Files: 166-2-25629
to 25631

Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

**WILLIAM CONLON, IVAN HOFFER
AND MICHAEL PATRICK**

Grievors

and

**TREASURY BOARD
(Public Works and Government Services Canada)**

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievors: Edith Bramwell, Public Service Alliance of Canada

For the Employer: Agnès Lévesque, Counsel

Heard at Ottawa, Ontario,
June 27, 1995 and October 7 and 8, 1996.

This decision follows the hearing of grievances referred to adjudication by three members of the Engineering and Scientific Support Group employed in the Department of Public Works, Messrs. William Conlon, Ivan Hoffer and Michael Patrick.

The grievors are claiming reimbursement for sums of money recovered from them by their employer under the *Financial Administration Act*.

Prior to the hearing, the employer sent the following letter to the Board, dated June 14, 1995, disputing the jurisdiction of an adjudicator to hear this matter:

> *With respect to the above-captioned matters, now rescheduled for hearing in Ottawa on June 27th or 28th, the grievors are grieving the employer's recovery of overpayments received in varying amounts, by the grievors. The position maintained by the PSAC is that the employer is estopped from effecting the recovery action.*
>
> *This letter is to advise the adjudicator that the employer will be making a preliminary objection to the latter's jurisdiction to review the merits of this case. It is the employer's position that a recovery action instituted pursuant to section 155 of the Financial Administration Act is not within the purview of the adjudicator.*
>
> *The employer will be requesting the adjudicator to rule on the jurisdictional matter before proceeding to the merits of the case.*

The following Agreed Statement of Facts was submitted:

> *IT IS AGREED BETWEEN THE PARTIES HERETO, for the purposes of this adjudication:*
>
> *(a) that the facts set forth herein 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;*
>
> *(b) that the documents attached as schedules hereto are admitted as proven, subject to their relevance to the issues herein and to their weight being determined by the adjudicator;*
>
> *(c) that each Schedule hereto is a true copy of a document, the original of which was printed, written, signed or executed as it purports to have been, and which was sent and received, as the case may be, by the persons indicated thereon or therein, at or about the dates indicated;*

(d) that this Agreement is entered into without prejudice to the right of either party to introduce additional evidence at the hearing which does not contradict the assertions contained in the Agreed Statement of Facts; and

(e) that the decision issued by the Adjudicator arising out of Board File No. 166-2-25629 shall apply in all manner and respect holus bolus to all other grievances listed in Schedule 1, referred to adjudication.

Introduction

At issue in this grievance is an overpayment received, in varying amounts, by each of the three grievors.

Background

1. Prior to December 21, 1987, all of the grievors held positions classified at the EG-ESS-07 level. At that time, all of the grievors were receiving the top increment of the EG-ESS-07 level, and had done so for more than one year.

2. Pursuant to letters dated July 14, 1988, (see Schedule 2) the grievors' positions were retroactively reclassified, effective December 21, 1987, to the EG-ESS-08 level. They were placed at the second increment of the EG-ESS-08 level.

3. In 1990, the grievors' positions and salaries were affected by a conversion undertaken by the Treasury Board with regard to classification. The result of the conversion was that EG-ESS, which had been comprised of 11 levels, became EG, comprised of 8 levels, effective retroactive to December 22, 1987 (see Schedule 4, and see Schedule 6, page 2).

4. On May 23, 1990, a letter was sent to Regional Directors from Mr. G. Curran, Director of Staff Relations and Systems (see Schedule 3). The letter was entitled "EG Conversion", and indicated that employees who had been paid at the maximum rate in the former scale of rates for a period of one year or more, and not paid at the maximum rate in the new scale of rates, were to be granted a salary increment retroactive to December 28, 1987. Because of the retroactive reclassification of the grievors effective December 21, 1987, (see point 2), the grievors did not qualify for this increased increment (see Schedule 6, page 2).

5. On September 18, 1990, employees received notice of the effect of the EG conversion on their positions (see Schedule 4). Employees at the EG-ESS-08 level, such as the

grievors, had their positions converted to the EG-06 level. The grievors received the third increment in the EG-06 level. The conversion date was December 22, 1987, one day after the grievors' reclassification to EG-ESS-08 had taken place.

The Overpayment

6. On November 15, 1990, Mr. T. Heinmaa, Chief of Maintenance Engineering and manager of the grievors, sent a letter (see Schedule 5) to Ms. Carriere of Human Resources, Compensation Unit. He indicated that if the promotion/ reclassification from EG-ESS-07 to EG-ESS-08 had taken effect on December 29, 1987, as opposed to December 21, 1987, the grievors would have qualified for the increment as described by the Deputy Minister in the May 23, 1990 memorandum (see Schedule 3).

7. Mr. Heinmaa's November 15, 1990 memo was actioned without the prerequisite authority from Departmental Headquarters' Classification Directorate, the Assistant Deputy Minister of Human Resources, and Treasury Board. The action was processed in the Human Resources, Compensation Unit without the appropriate supporting document, a Classification Evaluation Report. This created the overpayment which is the subject of this grievance.

8. On March 18, 1991, the grievors, except Mr. Hoffer who was ill at the time but informed later, were informed at a meeting with representatives of management that the action referred to in point 7 was not authorized, and that they were in an "overpayment situation" as a result of the unauthorized action.

9. Representatives of management met the grievors on 30 October, 1992, to further discuss the overpayment, and the sequence of events which had led to it (see Schedule 6, page 2).

10. By letter dated December 1, 1992 (see Schedule 6), summarizing the 30 October 1992 meeting, the grievors were told that the salary increment which they had received constituted an overpayment and would be recovered from their wages starting January 11, 1993.

11. The grievors filed grievances on December 23, 1992 and management of the department decided to put recovery of the overpayment on hold until resolution of the grievances. Thus, the recovery of the overpayment did not begin until August 1993 at a 5% rate of recovery, half the 10% rate which is the prescribed rate of recovery for overpayments. The grievors were informed of this by a letter with

attachment dated 16 July 1993 from Lyse Danis, Liaison Officer, Staff Relations and Compensation (see Schedule 7).

12. Following the fourth and final departmental level response to the grievance, the department made a submission to Treasury Board recommending that a portion of the overpayment be written off, from March 19, 1991 to November 29, 1992. The grievors received a letter dated October 6, 1994 from Mr. G. Curran, Acting Assistant Deputy Minister of Human Resources (see Schedule 8), informing them that the submission had been denied by Treasury Board. Consequently, the grievors were informed by letter dated 2 November 1994 from Lyse Danis, Liaison Officer, Staff Relations and Compensation (see Schedule 9), that recovery of the overpayment would continue starting November 17, 1994.

13. The overpayment, now fully recovered from grievors 1 and 2, and still being recovered from grievor 3, is as follows for each of the grievors:

1. Conlon $4301.62 (Gross)

2. Patrick $2987.35 (Gross)

3. Hoffer $6932.92 (Gross) (see Schedule 7)

Summary of Evidence

Subsequent to the employer's decision on July 14, 1988 to promote these three grievors from the EG-07 to the EG-08 level (retroactive to December 21, 1987), two further decisions, both with retroactive effect, were made by the employer.

The conversion undertaken by Treasury Board with regard to classification in 1990 resulted in a decision which converted 11 levels of the EG-ESS classification to eight levels. As a result, the grievors who were then at level 8 of the EG-ESS scale of rates were converted to level 6 of the new scale of rates. This conversion was made retroactively effective to December 22, 1987, just one day after the grievors' promotion took retroactive effect.

The evidence of the grievors is that they, as EG-ESS-07's, had been "mixed in" with EG-ESS-08's in 1986 and from then on they had done the same work as the level 8's but were paid at the lower scale. Their promotion was a response by their employer to their complaints about this inequity.

Since the grievors, as EG-ESS-07's, had been at the maximum rate of their pay scale for more than a year, they would have been eligible for this retroactive increment in their old positions. The grievors argued that had they received this increment they would have been eligible to receive exactly the same salary in the new scale of rates. (See scale of rates submitted in grievors' written argument.)

Calculation I shows what happened to the grievors' pay rates following their promotion. Calculation II shows how their pay would have been affected by the employer's actions had they never received a promotion through reclassification. This is based on the fact that they were rated as post-conversion EG-06's by their employer.

When the grievors concluded that, because of the sequence of retroactive events that had taken place they were no further ahead with their promotion, they complained to the employer. The employer apparently recognized their position and attempted to rectify it. It attempted to retroactively restructure their promotion and conversion in such a way that the grievors would be able to retain the benefit of their promotion.

The supervisor changed the effective date of the promotion by eight days, moving it to after the date of the conversion to the new classification system, thus allowing the grievors a pay increase from their promotion. The steps which the supervisor used are set out in calculation III. Despite the fact that the supervisor did not get proper authorization for this attempted remedy, the change in the grievors' pay status was actioned by Pay and Benefits and the grievors temporarily received an increase in pay.

On March 18, 1993, the grievors were informed at a meeting called by management that there was a problem regarding the authority for the pay action. The grievors disagreed and offered to bring in cases which the employer agreed to consider. There were further delays.

One of the grievors, Mr. William Conlon, testified. He was hired as an electrician in 1976 and in 1981, became classified as an EG-07. In 1986, he moved to Place du Portage in Hull and was mixed in with the Energy Conservation Group who were classified at the EG-08 level. Messrs. Patrick and Hoffer were also working in this area. The grievors spoke to their supervisor about the fact that they were performing

the same duties as the EG-08's. The employer agreed and responded to their concerns with the letters issued in the summer of 1992. From 1986 to 1990, they continued to perform the same duties except that they were involved in larger and more complex projects as time went on. They accepted the answer given by their employer and were satisfied that everyone would be paid at the same level. When they learned of the situation created by the retroactive decisions that had been made which would have the effect of wiping out the monetary gain of the promotion previously granted, Mr. Conlon approached his manager, Mr. Tom Heinmaa. The latter understood and wrote to Pay and Benefits to arrange that they be paid the increment as well as backpay. The grievors were satisfied that their situation had been addressed when their pay cheques reflected the implementation of the promise given to them. At the meeting of March 18, 1993, they were informed that the pay action was not authorized and they were in an overpayment situation. It was certainly not clear at that meeting what exactly would happen.

Mr. Stan Collis testified for the employer. He has been with the Canada Communication Group since May 1993. In 1990 and 1991, he was the Regional Director of Human Resources for the National Capital Region of Public Works. He became aware of a difficulty regarding the authorization of Mr. Heinmaa's request to move the effective date of the grievors' classification from EG-07 to EG-08 to make the effective date December 29. The authority for the conversion rested with Treasury Board. "When we (the Department) asked our classification board to authorize this change, we were assuming the authority of Treasury Board who had dealt with the conversion on a national scale". Nevertheless, the classification officer when consulted said: "Go ahead and do the pay. I'll give you something". The witness stated that when he discovered this, he was concerned and spoke to the Assistant Deputy Minister of Human Resources who was also concerned. After that, the meeting of March 1991 took place with all the employees affected being present except for one, Mr. Hoffer. "At the time of the meeting we did not know the amounts involved". After the meeting, he asked that calculations be prepared. There was a further meeting on October 30, 1992 followed by a letter dated December 1 telling the grievors that the salary increment they had received was an overpayment and recovery would commence. The witness could not recall for certain whether or not the employees had received the calculations at the October meeting. He also testified that

he did not remember this meeting well enough to say whether or not some impression might be left on the employees that the question of recovery action was still open.

Argument of the Grievors

Ms. Bramwell argued, in the first place, that there was no true overpayment. The grievors were legally entitled to the money that was recovered. She did state, however, that "this is really an estoppel case". The employer having agreed with the grievors, held out promises and assurances to them and paid them in accordance with those promises; the employer is now precluded from saying: "We don't agree anymore and want the money back." The grievors relied on these promises and took no action to put in classification grievances.

Ms. Bramwell also argued that there is a discretion under the *Financial Administration Act* which allows debts to be forgiven. The following cases were cited: Foglia (Board file 166-2-23755); Guillemette (Board file 166-2-23827); MacCabée (Board file 166-2-19793); Adamson (Board file 166-2-16207); Lajoie (Board files 166-2-20731 and 20732 and (1992), 149 N.R. 223); de Bruijn et al. (Board files 166-2-22275 to 22279; 166-2-22290; 166-2-22306 and 22307; 166-2-22336); Barbe (Board file 166-2-18078); Constain and Others (Board files 166-2-18508 to 18511); and Arnold and Others (Board files 166-2-17505 and 17506; 166-2-17508 to 17511; 166-2-17513 and 17514).

Ms. Bramwell submitted that I had jurisdiction under the pay action provisions of the collective agreement.

Argument of the Employer

Counsel for the employer questioned my jurisdiction relying on the issues raised in the employer's letter of June 14, 1995. She also raised my lack of jurisdiction to deal with these issues because they relate to classification of positions contrary to section 7 of the *Public Service Staff Relations Act*.

It was argued that all the decisions made by the employer were independent events and not designed to take away the promotion that had been granted to the grievors. The departmental pay section did not have the proper authority and therefore the grievors had no legal entitlement to the money collected back from them

as overpayment. No letter was given to the grievors, nor was it clearly stated that they would get the increment in question.

Counsel for the employer referred me to the following cases: Ménard and Ouellette (Board files 166-2-19465 and 19466 and [1992] 3 F.C. 521); Burnett (Board file 166-2-21562); Levert, Lipson and Williams (Board files 166-2-22780 and 22781; 166-2-23130); Bethell (Board file 166-2-22225); Gunderson (Board files 166-2-26327 and 26328); Gordon (Board file 166-10-14302); Gibbon (Board file 166-2-14480); Tsang (Board file 166-2-14768 and Federal Court file A-1514-84 (unreported)); Legare and Treasury Board ((1987), 76 N.R. 353); and Andrews v. Brent ([1981] 1 F.C. 181).

Reasons for Decision

I accept jurisdiction as I do not believe that the objections to my jurisdiction raised by the employer have any merit. The issue is not the employer's right to recover moneys owed to the Crown under the relevant provisions of the *Financial Administration Act* or the classification of the grievors, but the pay consequences which flow from this classification. The pay provisions of the collective agreement provide me with my jurisdiction to hear this matter.

When the employer promoted these grievors from EG-07's to EG-08's, it obviously wanted to correct an inequity as to their pay and put them in the same level as the EG-08's performing the same duties. The grievors accepted the promotion and the increase in pay and took no further steps.

The problem in this case arises out of a decision by the employer, also in 1990, to grant a salary increment, effective December 28, 1987, to certain employees who had been paid at the maximum in the former scale of rates for a year or more. The grievors felt that the result of that decision was to wipe out the effect of their promotion.

The grievances are granted for the reasons that follow.

When their supervisor recognized and attempted to correct their situation by recommending a change in the date of their promotion, his decision was implemented by Pay and Benefits. In the minds of the grievors, management had responded to their concerns and they began receiving pay cheques at the higher amount. The

grievors' concerns were allayed; the matter was closed. Relying on the employer's response, they used the money and they put in no classification grievances. It should be noted that at the hearing before me, counsel for the employer did not dispute Ms. Bramwell's statement to this effect. This situation continued for a considerable period of time before management discovered that the pay action had not been properly authorized and informed the grievors of this at a meeting on March 18, 1993. Even after this meeting, they continued to be paid at the higher rate.

The employer made clear representations to the grievors that measures would be taken to address the inequities created by its retroactive decisions. Their manager, Mr. Heinmaa, took steps to protect the effect of their promotion, thus recognizing that it should be protected, and they received pay in accordance with his decision. The grievors relied on the employer's decision to pay them in accordance with their request as being properly implemented and they accepted and used the pay that they received accordingly.

In the Adamson (supra) case, the adjudicator stated (at page 17):

> *In the present case, we are not dealing with innocent ignorance. On the contrary, we are dealing with a deliberate decision by a manager to act in a certain manner in order to achieve a definite object ...*

He went on to find that having regard to all the circumstances, and especially, but not solely, the delays involved, that:

> *... even if the employer had a legal right to recover (a matter on which I make no finding), it would be unconscionable to allow it to do so.*

In my view, the employer is now estopped from recovering any overpayment. When the employer realized that there had been a mistake in its initial policies, a number of months had elapsed. Although a meeting was held, there was no clear decision that the employer would take recovery action. This is not simply a case of money mistakenly paid which the employer at a later time wished to recover. It was money to which the grievors felt entitled by virtue of the fact that it was received as a result of their representations to management regarding the pay owing to them pursuant to the promotion which their employer had decided to award them.

Management agreed that they were entitled to this money and made arrangements for them to receive it, arrangements which turned out to be flawed because of an internal error. Relying on the representations of management, the grievors did not pursue classification grievances or any other form of redress that might have been open to them. It would seem that departmental management had a great deal of difficulty in making up its mind that this money should be recovered. There were a number of delays before it was finally decided to take recovery action.

Even after the final level of the grievance procedure, the Department recommended to Treasury Board that a portion of the overpayment be written off, from March 19, 1991 to November 29, 1992. Although their request was denied by Treasury Board, the Department recognized the problem for the grievors created by its actions.

Accordingly, for all these reasons, the grievances are allowed. The money collected as overpayment must be returned to the grievors. I will remain seized in case the parties encounter any difficulties in implementing my decision.

Rosemary Vondette Simpson,
Board Member

OTTAWA, June 4, 1997.