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*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**PATRICK BYTTYNEN, ANDY CHO, WADE JAMES CRITTENDEN, FRANK HO, ROSE  
LACOURSIERE, FREDERICK KRYSKO, YVONNE O'KEEFE, WILLIAM RICHARDS,  
PIERRE SABOURIN, ANGELA WACHOWICZ, STANLEY WINGENBACH, EILEEN YAU  
AND JACK YIP**

Grievors

and

**CANADA REVENUE AGENCY**

Employer

Indexed as  
*Byttynen et al. v. Canada Revenue Agency*

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** George Filliter, adjudicator

***For the Grievors:*** Neil J. Harden, Professional Institute of the Public Service of  
Canada

***For the Employer:*** Christine Langill, counsel

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Heard at Calgary, Alberta,  
November 19 to 21, 2013.

**I. Introduction**

[1] Patrick Byttnen, Andy Cho, Wade James Crittenden, Frank Ho, Rose Lacoursiere, Frederick Krysko, Yvonne O'Keefe, Willam Richards, Pierre Sabourin, Angela Wachowicz, Stanley Wingenbach, Eileen Yau and Jack Yip ("the grievors") were auditors employed by the Canada Revenue Agency ("the employer") in its Calgary, Alberta, office. They were employed in the Electronic Commerce Audit Section (ECAS), a part of the Specialty Audit Branch. The grievors claim they are entitled to acting pay for various periods of time while the employer does not agree to this claim.

[2] There is no dispute these persons are all highly experienced and technical employees who perform their jobs well.

[3] I want to thank counsel for the employer and the representative for the grievors for the professional and helpful manner in which they presented the cases for their respective parties.

**II. Issues to be decided**

[4] The employer raised the issue of the timeliness of the grievances, all of which counsel for the employer submitted ask for corrective action beyond the time limit agreed to in the collective agreement between the Canada Customs and Revenue Agency and The Professional Institute of the Public Service of Canada for the Audit, Financial and Scientific Group expiring on December 21, 2007 (collective agreement). The Professional Institute of the Public Service of Canada ("the bargaining agent") acknowledged the corrective action would be limited to the period in the collective agreement but argued the time limit should start from the date of a letter written by a representative of the bargaining agent, not from the date of the grievances.

[5] The employer also submitted that some of the grievances were moot as they refer to a period well before the time limit in the collective agreement began to run. In response, the bargaining agent conceded the grievances of Messrs. Cho, Crittenden and Ho are moot. In other words, the parties are in agreement these particular grievances are untimely.

[6] The third issue raised by the employer was a matter of jurisdiction. It argued these were classification grievances, not acting pay grievances, as proposed by the bargaining agent. As such, the employer argued I am without jurisdiction.

[7] If I were to determine that I have the jurisdiction to hear this matter, the main issue before me would be to decide whether the employer violated the terms of the collective agreement. Specifically, does the collective agreement impose an obligation on the employer to pay the grievors acting pay in the particular circumstances of this case?

### **III. Facts**

[8] The grievors called Michael Buchmann, a long-term shop steward for the bargaining agent who worked in the employer's Calgary office, Mr. Richards, and Ms. Wachowicz, two of the grievors, as witnesses during the presentation of their case. In rebuttal they recalled Mr. Buchmann as well as Mr. Sabourin and Mr. Crittenden.

[9] The employer called Susan Clozza, who from 2004 to 2007 was the manager of the Specialty Audit Branch, which included the ECAS, and Bruce Evans, who managed the ECAS unit from 2008 to 2012, as its only witnesses.

[10] After a review of the verbal and documentary evidence, it is my view the relevant facts in this matter are not in dispute.

[11] The grievors were auditors and held the classification of AU-03 ("old AU-03"). The employer developed a job description for this classification that became effective on June 1, 1994. This classification remained in effect until 2008. The first key activity for this classification read as follows (Exhibit 1, tab 15):

*Performing Computer Assisted Audits (CAA), Record Retention Evaluations (RRE) and System under Development (SUD) consultations on large and complex computerized accounting systems, including both national and multi-national enterprises.*

[12] Until 2002, the grievors reported to a supervisor whose classification was AU-04 ("old AU-04"). The first key activity of this classification read as follows (Exhibit 1, tab 16):

*Managing an Electronic Commerce Audit team which may include Electronic Commerce Audit Specialists (ECAS's), electronic Commerce Audit Technicians and other staff, by establishing work objectives, priorities, staff requirements, time frames and quality standards.*

[13] The second key activity of the old AU-04 classification was identical to the first key activity of the old AU-03 classification (Exhibit 1, tab 16).

[14] The employer issued a memorandum entitled, "Electronic Commerce Audit Specialists: Revised Work Guidelines for Work Allocation," which was received in Calgary on April 9, 1999. The second page of that document has a table, which indicates those classified at the old AU-04 level do the following (Exhibit 7):

*Works independently and as a team leader on range 1 and 2 files. In addition, co-ordinates and technically assists a team of AU -127s and AU -034s. Participates, as a team member, in planning of all large files.*

[15] In 2002, the employer reclassified the old AU-04 supervisors of the ECAS who were supervising five or more direct reports to the MG-05 group and level (Exhibit 9). However, the old AU-04 job classification remained in existence and was unchanged until 2008.

[16] Sometime after the creation of the MG-05 classification, the grievors were made aware of the fact that the employer was starting a similar review process with respect to the old AU-03 positions.

[17] Each year, the employer issued a document called "Planning Guidelines." In the year 2005-6 Planning Guidelines (Exhibit 8), a table entitled "Time utilization" was produced (see Appendix A of this decision), in which the employer budgeted direct and indirect time to old AU-03s and old AU-04s. It is to be noted at this time there were no supervisory AU-04s, and as noted in the table, the old AU-04 and old AU-03 positions were under review.

[18] The same type of table appears in the 2006-7 Planning Guidelines (Exhibit 13). However, in the 2004-5 Planning Guidelines (Exhibit 12), there was a similar table, which did not indicate the old AU-03 and old AU-04 positions were under review. It is therefore my conclusion the review of the old AU-03 positions commenced around 2004.

[19] As members of the ECAS, the grievors assisted driver programs in obtaining data from taxpayers. They were also responsible for bringing this data into a specialized internal program referred to by the acronym IDEA. This transfer allowed the data to be assessed and analyzed by the auditors in the driver programs. To do so, the ECAS auditors had to be familiar with a variety of electronic accounting programs.

[20] As stated by both Ms. Clozza and Mr. Richards, when an auditor or audit team in one of the driver programs encountered a problem in retrieving data, a request would be made to an ECAS supervisor to have an ECAS auditor assist in recovering the data and putting it into a format that was useable by the driver program.

[21] The driver programs included (Exhibit 8) the following:

*SME (Small and Medium Enterprises)*

*Large file*

*Basic file*

*GST*

*International*

*Tax avoidance*

[22] The employer differentiated between these programs and concluded the larger the file, the more complex it was. The size of the file was determined based upon the gross income of the enterprise. For instance, in the 2005-6 “Program Year,” a Large file was either a “Range 1” or “Range 2” file. Range 1 files involve companies with gross incomes in excess of \$400 million, and Range 2 files involve companies with gross incomes from \$250 to \$400 million (Exhibit 8, page 13).

[23] “Basic” files in the same year were either Range 3 or 4. Range 4 files involve companies with gross incomes of \$125 to \$250 million, and Range 3 files involve companies with gross incomes of \$50 to \$125 million (Exhibit 8, page 13).

[24] Between 2002 and 2008, the grievors were often asked by auditors in the driver programs to obtain data from both Large and Basic files. Most times, they would perform this job on their own without any direct supervision or as part of a team. However, as acknowledged by the grievors, the core team was the auditors who requested assistance from the ECAS in order to obtain data from an electronic accounting system.

[25] Mr. Richards’ testimony was not disputed. As an ECAS auditor, he was assigned work from his manager, and from that point forward, he worked directly with the taxpayer. He stated he was not supervised directly.

[26] On October 23, 2006, a number of employees, including some of the grievors, wrote to Ms. Clozza and expressed the bargaining agent's concerns. Essentially, they expressed the view all auditors in the ECAS at the old AU-03 level should be paid at the old AU-04 level while working on "range 1 & 2 complex files." They also referred to clause 34.01 of the collective agreement, which provides for the protection of the right of an employee to file a grievance while they attempt to resolve their issues informally with the employer. Finally they indicated the failure to address this situation within 30 days would result in formal grievance proceedings being pursued (Exhibit 3).

[27] On November 10, 2006, Ms. Clozza had her administrative assistant send the following email to the staff of the ECAS (Exhibits 16 and 17):

*Marlene White attended the ADA Conference in Toronto the week of Nov 3. At that conference, they discussed the progress being made on the ECAS AU4, AU3 and AU2 audit specialist positions. They were advised by HQ that the classification process of these positions was imminent. Both the ADAs and the union will be asked to provide their comments on the 3 jobs. As well, they were advised that the current AU4 ECAS co -ordinator position will no longer exist. I have asked HQ for clarification on a timetable for the events related to the classification of the 3 positions, but as yet have not heard back from them. Once I have further information on the timeframes I will let the Section know. It is important to let you know that progress is being made on the classification of these positions, especially the AU4.*

[28] Ms. Clozza responded to the October 23, 2006, letter from employees on November 19, 2006, confirming the fact that a process was underway to consider the work of the old AU-03 in the ECAS. In the concluding two paragraphs of this letter, Ms. Clozza stated as follows (Exhibit 1, tab 20):

*At the present time, Headquarters is in the process of consultation with Management and the Union on these three work descriptions. They have set a date of early December for completion of these consultations. Once the consultation process is completed, the work descriptions will be presented for classification. Subsequent to the classification process, we will be notified and provided with instruction on the implementation of the new AU4 position. Mike Buchmann would probably be in a position to advise you as to what stage the consultations are at with the Union.*

*I would ask for your patience during this process. I understand that this issue has been ongoing in Headquarters*

*for a number of years; however, it appears that a resolution may come shortly.*

[29] Then on November 20, 2006, Mr. Buchmann emailed those who signed the letter, and he copied Ms. Clozza. In the body of the email, Mr. Buchmann tells those who signed the letter “. . . article 34.01 is still in place, unless you wish to file a grievance. So your 25 day clock to file a grievance has not yet started,” (Exhibit 4).

[30] Mr. Byttynen, Ms. Lacoursiere, Ms. O’Keefe, Mr. Richards, Mr. Sabourin, Mr. Wingenbach, Ms. Yau and Mr. Yip filed two grievances on March 2, 2007.

[31] Although the grievances were intertwined, one grievance was categorized by the parties as a “job content grievance” and is not the subject matter of this adjudication. The second grievance was referred to by the parties as an “acting pay grievance” and is the subject matter of this adjudication.

[32] In similar fashion, Mr. Cho and Mr. Ho on November 8, 2007, Mr. Crittenden on November 22, 2007, Ms. Wachowicz on June 23, 2008 and Mr. Krysko on June 24, 2008 filed two grievances.

[33] The grievances referred to adjudication allege the same thing, albeit there are two different grievances.

[34] It is useful to reproduce each grievance. Although the grievances of Mr. Byttynen, Mr. Krysko, Ms. Lacoursiere, Ms. O’Keefe, Mr. Richards, Mr. Sabourin, Ms. Wachowicz, Mr. Wingenbach, Ms. Yau and Mr. Yip have different dates mentioned in the corrective action sections to reflect their individual circumstances, they are otherwise identical and state as follows:

***Details of Grievance***

*Management has recognized the increased complexities for numerous sections within the audit division (or Compliance Branch) and neglected the eCAS division until recently.*

*A Job description (AU-04) that reflects the increased complex duties I have been assigned does exist.*

*Therefore, I grieve that management has not yet assigned that job description to me and I have not been compensated to reflect the additional complexities assigned.*

***Corrective Action***

*Until such time that management assigns to me the higher complex [sic] AU-04 ECAS job and related workload to employees that I be assigned AU-04 acting pay and be fully compensated for all pay and benefits retroactive to [specific dates in each grievance].*

[35] Similarly, although the grievances of Mr. Cho, Mr. Crittenden and Mr. Ho have different dates mentioned in the body of the grievances and the corrective action sections, they are otherwise identical and state as follows:

***Details of Grievance***

*I grieve management's decision to provide me with an AU-03 ECAS job Description (Art 20.02 of the agreement expiring Dec 21, 2007) when the duties assigned to myself since [specific date in each grievance] (and until I accepted my AU-04 ECAS/Coordinator job description), which were the assignment of Range 1 & 2 files, which per a memorandum already provided to management were to be assigned to either an AU-04 ECAS auditor or a team of AU-03 ECAS auditors. These Range 1 & 2 files were assigned to me as an individual not a team. I was required to conduct the audit assist independently.*

***Corrective Action***

*That management recognize the higher complexity work assigned to me that is not included in my current job description and that I be immediately retroactively compensated from [specific date in each grievance], as an AU-04 ECAS auditor until my AU-04 ECAS Coordinator appointment of [specific date in each grievance].*

[36] On May 30, 2008, Scott Shelton, Assistant Director, Audit Division, Calgary TSO, wrote to the grievors as a result of their refusal to continue to work on Range 1 & 2 files (Exhibit 1, tab 21). The second and third paragraphs state as follows:

*The continued work by ECAS staff on Range 1 & 2 files is an important component of meeting our program commitments. I am requesting your patience while we work through the formal redress process and until a revised Work Description is issued. You have my commitment that I will undertake to emphasize the urgency in resolving these matters and the need to expedite their resolution at the national level.*

*In my opinion, the formal redress (Grievance) rights, which you have exercised, will not be affected, by your continued work on Range 1 & 2 files.*



[37] The letter had a positive effect, as the grievors returned to work on Range 1 & 2 files.

[38] On October 27, 2008, after a lengthy process, the employer introduced an amended job description for the AU-04 classification (“new AU-04”), which was significantly different. For instance, the first key activity stated as follows:

*Conducts evaluations of the most complex computerized business systems used by the largest corporations to assess taxpayers' capacity to record, retain, and report transactions according to legislative requirements and to accurately calculate income and consumption taxes administered by the Agency. Where business systems and/or electronic records produced by these systems does [sic] not meet legislative requirements, undertakes or recommends to the audit team actions needed to increase the level of assurance from the Agency perspective.*

[39] The employer offered the grievors an acting assignment so as to assess their analytical abilities for six months by observation and attestation, sometimes called “O & A”. It was necessary for the grievors to achieve a higher level of analytical thinking than they had demonstrated in their old AU-03 positions.

[40] After this acting period, the employer held a competition. The grievors applied, and for the most part, they were appointed on a full -time basis as new AU-04 ECAS auditors.

[41] The employer’s final-level reply, which denied all these grievances, was dated April 10, 2012. It is useful to reproduce the reply, which reads as follows:

*This is in response to your grievance wherein you grieve the employer’s decision to deny your request for acting pay. I have reviewed the submissions made on your behalf by a representative of the Professional Institute of the Public Service of Canada. The circumstances giving rise to your grievance were carefully examined.*

*Further to my review, I note that your job content grievance against AU -0127 was lodged during the same time period as your acting pay grievance. The results of the job content grievance determined that the work description assigned to you was appropriately classified at the AU03 group and level. As a result, I am satisfied that the duties and responsibilities performed by you were within the scope of the AU03 ECAS job description and you are not entitled to be*

*compensated at the higher level. I further conclude that your request for acting pay is untimely.*

*Consequently, and in consideration of your requested corrective actions, your grievance is denied.*

[42] The grievors referred their grievances to adjudication with the support of the bargaining agent on June 8, 2012.

#### **IV. Positions of the parties**

##### **A. The grievors**

[43] The grievors argued the letter they signed on October 23, 2006 (Exhibit 3), invoked the provisions of clause 34.01 of the collective agreement and therefore extended the time limit for any remedy I might grant to 25 days before this letter (see *National Film Board of Canada v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL)).

[44] The grievors' contention was while they were working on Large files (Range 1 & 2), they should have been paid as old AU-04s. Their argument was that this work fell clearly within the boundaries of the old AU-04 job description. As such, the grievors argued clause 45.07 of the collective agreement required the employer to pay acting pay after three days.

[45] The grievors argued the job description defined the duties of the old AU-04 classification. However, they submitted the job description must be read in light of other documents.

[46] For instance, the grievors referred me to the 1999 document issued by the employer (Exhibit 7). According to the grievors, this document indicated old AU-04s were required to work independently on Range 1 & 2 files. As this was the work the grievors did and it was done independently, they submitted acting pay is due.

[47] The grievors also argued that when the MG-05 positions were put in place, the incumbents continued to perform the supervisory roles of the old AU-04 classification. It was alleged the employer keeping the old AU-04 classification in effect must have meant something. The grievors submitted the only conclusion that can be reached is when the remaining functions of the old AU-04 classification were carried out, the person doing this should have been paid as an old AU-04.

[48] It was the grievors' position the response to the job content grievance was important. The employer stated in this response the old AU-03 job description was a complete and current statement of their duties and responsibilities. In their view, this amounts to an admission they were not to work independently on Range 1 & 2 files.

[49] The representative of the bargaining agent argued the employer cannot hide behind its right to classify positions in an attempt to avoid paying acting pay (see *Stagg v. Canada (Treasury Board)*, [1993] F.C.J. No. 1393 (T.D.)(QL), and *Chadwick v. Attorney General of Canada*, 2004 FC 503).

[50] The grievors argued they did not have to perform all the duties of the higher classification to be entitled to acting pay (see *Begin et al. v. Treasury Board (Revenue Canada)*, PSSRB File Nos. 166-02-18911 to 18917 (19900207), *Beaulieu et al. v. Treasury Board (Federal Court of Canada)*, 2000 PSSRB 76, and *Rice v. Treasury Board (Department of National Defence)*, 2004 PSSRB 128).

[51] The grievors submitted that performing a single duty of a higher classification entitled them to receive acting pay (see *Lavigne et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 117).

## **B. The employer**

[52] Insofar as the issue of timeliness is concerned, counsel for the employer submitted the letter of October 23, 2006 (Exhibit 3), does not assist the grievors. She noted this letter did not make any mention of acting pay but rather referred to classification. So, it was the employer's position this letter does not extend the time limits for the grievances before me that relate to acting pay.

[53] The employer argued these grievances are in reality classification grievances in disguise. It was recognized the grievors might have been frustrated with the length of time taken, but there is a process, which must be followed (Exhibit 1, tab 19).

[54] The employer submitted the responsibility for classification rests solely in its hands (see *Brochu v. Canada (Treasury Board)*, [1992] F.C.J. No. 1057 (C.A.)(QL), and *Peck v. Parks Canada*, 2009 FC 686). Therefore, its position was that I had no jurisdiction to entertain these grievances.

[55] In support of the employer's contention that I have no jurisdiction, counsel noted in some instances the granting of acting pay has been considered the same as granting a request for reclassification (see *Charpentier and Trudeau v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-02-26197 and 26198 (19970131)).

[56] The employer also argued the grievors' claims are moot as there is no jurisdiction for me to retroactively date the new AU-04 classification, which came into effect in 2008 (see *Heppell v. Canada (Attorney General)*, 2005 FC 1345, and *Lamy and Pichon v. Treasury Board (Department of Public Works and Government Services)*, 2008 PSLRB 23). I have already concluded this argument is in reality one of timeliness.

[57] The employer noted that the bargaining agent did not challenge the classification process and that it was transparent throughout as is evidenced by the communication from Ms. Clozza.

[58] It was the employer's position that these grievances were not about acting pay but rather about the classification of the grievors. As such, the submission was that I do not have the necessary jurisdiction.

[59] In the alternative, the employer argued that even if the grievances are about acting pay, I cannot overlook the fact that the job classifications in effect at the relevant time were the old AU-03 and AU-04 job descriptions (Exhibit 1, tabs 15 and 16). Counsel for the employer submitted the first and therefore the most important key activity of the old AU-04 job description was supervisory in nature and the grievors were not claiming to have performed this portion of the job.

[60] The employer argued the grievors were claiming they were performing the second key activity of the old AU-04 classification in existence at the time of the grievances when they worked on Range 1 & 2 files independently. This activity is worded exactly the same as the first key activity of the old AU-03 classification in existence at the time of the grievances.

[61] So rhetorically, the employer asked how the grievors could claim to have been acting when they were doing their first and primary key activity.

[62] In support of this contention, counsel for the employer argued the case law recognized there are times when job descriptions overlap (see *Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40, *Moritz v.*

*Canada Customs and Revenue Agency*, 2004 PSSRB 147, and *Tousignant and Paradis v. Treasury Board (Correctional Service of Canada)*, 2005 PSSRB 13).

[63] In conclusion, counsel for the employer submitted for the grievors to be able to claim acting pay, there are four elements they must establish. First, the employer must require the employee perform certain duties; then, the employee must substantially perform duties at a higher classification, the performance must be in an acting capacity and the duties must be performed for at least three days (see *Cooper and Wamboldt v. Canada Revenue Agency*, 2009 PSLRB 160).

## **V. Analysis**

[64] The first issue is that of the timeliness of the grievances. Although, as will be seen later in the decision, my views as to the effect of the October 23, 2006 letter (Exhibit 3), are of no real import.

[65] That said, if I am incorrect, I will accept the interpretation of the significance of this letter as proposed by the bargaining agent.

[66] This letter was not only about the classification of the positions, as argued by the employer, but it also clearly referred to the substance of the grievances before me. In the penultimate paragraph of the letter, the grievors stated as follows:

*In closing, it is only reasonable to expect that all ECAS working on range 1 & 2 complex files should be compensated at the AU-04 classification grade. This pay should be retroactive to the date that the ECAS Co-ordinators commenced receiving MG-05 pay.*

[67] In my view, this is clear and not at all ambiguous. Therefore, I would interpret this letter as an attempt by the grievors to informally deal with the issue of the appropriate level of pay, in addition to the classification process.

[68] This is exactly what is contemplated in clause 34.01 of the collective agreement, which states as follows:

*The parties recognize the value of informal discussion between employees and their supervisors to the end that problems might be resolved without recourse to a formal grievance. When an employee, within the time limits prescribed in clause 34.08, gives notice that the employee wishes to take advantage of this clause, it is agreed that the*

*period between the initial discussion and the final response shall not count as elapsed time for the purpose of grievance time limits.*

[69] Thus, if I were to award a remedy, it would be for a period commencing 25 days before the date of this letter, which is the time limit found in clause 34.08 of the collective agreement. This conclusion was argued by the grievors.

[70] The second issue is the employer's argument that I have no jurisdiction to deal with these grievances.

[71] I am not persuaded these grievances are classification grievances, despite the able argument of counsel for the employer.

[72] I accept the principle that in some circumstances to award acting pay might have the same effect as reclassification (*Charpentier and Trudeau*). However, the case before me is distinguishable.

[73] In *Charpentier and Trudeau*, the learned adjudicator was faced with a situation in which the grievors had been unsuccessful in a reclassification a few years before they filed grievances against the employer claiming acting pay. He quite properly concluded the purported acting pay grievances were, for all intents and purposes, classification grievances.

[74] The grievances before me allege the grievors were entitled to acting pay, in accordance with the collective agreement. They are not classification grievances as submitted by the employer. Therefore, in my view, I have jurisdiction to deal with them.

[75] The grievors had the onus of proving their case on a balance of probabilities.

[76] The third issue is whether the grievances were moot, as submitted by the employer.

[77] At the outset, the bargaining agent conceded the grievances of Mr. Cho, Mr. Crittenden and Mr. Ho were moot, or as determined by me the grievances were untimely.

[78] As for the rest of the grievances, I accept the employer is not entitled to hide behind its right to classify a position in an attempt to avoid paying acting pay (see *Stagg*

and *Chadwick*). However, in my view, these decisions do not apply to the situation before me.

[79] A reclassification process was underway. However, until such time as the process was completed, the old job descriptions remained in place.

[80] I understand and appreciate the grievors' frustration. Their supervisors, who were classified as old AU-04s until 2002, were reclassified MG-05. And yet, nothing tangible occurred with respect to the grievors for some time.

[81] The employer commenced a reclassification process, but this lasted at least four years.

[82] That said, Mr. Buchmann acknowledged that classification processes can take a long time. He also acknowledged having been involved in these processes and was aware of some taking two to three years.

[83] I would also conclude, if it were necessary, that Ms. Clozza and Mr. Shelton, on behalf of the employer, were transparent and open in their communications with the ECAS staff (Exhibit 1, tabs 20 and 21). Unfortunately, their communications did nothing to speed up the process and left the grievors further frustrated.

[84] The length of the process is not a matter before me. If it were, I would be restricted in any remedy I might consider as the law is clear. I would have no authority to retroactively date the new AU-04 classification (see *Lamy and Pichon*).

[85] The employer was correct when it argued that classification is its responsibility (see *Peck and Brochu*).

[86] In conclusion, I do not find the grievances are outside my jurisdiction, as they do not deal with the process of reclassification or the length of time it took, but rather deal with an alleged entitlement to acting pay.

[87] The final and most important issue before me was whether the employer violated the collective agreement by not paying the grievors acting pay when they were required to work independently on Large files (Range 1 & 2).

[88] In my view, the answer is no.

[89] Clause 45.07 of the collective agreement states as follows:

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

*When a day designated as a paid public holiday occurs during the qualifying period, the holiday shall be considered as a day worked for the purpose of the qualifying period.*

[90] It is obvious the first sentence of this clause is what is at issue. I considered the same clause in another decision (*Cooper and Wamboldt*). In that case, I concluded as follows at paragraph 38:

*[38] It seems to me that clause 64.07(a) of the collective agreement by its very nature requires the grievors to establish that four things have occurred. They are as follows:*

- There must be a requirement by the employer that the employee perform certain duties.*
- The employee must be required to substantially perform duties at a higher classification level.*
- The employee must perform those duties in an acting capacity.*
- The employee must perform those duties for at least three (3) consecutive working days or shifts.*

[91] There is a body of jurisprudence from the Public Service Labour Relations Board and the predecessor board with respect to acting pay (*Begin et al.*, *Beaulieu et al.*, *Rice* and *Lavigne et al.*). I agree with the grievors that they do not have to perform all the duties of the higher classification and in certain circumstances such as those in *Lavigne*, the performance of a single task that is particular to the higher classification for the minimum period set out in the collective agreement will entitle an employee to acting pay. Nonetheless an employee must substantially perform the duties of the higher classification to be entitled to acting pay. The jurisprudence of this board and the former board establish that the duties of the higher classification must comprise 70% of the employee's duties or workday. The grievors did not present evidence to establish



the amount of time they spent on the contested duties and have therefore failed to meet their burden of proof on this point.

[92] In this case, the grievors acknowledged they did not perform the first key activity of the old AU-04 position (which was supervisory in nature) but rather they relied upon the second key activity. In making this claim, the grievors argued this key activity became, for all intents and purposes, the first key activity of the old AU-04 classification.

[93] Whether or not that is so, I cannot get beyond the obvious fact that the second key activity of the old AU-04 classification is identical to the first key activity of the old AU-03 classification. Therefore, I do not agree with the contention of the grievors they were performing work of the higher classification.

[94] It has been recognized that it is not unusual for job descriptions to overlap (see *Bungay et al.*, *Moritz*, and *Tousignant and Paradis*). So the fact that the first key activity in the old AU-03 job description is identical to the second key activity in the old AU-04 description is not only understandable, but it also was not challenged by the grievors.

[95] However, in this case it is my conclusion the grievors were simply performing the first key activity in their job description, the old AU-03 classification. There was no evidence that any of the four tenets of clause 45.07 of the collective agreement were met (see *Cooper and Wamboldt*).

[96] In conclusion, I am not convinced the grievors were acting as old AU-04s when they worked independently on Large files (Range 1 & 2). It is my view that they were simply doing what they were required to do, what is described in the key activity of the old AU -03 job description.

## **VI. Conclusion**

[97] For all of the reasons stated above, I conclude that the grievors have not proven their case, and therefore, the grievances are dismissed.

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

*(The Order appears on the next page)*

**VII. Order**

[99] The grievances are dismissed.

December 13, 2013.

**George Filliter,  
adjudicator**

## Appendix A

### c) Job Profiles

This functional program includes job profiles for the AU-02, AU-03, AU-04 levels. The resource allocation for each individual office reflects the TSOs expected Audit workload and eCAS services to be provided. The level of services is to be provided in accordance with the national eCAS program mandate and priorities while remaining within the established salary envelope.

CAS #	Job Profile	Grade & Level	Description
20000869	AU-0032	AU-04	eCAS-Co-ordinator
20000870	AU-0033	AU-03	eCAS-Co-ordinator
20000957	AU-0127	AU-03	Senior eCAS
20000871	AU-0034	AU-02	eCAS

eCAS = Electronic Commerce Audit Specialist

eCA = Electronic Commerce Audit

#### • Time utilization (Direct and indirect categories)

Activity	Coordinator AU-04	Coordinator AU-03	eCAS AU-03	eCAS AU-02	eCA Technician
Description	Under review 20000869 AU-0033	Under review 20000870 AU-0032	20000957 AU-0127	20000871 AU-0034	20002550 CS-0277
	Hours	Hours	Hours	Hours	Hours
Direct					
Direct Hrs (548, 550, 552)	895.0	1,120.0	1,270.0	1,295.0	1,295.0
<b>Total Direct</b>	<b>895.0</b>	<b>1,120.0</b>	<b>1,270.0</b>	<b>1,295.0</b>	<b>1,295.0</b>
Indirect					
Supervision (001, 002)	450.0	225.0			
Admin Supp (040)	40.0	40.0	40.0	40.0	40.0
Training(024,068,069,071,072, 073,074,076)	150.0	150.0	225.0	200.0	200.0
Leave (refer to time sheet)	285.0	285.0	285.0	285.0	285.0
Other Indirect (003,041,049,050, 070,095,106,130,135,138,140 refer to time sheet)	137.5	137.5	137.5	137.5	137.5
<b>Total Indirect</b>	<b>1,062.5</b>	<b>837.5</b>	<b>687.5</b>	<b>662.5</b>	<b>662.5</b>
<b>Total</b>	<b>1,957.50</b>	<b>1,957.50</b>	<b>1,957.50</b>	<b>1,957.50</b>	<b>1,957.50</b>

Above profiles of various eCAS jobs specifically allow for higher than average (compared to audit) level of indirect time for activities such as training taken, training given, development or updating of training courses, and specific national projects,