 11:

- Exhibit 9: *Regulations Respecting Pay on Reclassification or Conversion* (RRPRC) (effective December 13, 1981)

- Exhibit 10: "Memorandum of Understanding (MOU) – Professional Institute of the Public Service of Canada (PIPSC)" (salary protection)

- Exhibit 11: "Bulletin No. 49-87", an update to Exhibits 10 and 11.

[13] The witness stated that the reclassification date of an employee may differ from the reclassification date of a position if his or her manager verifies he or she was doing the duties of a position at any specified date. Treasury Board form TB330 (Exhibit 6) is the authorization document that gives a position a new classification. The effective date of classification of an employee is that which the document authorizes, while the effective date of classification of the position is that which the manager determines, in this case August 1, 2000.

[14] When an employee meets all the requirements of the position and performs all the duties, salary is made retroactive by employer policy (Exhibit 9: *Regulations respecting pay on reclassification or conversion*). In Mr. Rice's case, Part II, paragraph 12 applies.

[15] Mr. Rice was advised on May 6, 2004, that he was now subject to a new collective agreement, being that of the CS group.

[16] Nothing in the *Terms and Conditions of Employment Policy* (*T's and C's*) (Exhibit 13) makes the payment of the TA retroactive. The only mention of retroactive payments in the CS collective agreement (Exhibit 1) refers to salary on negotiation and not reclassification.

[17] In cross-examination, the witness was shown Exhibit 12, an excerpt from the *T's and C's* on entitlement to remuneration, paragraph 20(1), referring to the appropriate rate of pay.

. . .

> ***Part II – Reclassification to a group and/or level having a higher maximum rate of pay***
>
> *12. (1) Where a position is to be reclassified to a group and/or level having a higher attainable maximum rate of*

> *pay, the effective date of the reclassification will be determined by the authorized classification authority, taking into consideration the date on which the current duties and responsibilities were assigned to the position.*
>
> *(2) The rate of pay and the salary increment date of the employee assigned to the new level of the position under subsection (1) shall be calculated in accordance with the collective agreement or pay plan or the* Public Service Terms and Conditions of Employment Regulations *as applicable.*
>
> . . .
>
> [Emphasis in the original]
>
> 20. *(1) Subject to these regulations and any other enactment of the Treasury Board, an employee is entitled to be paid, for service rendered, the appropriate rate of pay in the relevant collective agreement or the rate approved by the Treasury Board for the group and level of the employee's classification.*
>
> . . .

As well, the witness agreed with the definition of remuneration in Exhibit 13, the *T's and C's,* as including both pay and allowances.

Submissions by the grievors

[18] Exhibit 7, the *PSSRA*, at subsection 2(1) defines "remuneration" as including ". . .a daily or other allowance for the performance of the duties of a position . . . ."

[19] Exhibit 8, the *PSEA*, at Part III, section 22, provides that "An appointment under this Act takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument . . ."

[20] Exhibit 4, the letter of reclassification for Mr. Rice, shows the reclassification to the CS-01 group and level is an appointment under the *PSEA* (Exhibit 8), as appeal rights were posted regarding the appointment. For Mr. Rice the appointment was effective August 21, 2000; for Mr. Del Vasto October 21, 2003 (Exhibits 5 and 6, the Classification Action Forms).

[21] The grievors were performing the duties of their positions on the effective dates of appointment.

[22] Ms. Marchand-Bigras acknowledged that remuneration includes pay and allowances.

[23] Appendix "E" of Exhibit 1, the collective agreement (MOU concerning the TA) at clause 1(b) says that the TA is not part of salary, but it does not say it is not part of remuneration.

[24] Again, in Appendix "E" of Exhibit 1, the reference to the "certificate of appointment" is in this case, a reference to Exhibits 5 and 6 (the Classification Action Forms). The appointment dates are August 21, 2000, for Mr. Rice and October 21, 2003, for Mr. Del Vasto.

[25] The standard practice for remuneration is to apply it retroactively.

[26] Case law:

1) *Guétré v. National Film Board of Canada*, PSSRB File No. 166-08-12642 (1982):

   This case demonstrates that some allowances can be retroactively changed. An ST-03 was retroactively reclassified to a CR-03, and the amount of the bilingual bonus she was paid in the ST-03 position was retroactively taken from her, as there was no entitlement to the bonus in the CR-03 position.

2) *Gagnon et al. v. Treasury Board (Department of External Affairs)*, PSSRB File Nos. 166-02-16987 to 17013 (1987):

   This case concerns a retroactive reclassification from PM-05 to FS-02, and a change in departments from the Canadian International Development Agency to External Affairs. The grievance was allowed, providing performance pay for a period during which that the grievor was not even in the department.

3) *Parker et al. v. Treasury Board (National Archives of Canada),* 2004 PSSRB 13:

   This case also supports retroactive entitlement to a TA. The grievors were retroactively reclassified from AS-02 to CS-01. The grievances were allowed and the TA was applied retroactively; moreover, there was no application for judicial review.

4) *Gunn v. Treasury Board (Revenue Canada – Customs, Excise and Taxation)*, PSSRB File No. 166-02-28657 (1999):

This case examines whether one is entitled to receive a TA while on leave without pay. The grievance was allowed, as the grievor was an incumbent of the position.

In closing, the bargaining agents' representative said that the grievors were entitled to the TA as of the day the employer deemed they were doing the work.

Submissions by the employer

[27] It may be true, as the bargaining agent asserts, that the date of appointment is the date specified on the reclassification letter, but, although the reclassifications were effective on August 21, 2000, and October 21, 2003 (Exhibits 3 and 4, letters of reclassification), the appointments were effective only on the date of the letter of appointment.

[28] Nothing in the collective agreement (Exhibit 1) speaks to the *T's and C's* being retroactive. Neither are the issues of retroactivity of membership in a bargaining unit, or of being subject, retroactively, to that bargaining unit's collective agreement, covered.

[29] If parties wanted the collective agreement to apply retroactively, they would have provided for it.

[30] The date of appointment is irrelevant for our purposes.

[31] The *T's and C's* (Exhibit 13) and the regulations on reclassification (Exhibit 9) speak to entitlement to pay, and not to remuneration. Any exception to this must be expressly stated, as in Exhibits 10 (the MOU on salary protection) and 11 (the update to Exhibit 10) negotiated between the parties.

[32] Although it may be true that the certificate of appointment referred to in Exhibit 1, the collective agreement, at Appendix "E", is the "Classification Action Form", there is no mention of the TA being retroactive; therefore, the appointment must be as of the date of the letter (Exhibits 3 and 4, letters of reclassification), which was July 7, 2004.

[33] Comments on the case law provided by the bargaining agent:

1) *Guétré:*

This case is 24 years old and it is not now the employer's practice, nor should it be, to recover an allowance retroactively.

2) *Gagnon:*

This is an erroneous decision. There is nothing in the agreement, legislation, regulations, policies or MOU that provides for the retroactive application of a collective agreement. Although some unions have negotiated retroactive application of some terms and conditions, that is not the case here.

3) *Parker et al.*:

This case was wrongly decided. The employer in this case correctly determined entitlement to retroactive pay based on the regulation (Exhibit 9), and the regulation clearly applies to pay, not to an allowance being retroactively applied. Mr. Guindon was wrong when he said at paragraph 52 that the employee is entitled to be paid pay and allowances. Sub-section 20(1) of the *T's and C's* refers to rate of pay only.

As well, unlike the facts in paragraph 54 of that decision, the employer in this case is not applying the collective agreement at all, except by reference to the rate of pay found in the collective agreement.

4) *Gunn*:

This case must be distinguished from the present grievances, as the grievor in that case was a member of the bargaining unit and subject to the collective agreement. Any other issues are irrelevant.

[34] It would be impossible to recreate all the terms and conditions of a collective agreement.

[35] Payment of a TA is for retention purposes. You cannot need retention retroactively.

[36] Exhibits 10 and 11, the bulletin and update concerning salary protection, are examples of a situation where parties negotiated protection, which they did not do here.

[37] *Janveau v. Treasury Board (Natural Resources Canada) and Public Service Alliance of Canada*, 2002 PSSRB 2 (upheld on judicial review) concerned someone classified as a CS-02 who was reclassified to an EG-04 and lost his entitlement to a TA. The decision stated that the reclassification meant he ceased to be a part of the CS bargaining unit and, so, ceased to be covered by the CS collective agreement.

The employer concluded by requesting that, if these grievances were upheld, I retain jurisdiction regarding whether the TA was already paid from May 1, 2004, until July 2004.

Reply of the grievors

[38] The grievor's representative argued that I should disregard Exhibits 10 and 11, the memorandum and update concerning salary protection, as they don't apply to the facts before me.

[39] There is no difference between remuneration and pay. The *PSSRA* provides that remuneration includes both pay and allowances, and that definition must prevail over an employer policy.

[40] Exhibit 4, the letter of reclassification, in paragraph I, does not say that the TA is only effective on the date the Classification Action Form was signed. The employer considers that the grievors have performed the duties of the CS-01 position since August 2000.

[41] Exhibit 8, the *PSEA*, at section 22 provides for retroactive appointments ". . . any date before, on, or after the date of the instrument".

[42] Had the employer properly classified these positions originally, rather than move them through a series of reclassifications to, ultimately, the CS-01 classification and level without a change in duties, the grievors would not now have to claim the allowance retroactively.

Reasons

[43] On August 17, 2004, Messrs. Rice and Del Vasto submitted essentially the same grievance:

> *The employer has determined that the duties I have been performing were that* [*sic*] *of a CS-01 and reclassified my position to a CS-01 retroactively to August 21, 2000. Yet they have failed to include "terminable allowance" in that calculation. Therefore I am aggrieved.*

[44] Provision for the payment of a TA is found in Appendix "E" of the collective agreement in an MOU signed June 3, 2003, to expire December 21, 2004. In order to be eligible to receive the TA, one must satisfy certain criteria set out in the preamble:

> 1. one must be the incumbent of a position whose classification is at the CS-01 to CS-05 group and level.
>
> 2. one must perform duties in the computer systems group.
>
> . . .

[45] I find that both the grievors meet these requirements.

[46] By virtue of Exhibits 3 and 4 (the letters of reclassification), it is the employer who has determined that the grievors were the incumbents of CS-01 positions on August 21, 2000 (for Mr. Rice), and October 21, 2003 (for Mr. Del Vasto). Further, the retroactive payment of salary to those dates corroborates that those were the dates on which the grievors were acknowledged as having commenced to perform these duties. These facts seem to dovetail with other evidence: Ms. Marchand-Bigras testified that salary is made retroactive by employer policy (Exhibit 9) ". . . when an employee meets all the requirements of the position and performs all the duties. . . ."

[47] Nor did the employer contest Mr. Rice's testimony that throughout his employment, regardless of classification, the duties he was assigned did not change. As well, there was no evidence led that the position numbers had changed. Indeed, when one looks at Exhibits 5 and 6, the Classification Action Forms, the position number appears to be continued for both grievors. That being said, I conclude that both grievors had been the incumbents of these positions all along. The employer has not argued to the contrary.

[48] As well, criteria number 2 of the preamble to Appendix "E" has been met, as the duties remained the same throughout the retroactive period claimed by the grievors. The employer conceded in finally recognizing a long-standing inequity in classification that the duties being performed were more properly classified at the CS-01 group and level. Again, there was no suggestion that it was a modification of the duties, or some added, or even enhanced, duties and/or responsibilities that were responsible for the higher classification.

[49] There is ample support in the case law cited for concluding that the grievors are entitled to receive the TA retroactively.

[50] In *Guétré*, a retroactive reclassification resulted in the National Film Board taking back a bilingual bonus that would not have been earned in the new classification. This action by the employer was supported at adjudication.

[51] The employer cannot have it both ways. If it can reach back and remove retroactively a bonus that was paid during the retroactive period, then it can also reach back and award an allowance that was not paid during a retroactive period.

[52] I agree with the reasoning expressed in *Gagnon*:

. . .

> *How can it be argued that the grievor was not an employee of the Department within the meaning of clause 8.04 when he was considered an employee within the meaning of clause 8.03? On April 1, 1983, he was either considered an employee or he was not. It appears that he was considered an employee, if I rely on the letter of April 29, 1983 to which I referred earlier. I fail to see how the employer could refer to retroactivity in a general way in a letter and later seemingly claim that this retroactivity did not apply to a particular clause of the collective agreement.*

. . .

[53] These grievors were paid retroactively because the employer deemed that they were performing the duties retroactively. It is for this reason that I cannot accept the submission of counsel for the employer that there is nothing in the *T's and C's* that provides for the retroactivity of an allowance. In the interpretation section of these regulations, at section 2, "allowance" is defined as follows:

. . .

Allowance means compensation payable

i. in respect of a position, or in respect of the positions in a group by reason of duties of a special nature,

. . .

[Emphasis added]

[54] Clearly, these grievors, as I have previously found, were incumbents of the positions and were performing the duties assigned to those positions. According to the collective agreement, it is the performance of duties that attracts the allowance. It is difficult to understand the employer's position here, as either the grievors were performing the duties or they were not. The employer has recognized, by retroactively paying them, that they were performing the duties. I refer again to Ms. Marchand-Bigras' own testimony that ". . . when an employee meets all the requirements of the position and performs all the duties, salary is made retroactive by the employer's policy". [Emphasis added]

[55] However, the employer urges me to find that the grievors were performing all the duties for the purposes of attracting retroactive pay, but not for the purposes of attracting the TA. This dichotomy has no merit. Further, I follow the adjudicator's reasoning in *Parker et al.* at paragraph 54, which reads as follows:

> *. . . The employer may not, at its discretion, acknowledge that the employees meet the conditions to be deemed employees subject to a collective agreement for only certain parts of that agreement. . . .*

[56] The employer has asked me to consider the decision in *Janveau*. The rationale set out at paragraph 29 of that decision lends support to, rather than distracts from, my findings above: ". . . with the reclassification of his position, the grievor became a member of a bargaining unit for which the PSAC is certified. The CS Group collective agreement concluded by the PIPSC was no longer applicable to him, as his position was no longer part of the CS Group bargaining unit. . . ." Applying that reasoning to this case, the grievors became members of the CS bargaining unit (and, so, covered by the CS collective agreement) on the dates their positions were reclassified: August 21, 2000 for Mr. Rice and October 21, 2003 for Mr. Del Vasto (Exhibit 2 "Agreed Statement of Facts").

[57] Turning to the statute governing appointments, Exhibit 8 (the *PSEA*) at section 22 is clear: "An appointment under this Act takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument".

[58] The dates specified in the instruments (Exhibits 3 and 4) are August 21, 2000 (for Mr. Rice), and October 21, 2003 (for Mr. Del Vasto), both of which, as the *PSEA* provides, are before the date of the instruments, which are May 6 and May 17, 2004, respectively.

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

(The Order appears on the next page)

Order

[60] Messrs. Rice and Del Vasto are to be paid the Terminable Allowance provided for in the applicable CS collective agreement retroactive to August 21, 2000, and October 21, 2003, respectively.

[61] As Ms. Roy requested, I remain seized for two months from the date of this decision for purposes of calculating the amounts owed.

November 6, 2006.

Barry D. Done,
adjudicator