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Citation: 2014 PSLRB 8

Public Service Labour Relations Act

Before the Chairperson of the Public Service Labour Relations Board

BETWEEN

DAVID SAVARD

Applicant

and

TREASURY BOARD
(Passport Canada)

Respondent

Indexed as
Savard v. Treasury Board (Passport Canada)

In the matter of an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: David Olsen, Acting Chairperson

For the Applicant: Jacek Janczur, Public Service Alliance of Canada

For the Respondent: Christine Diguer, counsel

Heard at Ottawa, Ontario,
September 4 and 5, 2013.

I. Application before the Chairperson

[1] The bargaining agent seeks relief against the expiration of time limits for referring this grievance to the second and third level of the grievance process and for the referral of the grievance to adjudication, pursuant to section 61 of the *Public Service Labour Relations Board Regulations* ("the *Regulations*"), on account of the grievor's diligence in enforcing his rights and of the prejudice that he will suffer should the grievance not be referred to adjudication.

II. Summary of the evidence

[2] At the commencement of the hearing the parties filed a signed agreed statement of facts and which reads as follows:

> 1. *The Treasury Board of Canada (Passport Canada) (the "Employer") and the Public Service Alliance of Canada (the "Alliance") agree, for the purposes of this adjudication:*
>
>   - *that the facts set forth herein are not in dispute and are admitted as proven as if those facts had been established in evidence, subject to their relevance to the issues and to their weight being determined by the Adjudicator;*
>   - *Nothing in this agreed statement of facts precludes the parties from calling evidence on other matters, subject to their relevance to the issues and to their weight being determined by the Adjudicator;*
>
> 2. *The grievor was first appointed to a pre-examination clerk position at the CR-4 level at Passport Canada on October 19, 2007. His appointment was for a determinate period (term) of one year. The grievor's term appointment was subsequently extended for one year from October 19, 2008 until April 17, 2009, at which time his term came to an end. He re-joined the public service on June 2, 2009 when [he] was appointed on a determinate basis to [a] position with the Canada Revenue Agency.*
>
> 3. *Passport Canada reclassified the pre-examination clerk positions from the CR-4 to CR-5 level in or around January 2010, following a national review of operational positions. The effective date of the reclassification was retroactive to August 15, 2007.*
>
> 4. *Employees who continue to be employed in these positions (incumbents) with Passport Canada were appointed to the new level of the position.*

5. *The grievor was not appointed to the new level of the position as he was no longer an incumbent of a pre-examination clerk position.*

6. *The grievor inquired about the status of the reclassification process of the pre-examination positions on May 5, 2010. He was advised at that time that he was not eligible for the reclassification. The grievor was at that time in a support clerk position with the Canada Revenue Agency in Halifax, Nova Scotia.*

7. *The grievor submitted the present grievance on May 28, 2010. Following are the grievance details and corrective action requested:*

   I grieve the actions of the employer by unilaterally deciding to deny me retroactive pay for the period for which I performed the duties in the position which was or may have been reclassified upwards as a result of the Classification Review exercise at Passport Canada.

   - April 17, 2009 - struck off strength
   - CRA 02 June 2009 - started w/CRA
   - Fall 2009 – emails to/from employer

   Raymond Brossard (PSAC) helped him out (Eastern Provincial Airways Malpa (1974))

   1. That this grievance proceed immediately to the final level and be heard at the final level.
   2. That I be paid retroactive pay for the period for which I performed the duties [of] the position(s) at Passport Canada which have reclassified upwards as a result of the Classification Review exercise.
   3. That Passport Canada reflect these increased pay amounts for pay and pension and relevant benefit purposes; and;
   4. That I be made whole.

8. *First level hearing into the grievance was held on December 1, 2010. The first level response was provided on December 10, 2010. The employer denied the grievance on the basis that the grievor was not eligible for retroactive pay based on reclassification rules prescribed in the Treasury Board's* Directive on Terms and Conditions of Employment, *Part 2, Subsection 4 - Reclassification or Conversion.*

9. *A number of emails were exchanged between Mr. Jim McDonald, Labour Relations Officer, Public Service Alliance of Canada date National Component and Human Resources representatives with Passport Canada between April 28, 2011 and September 1, 2011 regarding this and other grievances.*

> *10. A final level reply was issued on September 26, 2011. The grievance was denied both on the merits and because it was untimely.*
>
> *11. The grievance was referred to adjudication on October 28, 2010. The form refers to Article 64 (Pay administration) of the collective agreement between Treasury Board and the Public Service Alliance of Canada. There was no reference to this article, or any other article of the collective agreement throughout the grievance process.*

[3] The bargaining agent called Jim McDonald as a witness for the grievor.

[4] Mr. McDonald's title is Labour Relations Officer, National Component, Public Service Alliance of Canada. He provides labour relations services to members in eight different employee groups in the federal public service. In particular he provides labour relations advice and is the custodian of the third level of the grievance process for his union.

[5] He first became involved in the circumstances leading to this application when Passport Canada reclassified on a national basis CR-3, CR-4 and CR-5 positions.

[6] After the reclassification had been completed, some 1157 members wanted to file grievances because their positions were not reclassified. He and the employer representative Mr. S. Cardinal, concluded that processing that number of grievances would be unmanageable. The bargaining agent ended up filing a generic or representative grievance.

[7] As part of the process, it was contemplated that once the generic grievance was filed, any local individual grievances would be placed in abeyance pending the resolution of the generic grievance. He turned his attention to dealing with the generic grievance. However, a few of the individual grievances slipped through the cracks and started through the grievance process.

[8] The grievance at issue in this application was processed through the first level of the grievance process and a response was given by local management. Thereafter the grievance sat stagnant because the union was dealing with the generic grievance and was not aware of this individual grievance. The proper transmittal to the second and third level was not completed.

[9] When Mr. Savard's grievance and Mr. Daniels grievance, who was in a similar circumstance, came to light he looked into the circumstances of the grievances to ascertain why they did not fall under the generic grievance.

[10] Mr. McDonald brought this grievance to the attention of management at the national level in consultation. The employer agreed to hear the grievances of Mr. Savard and Mr. Daniels in the grievance process but did so reserving its right to raise technical procedural issues. There was some delay by the employer in dealing with the grievance at the third level as there was a change in the delegation of authority to hear grievances at that level. Ultimately the employer agreed to respond to the grievance without a hearing. An email exchange between Mr. McDonald with Labour Relations dated May 18, 2011 states as follows:

. . .

> *Savard/Daniels - retro pay from 2010 CR Classification- No 3rd level transmittal was provided to the Employer. Union to investigate and provide 3rd level transmittal - management will accept these grievances (combined) but will deny as per the Treasury Board directive - to be referred to adjudication.*

. . .

[11] Mr. McDonald testified that the employer at that time did not take the position that the grievance was untimely.

[12] The normal process would have been that once the first level response is received by the grievor, the union or both, there was a 10-day time period for the employee / union to transmit the grievance to the second level. It is the union that normally transmits the grievance in the circumstances of this case to the second level. There was no local representative of the union in Halifax. The first level was handled by the first regional vice president who also would have been responsible for transmitting the grievance to the second level. This person had a day job and was located in Newfoundland. The grievors themselves did not personally advance the grievance.

[13] Mr. Savard contacted Mr. McDonald regarding the status of the grievance through email on a regular/monthly basis.

[14] When the grievance was referred to adjudication, Treasury Board counsel raised the issue of the failure to follow the time limits for referring the grievance to the second level.

[15] The bargaining agent called the grievor, Mr. Savard, as a witness.

[16] Mr. Savard is a retired public servant. He was a retired union officer in an airline union and handled grievances presented to them at arbitration. He testified that subsequent to his grievance being filed he set up an electronic calendar and at the beginning of each month, he would check on the status of his grievance with a number of union officers, including Mr. Brossard, Ms. Decker, Mr. McLean and Mr. McDonald. The answer that he received was that everything was being done that needed to be done to advance the grievance.

[17] He never spoke about the timeliness of the grievance with the union officials, other than being advised that it takes a long time for a grievance to find its way to the grievance process.

[18] Mr. Savard produced a number of emails commencing on December 13, 2010, when he learned that his grievance was denied at the first level at which time he wrote to Ms. Decker in part as follows: “so now on to the next level . . . Keep me advised. . .” to which Ms. Decker replied in part: “now it goes to the next level .Will be in touch as process progresses.” He continued to make inquiries on a regular basis throughout 2011 until such time as the grievance made it to the PSLRB in 2012 and thereafter.

[19] He stated that he never considered his grievance to be abandoned.

[20] He testified that some $6000 - $7000 was at issue in this grievance. When he was hired at Passport Canada in the fall of 2007, one of the topics of importance amongst the coworkers was the reclassification exercise. He stated that the evaluators came to the Halifax office where he was working as part of the reclassification.

[21] He stated that, to the best of his recollection, Nancy MacLean got him the forms in order to file the grievance. A Mr. Brosseau of the PSAC national office assisted him as Mr. McDonald was away on vacation.

[22] He did not know the number of levels in the grievance process. He was not aware that the grievance was never filed at the second level. He knew the grievance was

being handled by his union representatives, and he relied on their ability and their procedures.

III. Summary of the arguments

A. For the Bargaining agent

[23] The bargaining agent argued that I should exercise my power under the *Regulations* to extend the time limits for the presentation of this grievance at the second level. Counsel referred to the seminal case of *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, where the Public Service Labour Relations Board ("the Board") sets out the well-established test for extending time limits at paragraph 75 as follows:

> - *clear, cogent and compelling reasons for the delay;*
> - *the length of the delay;*
> - *the due diligence of the grievor;*
> - *balancing of the injustice to the employee against the prejudice to the employer in granting an extension; and*
> - *the chances of success of the grievance.*
>
> …

[24] Counsel relied upon the decision of the board in *Trenholm v. Staff of the Non-Public Funds, Canadian Forces,* 2005 PSLRB 65, a termination case where the grievor complied with the time limits for the filing of the grievance but did not comply with the time limits for the referral to adjudication due to the default of the bargaining agent. In *Trenholm,* there was a delay of 5 1/2 months and the Board granted an extension of time to refer the grievance to adjudication. In this case, there was a delay by the union in transmitting the grievance to the second step in the grievance process. This is important because the employer cannot say that the grievor slept on his rights.

[25] In *Gill v. Treasury Board (Department of Human Resources and Skills Development),* 2007 PSLRB 81, the Board dealt with an application for an extension of time in a termination case where the grievor signed his grievance within the 25-day time limit in the collective agreement. However, his bargaining agent did not file it

until some three weeks after the expiration of the time limit. The Board, referring to the criteria set out in *Schenkman* at paragraph 51 stated as follows:

> *[51] These criteria are not always given equal importance. The facts of a given case will dictate how they are applied and how they are weighted relative to each other. Each criterion is examined and weighed based on the factual context of the case under review. In some instances, some criteria may not be relevant or may go to only one or two of them.*

[26] In the circumstances of the case, the Board found that the applicant demonstrated a clear and sustained intention to address his dispute and that the applicant signed the grievance forms within the time limits and followed the bargaining agent's advice. The only error in the process was made by the bargaining agent, and it was explained. The application for the extension of time was allowed.

[27] Counsel for the bargaining agent also noted that on the facts of this case there were 1157 members whose positions were not reclassified as a result of the reclassification exercise. The grievances in the present case slipped through the cracks at the lower level of the grievance procedure. There was no local union representative in Halifax, and members had to rely upon elected volunteers The national officers of the union were not aware of the grievances at the initial stages. The employer did agree to hear the grievances at the final stages of the grievance process but indicated it would deny them on the merits based on the Treasury Board policy.

[28] Counsel also submitted that a significant delay was caused by the absence of the chief executive officer at Passport Canada, which delayed the change of authority to deal with the grievances at the final step of the grievance process.

[29] It was the union that failed to advance the grievance through the steps of the grievance process. It was clear that Mr. McDonald received regular calls and emails from the grievor to ensure that the grievance was kept alive. Mr. Savard made it clear that he exercised due diligence in pursuing his grievance through the chain of emails that demonstrated a persistent desire to ensure that his grievance was processed.

[30] The grievor has demonstrated clear, cogent, and compelling reasons for the delay, which is understandable in the context of the massive reclassification exercise and the grievances arising therefrom.

[31] There is no evidence of any prejudice to the employer and the sum of money at stake in the grievance involving some $6 to $7000 is a considerable amount of money for a retiree but a relatively insignificant amount of money for the employer.

[32] The bargaining agent also disputed the employer's argument that the Board does not have jurisdiction over the grievance because it involves an employer directive and not a provision of the collective agreement. Just because the employer states that it was acting in accordance with a directive does not invariably mean that the Board does not have jurisdiction. The grievance, on the face of it, alleges a violation of the collective agreement. The failure to cite article 64 of the collective agreement in no way changes the nature of the underlying facts of the grievance. For the purposes of the extension of time to file the grievance, it is sufficient that the Board find that there is an arguable case on the merits.

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

[33] Counsel for the employer argued that the Board does not have jurisdiction to grant an extension of time in the circumstances of this case as there is no clear nexus between the grievance and the provision of the collective agreement, article 64. The grievance does not make out a violation of the collective agreement and consequently there is no arguable case.

[34] It also submitted that the employer has broad management rights to assign duties and to classify positions that are recognized in sections 6 and 7 of the *Public-Service Labour Relations Act* ("the *Act*"). As well, these broad management rights and authorities are set out in section 7 of the *Financial Administration Act*. The Treasury Board has significant management authority with respect to pay, unless that authority is expressly limited by statute or a collective agreement. With respect to the issues raised by this grievance, the employer's authority to not pay the grievor in circumstances where he is no longer an incumbent of the reclassified position has not been limited by statute or by the collective agreement.

[35] Counsel for the employer noted that Passport Canada reclassified these positions according to its broad managerial authority. The rules for the implementation of the reclassification exercise were done in accordance with the Treasury Board's directive on terms and conditions of employment. The employer can

agree to limit its rights in the collective bargaining process however this matter is not covered by the collective agreement

[36] Counsel referred to the *Directive on Terms and Conditions of Employment* and in particular to page 8, under the title "Part 2-Remuneration" and to page 10, under the title "Reclassification or classification conversion" as follows:

> ***1. Entitlement***
>
> *Subject to the provisions of this directive and any other enactment of the Treasury Board, a person appointed to the core public administration is entitled to be paid, for services 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 person's classification.*
>
> *. . .*
>
> ***4. Reclassification or classification conversion***
>
> *4.1 Persons appointed to the core public administration whose positions are*
>
> *a. reclassified to a level having a lower attainable maximum rate of pay;*
> *b. reclassified to a level having a higher maximum rate of pay; or*
> *c. converted to a new occupational group, level or both or to new classification plans, pay structures or both*
>
> *are subject to the applicable memorandum of understanding or, if there are no such memoranda, to the provisions set out in this Appendix.*
>
> *. . .*
>
> *4.3 Reclassification to a level having a higher maximum rate of pay*
>
> *4.3.1 Where a position is to be reclassified to a 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.*
>
> *4.3.2 The rate of pay and the salary increment date of the person appointed to the new level of the position under Subsection 4.3.1 are to be calculated in accordance with the collective agreement, pay plan or this Appendix as applicable.*

. . .

[37] It is the employer's interpretation of the directive that he was not entitled to the retroactive pay as he was not appointed to the new level of the position, even though he had been appointed to the position on the effective date of the reclassification.

[38] It was open to the bargaining agent to grieve the decision not to pay Mr. Savard the retroactive pay. However that decision did not engage the collective agreement and consequently could not be referred to adjudication.

[39] The employer submitted that the reclassification of positions is not dealt with in the collective agreement. Article 64, entitled pay administration provides as follows:

> ***64.01*** *Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.*
>
> ***64.02*** *An employee is entitled to be paid for services rendered at:*
>
> *(a) the pay specified in Appendix A-1 for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment;*
>
> *or*
>
> *(b) the pay specified in Appendix A-1 for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide*

[40] The employer submitted that the certificate of appointment issued for Mr. Savard was for a CR-4 position though no evidence or supporting documentation was provided on that point.

[41] The employer also submitted that there is no basis under article 64 of the collective agreement for compensating the grievor in the circumstances of this case.

[42] Counsel referred to an email from Mr. McDonald to Mr. Savard dated August 2, 2011, which states in part: “Notwithstanding the foregoing, Passport Canada has agreed to hear the merits of your grievance at the third level on a without prejudice basis. This will provide an opportunity to challenge the validity of the

treasury board's directive…" Counsel observes that the letter does not contain a reference to a breach of the collective agreement but rather refers to the directive.

[43] Counsel argued that the grievor at adjudication has sought to change the nature of the grievance from that dealt with in the grievance process contrary to the principles in *Burchill*.

[44] Counsel also submitted that the grievance was never presented to the second level of the grievance process and therefore is untimely. It is important to remember that Mr. Savard did have the assistance of his union representatives and they spoke at great length over the course of two years. The National Component was involved in filing the grievance in the first instance as there is a reference to Mr. Brossard being involved at that time.

C. Reply argument of the bargaining agent

[45] The bargaining agent acknowledged that the Board must have jurisdiction over the grievance as a threshold issue prior to considering exercising its discretion to extend time limits. The point of departure with the employer position is that section 209 of the *Public-Service Labour Relations Act* allows for the referral to adjudication of grievances relating to the interpretation or application of a provision of a collective agreement. The language of the grievance complains of the actions of the employer in denying the grievor retroactive pay as a result of the classification review exercise at Passport Canada. The agreed statement of facts recite that the grievor commenced employment with Passport Canada on October 19, 2007, and that he was employed until April 17, 2009. Paragraph 3 recites that the effective date of the reclassification was retroactive to August 15, 2007, which included the greater part of the time the grievor was employed in the affected position.

[46] Clause 64.02 of the collective agreement provides that an employee is entitled to be paid for services rendered at the pay specified in Appendix A-1 for the classification of the position to which the employee is appointed.

[47] It was submitted that the events giving rise to this grievance make out an arguable case for the contravention of article 64. The jurisdictional issue can be resolved by a finding of an arguable nexus between the facts and the collective

agreement. In the event the case is heard on the merits, there may be evidence of past practice that would assist in resolving the issue.

[48] Article 64 creates an entitlement to be paid for services. As part of the agreed statement of facts, there was a reclassification with retroactivity covering the period during which there was an entitlement to be paid for services.

[49] It is commonly understood that all CR-4's were reclassified and paid the retroactive pay other than Mr. Savard and Mr. Kennedy. There was no evidence that any of the other employees were reappointed to positions.

[50] Counsel for the bargaining agent questioned the employer's position that the matter is to be dealt with in the Treasury Board directive. Section 3.2 of the directive establishes that the directive sets out terms and conditions of employment that are not covered under collective agreements. From the agreed statement of facts, it is acknowledged that employees at the CR-4 level were not properly classified and not properly paid. The employer relies upon sections 4.3.1 and 4.3.2 to deny the retroactive pay to the grievor because he was not an incumbent of the position on the date of the reclassification in or around January 2010. There is nothing in section 4.3.1 about having to be an incumbent to be entitled to retroactive pay. Nor is there anything in section 4.1 that restricts retroactive pay to the incumbent of the position.

[51] Counsel stated that section 4.3.2 deals with the rate of pay and a salary increment date of the person appointed to the new level of the position under subsection 4.3.1 and sets out that these amounts are to be calculated in accordance with the collective agreement, pay plan or the appendix. This language does not preclude retroactive pay being given to a non-incumbent. The entitlement to a new salary arises from the collective agreement.

[52] The effective date of the reclassification was retroactive to August 15, 2007. Section 4.3.2 of the directive should have been applied as of that date and the grievor should have been paid in accordance with the appendix in the collective agreement for the CR-5 position. Clearly the collective agreement is engaged and the Board is conferred with jurisdiction.

[53] The Board would require clear and unequivocal language in article 64 of the collective agreement to determine that there is no arguable case on these facts to

found a claim in retroactivity. Article 64 creates an entitlement to be paid for services rendered. This is sufficient to ground a claim in retroactivity.

[54] Counsel for the bargaining agent also disputed the employer's argument that because there is no express reference to article 64 of the collective agreement in the grievance there has been a contravention of the principles set out in *Burchill*. The grievance complains of the employer's decision to deny the grievor retroactive pay as a result of a reclassification that engages the provisions of the collective agreement.

[55] The employer asserted that Mr. Savard had sought assistance, but it must be remembered that there were no local representatives of the Union in Nova Scotia. Mr. McDonald, the national representative, only became involved at the final stage of the grievance process.

[56] There was no evidence before me that the appointment of incumbents to the higher classification was a condition of getting paid retroactive pay.

[57] The union has satisfied the five-part test and the Board should extend the time limits as requested.

IV. Reasons

[58] Section 61 of the *Regulations* provides as follows:

> ***61.*** *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,*
>
> *(*a*) by agreement between the parties; or*
>
> *(*b*) in the interest of fairness, on the application of a party, by the Chairperson.*

[59] In *Schenkman*, the Board set out the tests for extending time limits namely

- *clear, cogent and compelling reasons for the delay;*
- *the length of the delay;*
- *the due diligence of the grievor;*

- *balancing of the injustice to the employee against the prejudice to the employer in granting an extension; and*

- *the chances of success of the grievance.*

[60] These criteria are not always given equal importance and the facts of a given case will dictate how they are applied and how they are weighted relative to each other. (*Grouchy v. Deputy Head (Department of Fisheries and Oceans*), 2009 PSLRB 92 at para45 and *Gill*, at par 51).

[61] On the evidence there were some 1157 members whose positions were not reclassified as result of the reclassification exercise. Mr. MacDonald testified that he and the employer representative concluded that processing that number of individual grievances would be unmanageable. The bargaining agent filed a generic grievance and it was contemplated that any local individual grievances would be placed in abeyance pending the resolution of the generic grievance. However, a few of the individual grievances slipped through the cracks and started through the grievance process.

[62] The grievance at issue was processed through the first level of the grievance process but there was no proper transmittal to the second and third level. When Mr. MacDonald became aware of the situation he brought the grievance to the attention of management at the national level in consultation. Due to the employer's position on the grievance, there was then some confusion as to where exactly Mr. Savard's grievance belonged. Specifically, Mr. McDonald needed to address the question raised by the employer as to whether or not the grievance fell into the generic grievance, although on the face of it, the issues were similar. On July 28, 2011, the employer took the position that the grievance did not belong with those grievances attached to the generic grievance. This was outlined in Mr. McDonald's email to Mr. Savard, dated August 2, 2011.

[63] Mr. Savard testified that subsequent to his grievance being filed he set up an electronic calendar. At the beginning of each month he would check on the status of his grievance with a number of union officers. The answer he received was that everything was being done that needed to be done to advance the grievance. He introduced into evidence a number of emails that indicate that he made inquiries on a regular basis as to the status of his grievance and that he never considered his

grievance to be abandoned. Mr. MacDonald confirmed the diligence with which Mr. Savard pursued his grievance.

[64] Apart from the use of a generic grievance process, and the fact that the employer did not consider this grievance as being attached to the generic grievance, there was another issue that did seem to add confusion to the manner in which the grievance was handled. The third level delegated authority was in the process of being changed. For example, in an email dated April 7, 2011 which followed up on one of Mr. Savard's inquiries as to the status of his grievance, Mr. McDonald wrote to another union official that the grievance had not been located, but it would not have gone anywhere in any event, because the Chief Executive Officer of Passport Canada had decided to change the delegation of authority in relation to third level grievances and that the union had been waiting several months for this delegated authority to be announced.

[65] I am satisfied that the grievor has established clear, cogent and compelling reasons for the delay. The delay can be attributed to the bargaining agent and to the massive exercise involved in managing the generic grievance and issues similar to that grievance. The failure to present the grievance to the second level was an oversight pending the resolution of the generic grievance involving over 1000 grievances. It is understandable how one grievance could slip through the cracks.

[66] I also find that the grievor exercised due diligence in pursuing his grievance over which the bargaining agent had carriage. On December 13, 2010 the grievor advised Angela Decker, (member of the bargaining agent) of the rejection of his grievance. On the same day, she responded to the grievor and also brought this to the attention of the National Component. Mr. Savard continued to make several other inquiries about this grievance. There is no evidence that Mr. Savard abandoned the grievance. There is also evidence of clear, cogent and compelling reasons that supports the fact that Mr. Savard had a clear and sustained intention to address this dispute. (See *Gill,* at para 66).

[67] According to the agreed statement of facts, the first level hearing into the grievance was held on December 1, 2010 and the first level response was provided on December 10, 2010. Mr. Savard then advised Angela Decker of the decision and she brought this to the attention of the National Component. A number of emails were exchanged between Mr. McDonald and the employer between April 28, 2011 and

September 1, 2011. These emails pertained not only to this grievance but others on the same or similar issues. The delay was approximately five months, not an inordinate amount of time when viewed in light of other cases where extensions have been granted for lengthier delays.

[68] Mr. Savard testified that the sum of money at stake in the grievance involves some $6-$7000, a considerable amount of money for a retiree. The employer did not adduce any evidence that would indicate any prejudice if the extension were to be granted. In assessing this factor there could be an injustice to the grievor if the extension were not granted. The employer has not established how the passage of time would cause it prejudice.

[69] In cases where there is an application for an extension of timelines, it is often said that the chances of success of a grievance may not be a significant factor because a significant amount of evidence on the merits is required to assess success. (See for example *Salain* at para 49). There is also no evidence that this is a frivolous or vexatious grievance. The key issues raised in argument that relate to the chances of success in this case were those two questions relating to jurisdiction that were raised by the employer.

[70] Counsel for the employer argued that the grievor at adjudication has sought to change the nature of the grievance from that dealt with in the grievance process, contrary to the principles in *Burchill v. Attorney General of Canada*, [1981] 1 F.C.109 (C.A.). The basis for this argument was the fact that the grievance did not expressly refer to the article in the collective agreement that was allegedly contravened. The *Burchill* principle provides that a grievor may not refer a new or different grievance to adjudication and that it is only the grievance as presented, which may be referred to adjudication.

[71] The bargaining agent argued that the failure to cite article 64 of the collective agreement on the face of the grievance in no way changes the nature of the underlying facts of the grievance.

[72] In deciding whether or not the grievance contravenes the principles in *Burchill*, I must decide whether or not the grievance that the grievor wishes to present is a new or different grievance than the one presented during the grievance process. The test in these cases is whether the employer knew what the grievance was about during the

grievance process and had an opportunity to address the issues. The grievance does not refer expressly to a contravention of the directive or a specific provision in the collective agreement. The bargaining agent has approved the presentation of the original grievance on the basis that it relates to a contravention of the collective agreement and undertakes to represent the employee. The underlying facts recited in the grievance are not in dispute, have been consistent throughout the grievance process and are reflected in the parties agreed statement of facts. Clearly the grievance seeks retroactive pay for the period for which the grievor performed duties in a position at Passport Canada which had been reclassified upwards as a result of the classification review exercise. I am satisfied based on the foregoing that the grievance does not contravene the principles in *Burchill,* as, in my view the employer has had an opportunity to address the issues raised in the grievance. It is the employer in the grievance response at the first level that categorized the grievance as relating to the directive.

[73] The other jurisdictional argument advanced by the employer is that the Board does not have jurisdiction over the grievance in the first instance. It submits that the Board does not have a platform to extend the time limits for the presentation of the grievance because it involves an employer directive and not a provision of the collective agreement.

[74] The employer submitted that there is no clear nexus between the grievance and the provision of the collective agreement, article 64. It argued that the Treasury Board has significant management authority with respect to pay and, unless that authority is expressly limited by statute or collective agreement, the Board does not have jurisdiction to hear a grievance concerning pay issues that are not the subject matter of articles in the collective agreement. The employer's position is that Passport Canada reclassified these positions according to its broad managerial authority in accordance with the Treasury Board's *Directive on Terms and Conditions of Employment* and that this matter is not covered by the collective agreement. It submitted that the authority to not pay the grievor in circumstances where he is no longer an incumbent of the reclassified position has not been limited by statute or by the collective agreement.

[75] The bargaining agent replied that the *Act* allows for the referral to adjudication of grievances relating to the interpretation or application of a provision of the collective agreement. Its position is that the language of the grievance complains about

the actions of the employer in denying the grievor retroactive pay as a result of the classification review exercise at Passport Canada. The agreed statement of facts reflect that the grievor commenced employment on October 19, 2007; that he was employed until April 17, 2009; that the effective date of the reclassification was retroactive to August 15, 2007 which included the greater part of the time the grievor was employed in the effective position. Clause 64.02 of the collective agreement provides that an employee is entitled to be paid for services rendered at the pay specified in Appendix A for the classification of the position to which the employee is appointed. The union submitted that this narrative presents an arguable case for the contravention of article 64. In the event that the case is heard on the merits there may be evidence of past practice that would assist in resolving the issue.

[76] In order to find that there is jurisdiction in this case, the grievance must relate to "the interpretation or application in respect of the employee of the provision of a collective agreement or an arbitral award."

[77] I accept that an adjudicator appointed under the *Act* does not have the jurisdiction to hear a grievance made under the *Treasury Board Directive on Terms and Conditions of Employment*. Where the evidence clearly shows that that an adjudicator has no jurisdiction and there is no chance of success before an adjudicator, the time lines ought not to be extended. On the other hand, there are situations where the issue of jurisdiction is arguable and evidence on jurisdiction and merits are so intertwined that they must be heard together in order to come to a determination on both. This is one of those situations. There is insufficient evidence before me to come to a conclusion that the issue in question here does not fall under the collective agreement. There is at least an arguable nexus between the grievance and the wording of the collective agreement. It may be that the evidence and argument on the merits of the case establish that the relevant provisions of the collective agreement apply. For example, the union argues that there may be evidence of past practice with respect to the application of the collective agreement. In addition, the employer's argument on this point is premised, in part, on a very technical point, the certificate of appointment. Evidence was neither presented on this issue, nor on the practices of the employer in these situations.

[78] If the Board does have jurisdiction over this matter, that jurisdiction would be limited to determining whether or not there has been a contravention of clause 64.02

of the collective agreement. That article provides that an employee is entitled to be paid for services rendered at:

> *(a) the pay specified in Appendix A-1 for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment;*
>
> *or*
>
> *(b) the pay specified in Appendix A-1 for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide*

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

(The Order appears on the next page)

V. Order

[80] I grant the extension of time for the presentation of the grievance at the second and third levels of the grievance procedure and for the referral of the grievance to adjudication.

January 24, 2014.

David Olsen,

Acting Chairperson