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Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

KATHERINE A. BABIUK ET AL.

Grievors

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Employer

Indexed as
Babiuk et al. v. Treasury Board (Department of Citizenship and Immigration)

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: Erna Post, Public Service Alliance of Canada

For the Employer: Neil McGraw, counsel

Heard at Toronto, Ontario,
February 8 and 9, 2007.

I. Grievances referred to adjudication

[1] Katherine A. Babiuk is one of a group of 19 grievors who grieved the effective date of their classification. The grievors are employed as Regional Program Advisors (RPAs) with the Department of Citizenship and Immigration in the Ontario Region. Following a very lengthy review of positions, a decision was made to reclassify the grievors from their former PM-4 group and level to the PM-5 group and level effective August 30, 2001. The grievors grieve that the more appropriate effective date should be sometime in June 2000 and submitted their grievances between June 30 and July 5, 2004.

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

[3] The parties each called two witnesses and submitted 23 exhibits.

[4] At the outset of the hearing, I heard submissions on my jurisdiction to hear the grievances. I determined to reserve my decision on jurisdiction and hear the merits of the case.

II. Summary of the evidence

[5] Joseph Carelli (one of the grievors) began with Manpower and Immigration (as it was then called) in 1972 and began working in the regional office in the early 1980s. He started work as a Program Specialist (now called an RPA) in 1982. As part of a regional working group considering both an updated work description for RPAs and a possible upgrade in classification in the summer of 2000, Mr. Carelli was privy to documents that were circulated on those subjects pertaining to relativity between regional and national program advisors and between his department and the customs department.

[6] As early as May 16, 2000 (Exhibit 3, an email from Classification to Pierre Gaulin, Director of Settlement and Port of Entry), the department included the RPAs on a list of positions to be reviewed. Given that assurance, the RPAs decided to

create a working group to review their work description in the summer of 2000 and sought volunteers in the group to participate.

[7] Mr. Carelli said that the RPAs' jobs had changed from a focus on reviewing files and recommending decisions to a focus on monitoring files for compliance and quality assurance. The duties were more complex and involved leaving the office to visit managers and identify training needs.

[8] By August 30, 2000, the working group had developed a work description (Exhibit 5, an email from Mr. Gaulin to Classification) and requested some feedback on job content and classification level from a classification officer. This work description was only the first of "many, many drafts" and the group expected a decision on classification within months, not four years, and expected to be paid for any reclassification from the summer of 2000.

[9] By the fall of 2001, there had been no news or feedback on its efforts (Exhibit 6) and the group was concerned at the slow pace of the process.

[10] On June 8, 2004, a new work description (Exhibit 7) was signed by management as accurate, and Mr. Carelli agreed with its contents. Mr. Carelli said that the duties described in that work description were consistent with the duties performed by the RPAs since June 2000.

[11] Once the department determined the effective date of the reclassification of the RPA positions, the working group prepared Exhibit 8 for use in the grievance process, identifying how key activities in the new work description had been done as early as June 2000. Mr. Carelli was not able to provide much detail on many of the key activities, as he personally had little or no involvement in many of them.

[12] Mr. Carelli explained that the reason the grievors were unhappy with the department's choice of August 30, 2001, as the effective date of the upgrade was that the date was arbitrary and was a product of the department choosing which positions to review in phase one of the review, which excluded the RPAs. He believes that all incumbents of positions reclassified upwards should have the same effective date, regardless of whether they were reviewed first or last in the process.

[13] In cross-examination, Mr. Carelli said that the working group consisted of only RPAs and was employee-led, although he saw management as recognizing their job had changed. A department-wide review began in 2000 (Exhibit 14, email dated December 21, 2000), with the creation of a National Steering Committee in September and the identification of groups that were to be reviewed in phase one. The RPAs were not part of phase one.

[14] Mr. Carelli knew in the summer of 2002 that August 31, 2001, was the effective date chosen by the employer, but he did not submit an acting pay grievance. The reason June 2000 was chosen by the grievors as the appropriate effective date was that it was then that they were supported in their decision to rewrite the work description and create a working group. Exhibit 5 demonstrates that management, through Mr. Gaulin, agreed to the rewriting of the work description.

[15] Carmine Cicci (one of the grievors) retired from the department in June 2005 and was not a part of the RPA working group. In March 2002, he had filed three grievances: (1) against not being provided with a complete and current statement of duties; (2) against his classification as a PM-4; and (3) against not receiving acting pay. In a covering memorandum, he requested that his grievances contesting acting pay and classification not be dealt with until his grievance concerning the provision of a complete and current statement of duties was resolved.

[16] On August 11, 2004, after his position was reclassified (Exhibit 19), Mr. Cicci received a reply to his classification grievance, rejecting the grievance as untimely.

[17] In cross-examination, Mr. Cicci said that he had abandoned his former grievances (Exhibit 18) in favour of his new effective date grievance, which is the subject of this hearing.

[18] Michael Smith is Senior Policy Advisor responsible for the classification of senior executive positions. Although positions were traditionally reviewed every four or five years, those reviews were deferred pending the implementation of the Universal Classification System (UCS) that was eventually abandoned. When the UCS was abandoned, the department had to look at those positions long overdue for review. This was a long and complex process considering there were very limited resources and a small budget, but “classification pressures were building.” Exhibit 20 shows the first five groups of positions to be reviewed, the first of which alone comprised some

1700 positions. The RPA positions were identified for review at a later, undetermined, date.

[19] Exhibit 21 is an evaluation record signed by the raters of the RPA positions showing the effective date of August 30, 2001, and the rationale for the new classification. According to Mr. Smith, who had shared responsibility for the RPA review with another consultant, the choice of August 30, 2001, was based on a policy of one year of retroactivity from the date on which the official review of the RPA positions began.

[20] In cross-examination, Mr. Smith said that managers and supervisors were probably looked at first in the review. There were approximately 40 to 45 RPA positions reviewed, as opposed to 1700 PM-2 regional program positions. He conceded that a smaller group would have been an easier project, particularly if that group had a signed, updated statement of duties.

[21] When asked if he thought that August 30, 2001, as an effective date was arbitrary considering that the job had evolved over time, Mr. Smith replied that "it was very difficult to determine who does the duties and when they were assigned the duties."

[22] Wilma Jenkins is Regional Director of Settlement and Intergovernmental Affairs in the Ontario Region. She was a member of the National Classification Committee that recommended which jobs were to be reviewed and in what order. Exhibit 22 illustrates those choices: priorities 1 through 8 were manager positions, with the RPAs coming next as priority 9. It was a sound practice to look at manager positions first ("a top down" approach), as it was difficult to review a manager's classification once positions reporting to that manager had already been reviewed. According to Exhibit 23, an update on the National Classification Review, it was only on August 16, 2002, that phase two of the process began, which included the RPA positions.

III. Summary of the arguments

A. For the grievors

[23] The grievors have met their onus of proof in establishing that they have performed duties at a higher level since June 2000. The evidence documents significant changes in the complexity of the job. It was those changes, which

management accepts, that required a new work description and generated a reclassification to the PM-5 group and level.

[24] Both bargaining agent witnesses testified that Exhibit 7 is an accurate work description and is consistent with the work the grievors have done since June 2000.

[25] The inclusion of the "Toronto Bail Program", which was a new program begun in 1999 (Exhibit 9), and "Your Passport to Business Success in Canada" (Exhibit 11), another new program, shows a greater involvement with other levels of both provincial and municipal governments. This proves that the RPAs substantially performed duties of a higher level.

[26] The length of time taken by the department to review the RPA duties penalized the grievors and led to a decision, given the one-year retroactivity policy, not to grant the retroactivity requested.

[27] Nothing in Exhibit 21 proves the added duties were not performed before August 30, 2001.

[28] The grievors' representative submitted the following cases in support of her arguments: *Cairns et al. v. Treasury Board (Department of Citizenship and Immigration)*, 2006 PSLRB 130; *Stagg v. Canada (Treasury Board)*, [1993] F.C.J. No. 1393 (F.C.T.); *Woodward v. Treasury Board (Fisheries and Oceans Canada)*, 2000 PSSRB 44; and *Charpentier and Trudeau. v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-02-26197 and 26198 (19970131).

[29] In conclusion, the grievors' representative stated that I have jurisdiction. The employer has not established that the grievors did not perform the new duties since June 2000. There has been no alteration of the grounds in substance. Accordingly, the grievors request acting pay according to the remedy in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (F.C.A.), at a minimum, or to June 2000.

B. <u>For the employer</u>

[30] As this case is similar to that described in *Cairns et al.*, I should apply the *Cairns et al.* findings unless there is a good reason not to.

[31] The issue of pay in these grievances is subsidiary to the real issue of classification. The grievances cannot be read so broadly as to include a reference to acting pay. Throughout the grievance process, acting pay was never mentioned.

[32] In 2002, Mr. Cicci filed a grievance requesting acting pay that he later abandoned. That earlier grievance referred to the traditional acting pay language — language that is not included in these grievances.

[33] Counsel for the employer stated that I do not have jurisdiction to determine the proper classification from June 2000 to August 30, 2001.

[34] Even if these were acting pay grievances, they were filed in 2004 and the grievors can only claim a remedy of 25 days. They have already received a full year of retroactivity.

[35] All that the department agreed to do was a classification review and not, as the grievors would like to think, a reclassification exercise.

[36] June 2000 is an arbitrary date. The RPAs were not included in phase one of the review, but they did not file grievances then. It was not until August 2002 that management decided to review the RPA positions.

[37] The grievors cannot claim that they did not understand the grievance process and that their grievance language should not be held against them. They were represented by an experienced bargaining agent throughout the process.

[38] There is no evidence that the order of reviewing groups was either unreasonable or unfair.

[39] It is not known how many of the key activities already existed in the previous statement of duties. Nor is there evidence that the work description created by the working group in August 2000 was the one adopted for discussion purposes by management in 2003 and signed in 2004.

[40] These facts are unlike the facts in *Cairns et al.* The change in duties evolved over time in this case, rather than being created at a fixed point by new legislation as in *Cairns et al.* The *Charpentier et al.* facts also are dissimilar, as those grievances were

acting pay grievances, unlike the language in these grievances on retroactivity of classification only.

[41] The only significance in the choice of June 2000 as the appropriate retroactive date is that that was when the employer supported the idea of a working group to consider changes to the work description. Even the working group's first draft was not signed off by the employer.

[42] In support of his arguments, counsel submitted the following cases: *Gvildys v. Treasury Board (Health Canada)*, 2002 PSSRB 86; *Nagle v. Treasury Board (Consumer and Corporate Affairs)*, PSSRB File No. 166-02-21445 (19911202); and *Coallier*.

C. Reply for the grievors

[43] Adjudicator D.R. Quigley took jurisdiction in *Cairns et al.*

[44] The delay in grieving in this case is explained by the fact that the Ontario Region review became a part of the larger national review. The grievors wanted to work with management to resolve their concerns in a collaborative way, rather than grieving.

IV. Reasons

[45] The employer has objected to my jurisdiction to hear these grievances. Paragraph 92(1)(*a*) of the former *Act* provides for the reference to adjudication of a grievance concerning the application of a clause in a collective agreement:

> ***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,*
>
> . . .
>
> *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.*

[46] The employer asserts that these grievances are, in essence, a classification matter and not an acting pay matter. Further, as the matter being grieved is purely the

date of classification, in order to grant the corrective action requested I would have to turn my mind to what would have been the proper classification in June 2000. This I have no authority to do.

[47] On the other hand, the grievors' representative asserts that these grievances are based on the application of clause 64.07(a) of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (expiry date: June 20, 2003) (Exhibit 1):

> ***64.07***
>
> *(a) When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least three (3) consecutive working days or shifts, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.*

[48] These grievances make no mention of acting pay. Neither do the grievance replies on file refer to an acting pay entitlement.

[49] There is no evidence that acting pay was a live issue between the parties when these grievances were heard. Under the former *Act*, it is grievances with respect to the interpretation or application in respect of the employee of a provision of a collective agreement that may be referred to adjudication (paragraph 92(1)(*a*)). After hearing the evidence, I am not convinced, on a balance of probabilities, that the particular provision (acting pay) now relied upon by the bargaining agent was raised during the grievance process.

[50] I say "now relied upon" since, from the evidence, it appears not to have been relied upon during discussions between the parties at the various grievance levels. It is precisely this situation that was dealt with by the Federal Court of Appeal in *Burchill v. Attorney General*, [1980] F.C.J. No. 97 (QL):

. . .

> *¶5 In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so*

> *presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.*
>
> . . .

[51] While the change of position in *Burchill* was a more radical change than the change of position taken in these grievances, the general principle that one cannot change horses in mid-stream still applies. In order that the internal grievance procedures are allowed to work to resolve complaints quickly and informally in the workplace, and in order to foster sound labour relations, it is fundamental that the subject matter that gave rise to the grievance be made perfectly clear. How can the parties move forward if they present one case to the employer and a different case, yet unanswered, to an adjudicator?

[52] For these reasons and those expressed in *Burchill*, I find I have no jurisdiction to hear these grievances.

[53] However, there is a further aspect in these grievances that I find troubling and that I must comment on: What does and what does not give rise to an entitlement to acting pay?

[54] Perhaps the most difficult obstacle to finding an entitlement to acting pay given these facts is the acting pay provision itself — specifically, but not limited to, the words “in an acting capacity.”

[55] Those words are not identified as new language in the collective agreement. They have survived a number of renewals over a series of collective bargaining sessions and presumably have some significance and some import in interpreting and applying the acting pay provision. As such, I am obliged to consider whether these words qualify the entitlement in any way.

[56] The words "in an acting capacity" are not defined in the collective agreement, but I take them to mean performance of a temporary nature as opposed to substantive performance. In French, the words for acting pay are "une rénumération d'interim" [emphasis added], which supports my understanding. As well, I rely on two definitions found in the definitions section of two public service regulations that are consistent with the temporary nature of an acting situation:

(a) the *Public Service Employment Regulations*, SOR/2005-334:

> *Acting appointment means the temporary performance of the duties of another position by an employee*;

and

(b) the *Public Service Terms and Conditions of Employment Regulations*, Appendix A of the Treasury Board's *Terms and Conditions of Employment Policy*:

> *An acting assignment is a situation where an employee is required to perform temporarily the duties of a higher classification level..*

[57] In the facts before me, the evidence is that the duties and responsibilities evolved over time. It is also clear that when those duties evolved, they were not assigned on either a temporary or an interim basis. Indeed, the grievors claim that they have been doing these duties since June 2000 and that they continue to perform them with no end date in sight. If the grievors are correct that those duties were what justified the higher classification — the move from PM-4 to PM-5 — they could not have been intended or even understood as temporary in nature.

[58] This begets a question that is fundamental to my deliberations: Can one be said to "act" in one's own position? That is to say, when an employee is permanently assigned new duties — duties that are written into his or her substantive work description — is the performance of those duties properly characterized as performance "in an acting capacity?"

[59] I think not.

[60] Any pay issue that arises from such a situation must be related to classification and not to acting pay.

[61] Clause 64.07 of the collective agreement is intended to provide a payment, under limited circumstances, to those who act: "the employee shall be paid acting pay calculated from the date on which he or she commenced to act for the period in which he or she acts" [emphasis added].

[62] For the reasons provided above, had I taken jurisdiction, I would have found that these grievors are not entitled to a benefit under clause 64.07 of the collective agreement as they did not act. However, had I determined that a case had been made for acting pay, I would have been unable to provide a remedy as the maximum remedy available under *Coallier* has already been exceeded by the provision of one year of retroactivity.

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

(The Order appears on the next page)

V. Order

[64] These grievances are dismissed.

May 16, 2007.

Barry D. Done,
adjudicator

PSSRB File No.	**Grievor**
166-02-36478	Katherine A. Babiuk
166-02-36479	Elisete Bettencourt
166-02-36480	Joseph Carelli
166-02-36481	Josephine Chung
166-02-36482	Carmine Cicci
166-02-36483	Fiona Corbin
166-02-36484	Diana Dwyer
166-02-36485	Grace Hsu-Holmes
166-02-36486	Walter Klein
166-02-36487	Cara Lee Laberge
166-02-36488	Christine Mamcarz
166-02-36489	Lynn Murrell
166-02-36490	Peter Ng-Yuen
166-02-36491	Betty Louise Robinson
166-02-36492	Colette Snyder
166-02-36493	Virginia M. Trevurza
166-02-36494	Gerhard W.T. Volkening
166-02-36495	Julie J. Wassif-Suleiman
166-02-36496	Marilyn Ziedenberg