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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

IRÈNE MARINOS

Grievor

and

TREASURY BOARD
(Solicitor General - Correctional Service Canada)

Employer

Before: Muriel Korngold Wexler, Deputy Chairperson

For the Grievor: Richard Letendre, Counsel

For the Employer: Harvey A. Newman, Counsel

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DE LA COMMISSION DES RELATIONS DE TRAVAIL DANS LA FONCTION PUBLIQUE

Heard at Montreal, Quebec,
August 13, 1997; written arguments on September 2 and 15, 1997.

This decision concerns the merits of the grievance presented by Ms. Irène Marinos contesting the termination of her employment as of July 17, 1996. On April 30, 1997, I rendered a preliminary decision with respect to the objection raised by the employer that an adjudicator appointed under the *Public Service Staff Relations Act (PSSRA)* had no jurisdiction to entertain this grievance as Ms. Marinos was not an employee within the meaning of the *PSSRA*. The objection was heard on March 12 and 13, 1997 and, on April 30, 1997, I found that Ms. Marinos was an employee under the *PSSRA* and therefore she had the right to present a grievance and refer it to adjudication under subsections 91(1) and 92(1) of the *PSSRA*. Thus, this case resumed on August 13 and September 2 and 15, 1997, at which time further evidence and arguments were presented.

At the outset of the hearing, on August 13, 1997, Mr. Harvey A. Newman, counsel for the employer, submitted that, "although the employer was not conceding the grievance", under the circumstances it had decided not to adduce evidence on the merits of the grievance and on whether the termination of Ms. Marinos' employment was justified. Since Ms. Marinos was dismissed by the employer for disciplinary reasons, the burden of proof rests with the employer. Thus, the only issue to be determined goes to remedy and, in particular, what type of employee was Ms. Marinos: an employee whose term of employment ended on September 30, 1996; an employee who had 10 days left on the term of her employment contract; or, as submitted by her counsel, an employee in an "indeterminate situation".

The parties requested that the evidence adduced on March 12 and 13, 1997 with respect to the objection raised by the employer be incorporated concerning the issue of remedy. Mr. Richard Letendre, counsel for the grievor, submitted that Ms. Marinos is entitled to reinstatement, reimbursement of legal fees and the award of damages for wrongful dismissal and mental distress in the amount of $6,000; whereas Mr. Newman argued that she is only entitled to 10 days pay.

The Evidence

The employer called Lise Bouthillier, Céline Laplante and Françoise Mittolo to testify on March 12, 1997. On March 13 and August 13, 1997, the grievor testified on her own behalf and, on March 12, 1997, Andrew Cathcart, Michael Douris,

Milton Miller, Jean-François Labrosse and Nathalie Drouin; on March 13, 1997, Louis Mercier, Lucette Espérance and André Bélanger; and on August 13, 1997, Danielle Taillefer, were called to testify by Mr. Letendre. The parties submitted 29 exhibits.

The principal facts are not in dispute.

Ms. Marinos' testimony concerning her employment status was corroborated by the declarations of all witnesses called on her behalf. Ms. Marinos and Ms. Drouin and Messrs. Cathcart, Douris, Miller and Labrosse testified that they expressed their interest in working for Correctional Service Canada by applying in writing to the Public Service Commission or the Laval Office of Correctional Service Canada. They received shortly thereafter the following letter (Exhibit 6(a)) :

> *Dear Candidate:*
>
> *We have reviewed your application in regard with a Correctional Officer position within the Correctional Service of Canada. As your qualifications meet our basic requirements, your application has been retained to participate in the selection process.*
>
> *Please note that the present recruitment is held mainly in order to establish a list of qualified candidates to fill absences of more or less short period. Positions will be casual employment or for a determinate period. No engaging for an indeterminate period is presently foreseen.*
>
> *Casual employment means a period of employment which does not exceed 90 calendar days and not more than 125 working days per year, whereas an employment for a determinate period is for a period of more than 90 days.*
>
> *Since April 1st, 1994, all recruits who are invited to attend the Correctional Training Program (CTP) will have to possess valid First Aid and CPR certificates. In order to meet the Health Canada requirements, candidates must have completed all modules listed in the annex. The mentioned organisms are the only ones recognized for the required certificates. Furthermore, before beginning the training, recruits will have to possess a valid driver's licence (class 4A).*

> *Before taking action to obtain the above mentioned certificates and driver's licence, we suggest you to wait to be qualified at all the tests of the selection process. We also inform you that qualified candidates after the interview will be submitted to a security investigation and a medical exam.*
>
> *If you want to be considered, please return to the undersigned the attached document duly completed as well as a proof of your last completed school degree.*

Ms. Marinos had applied sometime in May or June 1995. Thus, Ms. Marinos' letter is dated June 16, 1995. On June 28, 1995, Ms. Marinos and other candidates, such as Messrs. Andrew Cathcart, Michael Douris, Jean-François Labrosse and Milton Miller and Ms. Nathalie Drouin, received the following letter (Exhibit 6(b)):

> *Dear Candidate:*
>
> *Congratulations! You passed the Correctional Officer Video Test. You obtained 292/360.*
>
> *We will soon correct the Incident Observation and Report Writing test as well as the Report Summary Writing Test.*
>
> *If your results are favourable, you will be invited for an interview, which will be held in the region of the institution for which you are considered. If not, you will be informed in consequence.*
>
> *If possible, please do not communicate with us. You will be contacted as soon as the selection board will be ready to receive you.*
>
> *Thank you for your comprehension.*

Then, on August 31, 1995, a further letter was sent to the candidates (Exhibit 6(c)):

> *Dear Candidate:*
>
> *This is to inform you of your success at the interview. Following the Correctional Officer Selection process, your global mark is: 60/90.*
>
> *The endeavours will now be taken for the security investigation and the medical exam. Should the results be favourable, you will be on a waiting list to start the Correctional Training Program (CTP).*

> *I remind you that before starting the CTP, you have to possess a valid driver's licence (class 4A), as well as a valid certificate in First Aid and Cardio-pulmonary reanimation (CPR).*

On September 11, 1995, the employer invited the interested candidates to participate in a training program (Exhibit 6(d)):

> *Congratulations! You have been selected to participate in our Correctional Training Program (CTP) subject to the following conditions:*
>
> - *That the results of both your medical assessment and your security check are favourable.*
> - *That you submit proof of both First Aid and CPR certificates valid until at least April 2, 1996.*
> - *That you submit copy of your driver's licence (class 4.a).*
> - *That following successful completion of CTP, you are available for casual employment (up to 90 calendar days and not exceeding 125 workdays in any 12-month period).*
>
> *Training for a period of eleven (11) weeks will commence on October 2, 1995 at the Regional Staff College (5500 Levesque blvd., St-Vincent de Paul, Laval) and will end on December 15, 1995. After this training course, there will be a two-week integration period into the institution where you will be assigned.*
>
> *As part of the CTP, the Correctional Service of Canada operates a student allowance program. Under this system, an allowance of $280.00 per week will be given to you for all the duration of the course provided that you successfully continue to pass each level of training. In order to facilitate the payments of your allowance, please bring your birth certificate and social insurance card with you. The applicable Unemployment Insurance Premium, Quebec Pension Plan and Federal/Provincial Income Tax will be deducted from the allowance if applicable.*
>
> *This weekly training allowance includes scheduled class days and designated holidays on which instructors will not be working.*
>
> *During this training period, you will possess and maintain student status. You will not be considered an employee of the Public Service and therefore, you will not be entitled to any employee benefits such as insurance and pension benefits.*

> *If your permanent residence is outside the college area, you will be supplied with accommodation and meals at the Regional Staff College which is paid for by the Service (including weekends if necessary). If you reside permanently in the training area, you will still be eligible to receive lunch while participating in the program.*
>
> *For further information regarding the available facilities at the Staff College, please call at (514) 664-6635.*
>
> *Upon successful completion of all the levels of the Correctional Training Program, your name will be submitted to LECLERC Institution. An officer from this institution will get in touch with you when your services are needed.*
>
> *Should you have any further questions, do not hesitate to call the undersigned at (514) 967-3431. May I take the opportunity to wish you success in your training.*

The candidates, including Ms. Marinos, undertook the training program on October 2, 1995. It lasted until December 15, 1995. This training took place at the Correctional Personnel College in Laval. The duration of this training was 11 weeks. In addition, they had a two-week integration period during which they worked as correctional officers. The candidates were remunerated during the 13 weeks of training. During the integration period, Ms. Marinos doubled up with another correctional officer at each post worked. On January 4, 1996, they had a graduation ceremony during which they received a diploma (Exhibit 6(g)). On January 5, 1996, Ms. Marinos undertook firearms training and started work as a correctional officer on January 6, 1996. The evidence demonstrated that all successful candidates started their employment immediately after their graduation ceremony. On their first day of work, they were given a uniform and a "pigeon hole" for their mail.

The candidates in Ms. Marinos' group were interviewed at the Leclerc Institution and they were originally assigned to that Institution. However, during their 11-week training period, they were informed (mostly by Ms. Céline Laplante, Senior Human Resources Advisor, who had also signed all the above-noted correspondence) that there were more opportunities for assignment at the Cowansville Institution. Since Messrs. Cathcart, Douris, Miller and Labrosse and Ms. Drouin and Ms. Marinos lived on the South Shore, they requested and were granted a transfer to the Cowansville Institution.

Ms. Marinos explained that during her 11-week training period, Ms. Laplante showed the candidates in her group a chart listing all the institutions and the Cowansville Institution indicated a need for 25 correctional officers of which there were only nine "temporaries". Ms. Laplante told them that "the hours were at Cowansville".

Messrs. Cathcart, Douris, Miller and Labrosse and Ms. Drouin and Ms. Marinos signed similar contracts of employment. They each first accepted contracts for a period of three months or a 90-day duration which were renewed automatically without any breaks. In other words, these contracts were each of a 90-day duration but continuous. These witnesses confirmed that each was advised that he or she could only work 125 days in a 12-month period and 75 hours in a two-week pay period. They could not work more than nine days or 75 hours in a period of 14 days. Ms. Marinos was told by Mr. Jean-Pierre Roy, Keeper, that if she worked more than nine days in a two-week pay period, she would not be paid for the extra hours worked. Ms. Marinos was twice erroneously called in to work on a tenth day. She came to work and the keeper on duty offered her a choice. The first time, Mr. Michel Gagnon, Keeper, informed her that she had been called by mistake and he told her that she had the choice either to be paid for four hours even though she would work eight hours and it would show as a day worked or she could go home. Ms. Marinos chose to return home. The second time it happened, she simply went home and returned to work for the next shift. According to the employer's record of the hours worked by Ms. Marinos (Exhibit 3), she worked 18 days in January; 16 days in February; 21 days in March; 16 days in April; 20 days in May; 20 days in June; and four days in July. Moreover, she never had a break of more than four days in between working days. According to Ms. Marinos' record, she worked 17 days in February and 17 days in April (Exhibit 18). It was agreed that she worked a total of 115 days. Ms. Marinos' employment was terminated July 17 and her last day of work was July 8, 1996.

The witnesses confirmed also that they each were called to work on the same day as their scheduled shift. They were informed of their shift a few hours before it was to commence. Ms. Marinos added that she had the habit of going to the keeper's hall and asking the keepers on duty what were her chances of working the next day. The keepers would look at the schedule and reply that there was a good chance that

she would be called. However, the keepers would never confirm in advance the need for her services.

Ms. Marinos' contracts are entitled "Offer of Temporary Employment". The first one was signed by Ms. Marinos on January 16, 1996, and it covers the period January 5 to April 3, 1996 (Exhibit 1(a)); the second is identical to the first one except for the dates. It was signed April 13, 1996 and it covers the period April 4 to July 2, 1996 (Exhibit 1(b)). The third and last one, is again identical except for the dates. It covers the period July 3 to September 30, 1996 and it was not signed by Ms. Marinos because her employment was terminated before she could sign it. Ms. Marinos explained that had her employment not been terminated, she would have signed this offer of employment (Exhibit 1(c)). These offers of employment state the following (Exhibit 1(c)):

> *Your employment, however, may be terminated before the expiry date because of a work shortage, the elimination of a position, or for reasons such as a disciplinary infraction, misconduct, unsatisfactory performance. This letter should in no way be interpreted as an offer of employment for an indeterminate (permanent) period, and it is therefore advisable that you not rely or count on continuous employment with the Public Service.*
>
> *This appointment is not subject to the provisions of the Public Service Employment Act. This means, notably, that you will not qualify for internal competitions and will not be entitled to file a grievance during this period of employment. Moreover, the Act specifies that a person may be appointed as an employee temporarily for a period of not more than ninety (90) calendar days and may not work in the same department for more than one hundred and twenty-five (125) working days within a twelve (12) month period.*
>
> *Persons working within the Public Service of Canada must comply with the "Conflict of Interest and Post-Employment Code for the Public Service", whose directives are enclosed. Should you accept this offer, you will consent to your social insurance number being sent to the Canada Employment and Immigration Commission to detect and prevent any overpayments of unemployment insurance benefits. For more information, ask for the brochure "When You Get a New Job" from your nearest Canada Employment Centre. Correctional Service of Canada provides a non-smoking work environment. It should be noted that smoking is prohibited in all offices.*

> *As a new Correctional Service of Canada employee, you will be enrolled in the course for new Correctional Service of Canada employees in the near future if you have not already taken it. To this end, a copy of this letter will be sent to the training clerk of the operational unit concerned for appropriate action.*
>
> (Translation)

Ms. Marinos explained that she signed the first contract during her shift; the second one she found in her mail slot; the third she found in her pigeon hole the day her employment was terminated and she was asked to return it. Thus, it was never signed. However, Ms. Marinos would have signed it had her employment not been terminated on July 17, 1996.

Furthermore, she received by mail the following written notice dated April 17, 1996, signed by Messrs. Louis Mercier and Jean-Pierre Roy, keepers (Exhibit 9):

> *Section (D) of the policy governing the employment of temporary employees states that any temporary employee who does not meet the employer's expectations with respect to availability may have their name deleted from the call list. Consequently, an employee who refuses to come in to the facility when there are positions to be filled or who cancels when already scheduled to work may be subject to Section (D). Failure to return a call will be deemed a refusal.*
>
> *Please do not hesitate to contact us for further information.*
>
> (Translation)

Ms. Marinos felt insulted by this notice because she was working the maximum number of days she was told that she was allowed to work. When she started her employment, there was a book where she recorded her availability. However, in May 1996, this record was no longer required. She was told that she had to be available 24 hours per day.

On July 17, 1996, Ms. Lise Bouthillier, Director, Cowansville Institution, wrote the following letter to Ms. Marinos (Exhibit 22):

> *Further to information obtained by Correctional Service of Canada, you failed to inform the employer that you have received, in recent months, from at least three inmates, correspondence of a personal nature which was not approved*

by your superior. You have also acknowledged removing this correspondence from the facility and destroying it.

This conduct is unacceptable and inconsistent with your role as a peace officer. You have lost all of the employer's trust.

Consequently, pursuant to section 11 of the Financial Administration Act and the powers vested in me, you are dismissed as of July 17, 1996.

(Translation)

On July 25, 1996, Ms. Marinos presented the following grievance (Exhibit 19):

On July 17, 1996 I was dismissed for having failed to reveal to my superiors that I had received personal letters from inmates. This is clearly not a cause for dismissal. Be advised that these letters do not contain any relevant information that had to be communicated to my superiors and that no such instructions had been given to me. Furthermore, I voluntarily and through my own initiative informed the authorities of these letters. Lastly, please note that these letters have not been destroyed.

The corrective action which Ms. Marinos requested was:

I request to be reinstated in my employment with full compensation for lost of salary, social benefits and advantages, and for moral damages. Full compensation should include any lost salary or social benefits and advantages prior to my dismissal but related to same.

On October 25, 1996, Mr. John Rama, Corporate Advisor, Human Resources, denied the grievance and raised the issue concerning her employment status (Exhibit 20):

Your grievance concerning your dismissal has been reviewed and I have taken into consideration the comments provided by your lawyer to the CSC departmental representative.

I would like to comment on your employment status. You had been hired as a casual employee. This type of personnel does not meet the definition of employee as defined in the Public Service Staff Relations Act which states that an "employee means a person employed in the Public Service, other than ... (g) a person employed on a casual basis ...". In view of this status you are therefore not subject to the collective agreement. Consequently, you do not have the right to grieve.

> *However, for your information, I have reviewed the circumstances of your grievance and I concur with management's decision not to retain your services further.*
>
> *I hereby deny your grievance.*

Mr. Andrew Cathcart stated that he has been employed as a correctional officer since May 22 or 23, 1995. He had worked the 125 days by December 22 or 23, 1995. Mr. Roy advised Mr. Cathcart that he could not be called to work because he had completed 125 days. On May 21, 1996, he started work again and he was told that on May 22, he fell to 124 days, on May 23, to 123 days, and so on, and then on December 22, 1996, he would fall to zero. However, Mr. Cathcart was offered and accepted a full-time term appointment for the period June 25 to September 30, 1996. This full-time term employment was extended a first time for a further 30 days, ending October 1996; then, it was extended twice again in November for 30 days and in December for a further 30 days. Finally, at the end of December, Mr. Cathcart's term employment was extended a third time for a further period of three months, to March 31, 1997. Mr. Cathcart declared that in the language of Correctional Service Canada, his status prior to June 1995 was called a part-time employee on call or temporary. Mr. Cathcart was told during his training by Mr. Roy that he was a "part-timer". He was also told that there was no guarantee of minimum hours of work but that he had priority to replace an absent correctional officer. Mr. Cathcart was available for work 24 hours per day and he was called at 5:30 a.m. to start work at 7:00 a.m. the same day. Mr. Cathcart never refused an assignment or a shift. Messrs. Roy and Mercier requested that Mr. Cathcart be available 24 hours per day. At the time of the hearing of the reference of Ms. Marinos' grievance to adjudication, Mr. Cathcart was acting in a vacant AC-2 position (CX-COF-2). Mr. Cathcart's substantive position is vacant.

During the period May 1995 to December 1995, Mr. Cathcart worked six days in May; 20 days in June; 20 days in July; 17 days in August; 16 days in September; 16 days in October; 16 days in November; and 14 days in December (Exhibit 8).

Mr. Michael Douris explained that, when he was hired by Correctional Service Canada, he was told that he was hired as a "part-timer". However, he was given the impression that he would be offered permanent employment thereafter. At the time of his testimony, Mr. Douris was still under that impression. Mr. Douris had that

impression because of what he was told by Mr. Guy Larivière, Chief or Leader of the training course, and Ms. Laplante. He was given the impression that there would be a job in the future for him. Mr. Douris started his employment on January 3, 1996 as a correctional officer at the Cowansville Institution.

Mr. Douris was told about the 125-day limit; however, he was offered a three-month term appointment as of June 25, 1996. Since September 25, 1996, the term has been extended and Mr. Douris never returned to the "part-time" status or to the 125-day limit situation. Since December 16, 1996, Mr. Douris has been a full-time term CX-COF-2. When Mr. Douris was a "part-timer", he worked an average of nine days out of a 14-day pay period and he never worked less than seven days in a 14-day period. Exhibit 10 indicates that Mr. Douris worked during the period January to June 1996: 17 days in January; 16 days in February; 20 in March; 15 in April; 20 in May; and 14 in June.

Mr. Milton Miller started his employment at the Cowansville Institution on January 6, 1996. He worked nine days in a 14-day period and he finished the 125-day allotment in a period of seven months. He was off for two months and he was then invited back as a CX-COF-1 full-time term employee on a three-month term. This term has since been renewed for a further three months at the CX-COF-2 level ending March 31, 1997. When Mr. Miller received Exhibit 9, he disregarded the last paragraph requiring him to submit his contract for renewal every 90 days. Mr. Miller was of the opinion that it was not his responsibility but the employer's to express the need for his services and renew or extend the contracts.

Mr. Jean-François Labrosse started his employment as a correctional officer on May 23, 1995. His first contract was for the period May 20 to August 17, 1995. He worked regularly three or four days a week until October or November, when he worked two days a week. Mr. Labrosse worked elsewhere during the weekends; thus, he was only available to work Monday to Friday. Mr. Labrosse was a "part-timer" until September 26, 1996 and he finished the 125 days in 10 months. Mr. Labrosse worked in 1995: five days in May, 16 days in June, nine in July, 15 in August, nine in September, eight in October, six in November, and 12 in December. In 1996, he worked eight days in January, 10 in February, 14 in March, 12 in April, one in May, 16 in June, and 13 in July (Exhibit 13). Mr. Labrosse was then off for one month and

he started again in June 1996 for a further 125 days. However, he was offered a full-time term appointment for the period September 26 to December 27, 1996 which was consecutively renewed for a further period of three months from December 28, 1996 to March 31, 1997.

Ms. Nathalie Drouin has been a correctional officer at the Cowansville Institution since May 23, 1995. She had worked the 125 days by January 22, 1996. Then, she signed a new contract and started working again on May 24, 1996 until August 1996. She did not work in September and started again in October 1996. Ms. Drouin asked for and was granted permission by Mr. Roy to be absent during a two-month period. She started work again in January 1997 and, since February 3, 1997, she has been a full-time term employee. Her term ends May 31, 1997.

Ms. Lise Bouthillier testified that she has been employed 20 years with Correctional Service Canada and she has been the Director of the Cowansville Institution since November 1994. She has been responsible for the financial management, the administration and the personnel as well as the management of the inmates at the Institution. Ms. Bouthillier explained that the employer has resorted to the hiring of casual employees (called part-timers) since late 1994 or early 1995. She referred to three documents allowing for the delegation of some of the staffing authority from the Public Service Commission to the Commissioner of Correctional Service Canada (Exhibits 2(a), (b), (c)). Exhibits 2(a) and (c) provide for the staffing of casual or temporary employees and the Commissioner has the delegated authority to make casual appointments. This delegated authority covers the CX group since April 1, 1994. The guidelines on casual employment (page 1 of Exhibit 2(c)) stipulate that:

- *Casual employment is not used*
- *instead of determinate, seasonal or part-time employment,*
- *to avoid security screening or to impose an additional probationary period.*

These guidelines refer to section 21.2 of the *Public Service Employment Act.*

Ms. Bouthillier explained further that the Cowansville Institution uses "casual employees" to replace personnel for short periods. She acknowledged that these "casual employees" are subject to the same screening and selection processes and training programs as indeterminate employees. The difference is that in the case of casual employees, the work is not scheduled in advance. The work is assigned on call. Ms. Bouthillier has found that the Cowansville Institution requires 25 casual correctional officers but they have never been able to use more than 12 qualified casual correctional officers at one time.

The Cowansville Institution keeps a list of successful "casual" candidates. They are placed on the list according to the final mark obtained during the tests and selection process. The person with the highest mark goes on first and so on. The Keeper will call the "casual" employee as needed and a register is also kept of their hours of work. It is on the basis of the list and the number of hours worked that the Keeper decides whom to call. The one with the least hours worked will then be called in priority. Moreover, the Keeper will also take into consideration that the "casual" employee must not exceed nine days or 75 hours worked in a 14-day pay period. The Assistant Director, in this case Mr. Claude Guérin, keeps this list and register in his office. Ms. Bouthillier indicated that in general the employer will not exceed the 125 days in a 12-month period but there are exceptions to this rule.

Ms. Bouthillier explained that she identified a need for 25 casual correctional officers based on budgetary constraints, the use of the overtime budget, the needs of the Institution and the absences of correctional officers. However, they never actively had more than 12 working at one time. Ms. Bouthillier added that the 90-day contracts are automatically renewed provided the "casual employee" has not yet reached the 125-day limit. The "personnel clerk" leaves the contract (Exhibit 1) in the casual employee's pigeon hole for the latter's signature.

According to Ms. Bouthillier, in 1996, the Cowansville Institution decided to increase the ratio of correctional services officers on two-week vacation leave during the summer months. Thus, term appointments were offered to casual employees. A selection process was used to award these term appointments.

The Cowansville Institution has also a number of indeterminate correctional officers in manning overhead. They are not attached to a particular position. However, they appear on the schedule and are part of the regular schedule.

Ms. Bouthillier explained that the employer has not established the number of days each "casual" employee will work. It is up to the keepers to ensure that all posts or shifts are covered. The "casual" employee is called to replace absent employees. Their hours of work depend on the needs of the employer; they are not automatic. The employer does not want to schedule these "casuals" in advance because it wants to resort to them in a situation where the requirement for their services is not foreseeable and for a short duration. Ms. Bouthillier offered examples such as in cases of annual leave, training, sick leave because of work accidents resulting in absences of short duration, etc. According to Ms. Bouthillier, the "casual" employee could also replace an indeterminate or term employee on annual leave (for one or two days). Ms. Bouthillier acknowledged that the employer is aware of the employees' annual leave plans (two-week vacation leave) by early April. The majority of permanent correctional officers take their two-week vacation during the period April to September. Moreover, in 1996, the Cowansville Institution had at least 10 vacant CX positions and the evidence was to the effect that there was a need for at least seven correctional officers.

Ms. Céline Laplante has been employed in the Public Service since October 1975, and with Correctional Service Canada since 1989. From March 1993 to September 1996, Ms. Laplante was Chief Advisor in Human Resources and from July 1994, she was responsible for the staffing of "casual" correctional officers. Ms. Laplante called these casuals "temporary" employees. Correctional Service Canada resorted to the hiring of casuals when the *Public Service Employment Act* was amended in 1993. Ms. Laplante was responsible for the recruiting of these "casuals" for the Quebec region. The intention was to create a pool of casuals to be used for short periods and for a specific need. They were to be called when needed. The location of the offers of employment related to the residence of the interested applicants. Thus, the candidates were placed on a list according to their place of residence and the order of merit. This list was used at one of the institutions to staff term and indeterminate positions. However, since 1994, the list has not been used again to staff indeterminate positions.

At the start, all successful candidates on this list (Exhibit 5) were recruited on call; however, a few months later, some received offers for term appointments. According to Ms. Laplante, it is the duration of the employment which will change the status of this employee. If the duration of the employment is for more than three months, the correctional officer in question becomes an employee under the *PSSRA* with all the terms and conditions of employment attached to it. Ms. Laplante explained that the selection process and training programs are the same for the casual and indeterminate employees because the employer requires fully qualified and trained personnel.

Ms. Laplante testified that she would meet the candidates during their training at the "Laval [or Correctional Service] Training Centre" to provide general information on their employment status. She confirmed that the purpose of "casual" employees is to fulfill a temporary need. They are on call. When Ms. Laplante met the candidates, she informed them that the offer of employment was for "temporary work" and that there was no guarantee that they would work a minimum of days but they could not work more than 125 days in a 12-month period. It is up to the Institution to control the number of days worked by each "casual" employee. When an institution requires a term employee, the matter is referred to Ms. Laplante's office and the term employee is identified from a list based on merit (the "casual" with the highest mark). A permanent correctional officer works on average 20-21 days a month or 207 days per year. Ms. Laplante added that a "casual" employee could be used to replace a correctional officer, e.g. an absence of 30 days.

Ms. Françoise Mittolo has been employed in the Public Service for 27 years and she has been the Regional Chief, Pay and Benefits, Correctional Service Canada, for 13 years. Ms. Mittolo explained that, when the employer offers employment to the successful candidates, a copy of this offer is sent to her office which is responsible for the issuance of pay cheques. Ms. Mittolo prepares documents entitled "Report on Staffing Transaction" (Exhibit 17) for all casual, temporary or part-time employees for employment insurance purposes. Casual or temporary employees accumulate sick leave credits even though they cannot use them during their casual or temporary employment. The sick leave credits are calculated pursuant to the relevant collective agreement.

Mr. Louis Mercier has been a keeper since June 1989. He and Mr. Jean-Pierre Roy, also a keeper at Cowansville Institution, are involved in the interview process for casual employment. Mr. Mercier testified that he has been responsible for the on-the-job training of casual employees and, if problems arise, the casual employees refer them to him. Messrs. Mercier and Roy are in charge of ensuring that all posts on the shift schedule are filled. Thus, in case of absences or shortage of correctional officers, they will call the casual employees. Cowansville Institution has nine keepers. Messrs. Mercier and Roy wrote Exhibit 9 after consultation with Mr. Claude Guérin, Assistant Director, who required that all casual employees be always available 24 hours per day. In addition, Mr. Mercier and the other keepers wrote Exhibit 15, a policy on the use of casual employees. This policy stipulates that the casual employee must indicate his/her availability to the employer for a period of 14 days five days before the start of this period. The casual employee can only amend his/her availability with approval of his/her supervisor. The casual employee who does not satisfy the availability requirement may have his/her name deleted from the call list. This document (Exhibit 15) was widely distributed to managers, keepers and correctional officers.

Mr. Mercier explained that the casual employee with the fewest hours worked would be called first to fill an absence or vacancy on the shift. The absence or vacancy is filled on a daily basis regardless of the duration of the absence or shortage of correctional officers. At the time of this hearing, casual employees were filling 30-day absences. Mr. Mercier declared that there is a need for casual employees on a daily basis all year around.

Mr. Daniel Chateauneuf has been the Chief of Correctional Operations and he is responsible for work schedules at the Cowansville Institution. A casual employee could be called to work for two to three consecutive days. The "nominal call" is the shift schedule. It is a document prepared four days in advance indicating the correctional officers assigned to various posts and shifts. The keeper on night prepares the day and evening shift schedules. In addition, a register is kept in the keeper's hall and in the blocks or pavilions. There are four blocks at the Cowansville Institution (8, 9, 10 and 11). When the casual is called in, the keepers complete a form indicating the name of the institution and casual employee, hours worked and the

reason for his/her attendance, e.g. that a certain CX was on sick leave. The casual employee signs this document.

Mr. Mercier added that relief correctional officers are called first to fill an absence or vacancy on the shift. Mr. Mercier will decide whether he can function with such an absence, whether minimum staffing levels can be met or whether he will call a casual employee to work that post.

Ms. Lucette Espérance has been a personnel clerk responsible for the administrative support in staffing and labour relations matters. She completes the reports on staffing transactions (Exhibit 17). These documents are prepared for statistics purposes and submitted to the Public Service Commission. On this form, Ms. Espérance indicated that the Cowansville Institution used the casual employees a minimum of two days per week. Ms. Espérance decided on this number arbitrarily. At the time of this hearing, Ms. Espérance was instructed to write instead five days by the Staff Relations Regional Office (Ms. Lison Longprés and Ms. Joanne Limoges, Human Resources Advisors).

Mr. André Bélanger has been employed 23 years with Correctional Service Canada. At the time of the hearing of this adjudication, he was an acting keeper at the Reception, Ste-Anne des Plaines. Mr. Bélanger has also been the President, Local 10172, Union of Correctional Services Employees, PSAC. Every month, Mr. Bélanger receives a document indicating the number of CX jobs required at each institution, correctional officers, vacancies, personnel needed, casuals in training and those needed, etc. Mr. Jean-Claude Perron and a staffing officer report on it. These reports indicate that Cowansville Institution needed at least seven additional correctional officers or person/years during the period of employment of Ms. Marinos.

Mr. Bélanger explained that one CX job at an institution requires 1.7 P/Y (person/year) or 1.20 P/Y depending on the number of hours and shifts to fill in a year. (There are 250 working days in a year.)

Ms. Danielle Taillefer testified that she has been the Assistant in Human Resources, Regional Administration, Correctional Service Canada, for the past five years. She identified the list of correctional officers employed at the Cowansville Institution on a casual basis and as terms during the period 1996-97 (Exhibit 23). In

addition, Ms. Taillefer identified three exhibits concerning the days worked by various correctional officers employed on a casual basis for a specified period of time (Exhibits 24, 25 and 26). These three exhibits show that some of these correctional officers were offered employment for a specified period of time consecutively to having worked on a casual basis. They had contracts for employment on a casual basis followed by a term employment for a six-month period and then reverted back to contract employment on a casual basis for three months. This demonstrates that some of the correctional officers have worked "indefinitely" on a casual and term basis depending on the type of contract offered. Thus, employees hired on a casual basis may become term employees. The Cowansville Institution offers term employment (for a specified period of time) to persons first hired on a causal basis when the need arises to replace an employee for a period of three months or more. This is the reason why some of the casual correctional officers could be offered term employment and then revert back to their casual status. It is management who decides to whom to offer the term appointment.

Ms. Marinos described her state of mind when her employment was terminated on July 17, 1996. She did not expect it at all; she was in shock and cried a lot. She could not believe it. Ms. Marinos tried "to make reason or logic" of it but there was none. The more she thought about it, the less the termination of her employment made sense. She cried every day. This situation affected her family. She really loved her work and she suffered a great loss. She felt "worthless and ruined". It affected her "security field" and her personal relationship with her boyfriend, Mr. Michel Côté, to the point where they drifted apart. She cannot even go anywhere near the Institution and she feels "like a big loser". She even tries to avoid the shopping center near the Institution for fear of running into one of her former co-workers.

Ms. Marinos has made attempts to find work in her field of education without success. She has sent over 150 applications for employment to different employers. She was so desperate that she applied "everywhere" (Exhibit 27). On May 28, 1997, she finally obtained employment as a teller (CR) with "Thomas Cook" at $250.00 per week. Ms. Marinos wants to work in the security field. She studied "policing" and correctional intervention. She had worked four months at the Bordeaux Institution prior to coming to the federal government. Ms. Marinos has a certificate as a medical

emergency technician and she has training as a firefighter. Ms. Marinos urged me to reinstate her in her position as correctional officer. "She loved that job".

Arguments

Mr. Newman argued that Ms. Marinos was appointed under section 21.2 of the *Public Service Employment Act* which provides:

> *21.2 (1) Notwithstanding any other provision of this Act, the Commission may appoint any person to the Public Service for a period not exceeding ninety days.*
>
> *(2) No person appointed under subsection (1) may work in any particular department, or in any other particular portion of the Public Service, on more than one hundred and twenty-five days in any year.*
>
> *(3) The provisions of this Act, other than this section, do not apply to a person who is appointed under subsection (1).*
>
> *(4) Nothing in this section derogates from any other authority of the Commission to appoint persons to or from within the Public Service for specified periods not exceeding ninety days.*

Thus, she was not an indeterminate employee and the best she could be is a term employee whose term ended September 30, 1996 (Exhibit 1).

Mr. Newman pointed out that Ms. Marinos worked 115 days and her last offer of employment was for 90 days. Pursuant to this last offer and section 21.2 of the *Public Service Employment Act*, the most she could have worked was 125 days in a 12-month period. Hence, she could only have worked a maximum of 10 more days. Mr. Newman explained that this is not the first time that the issue of remedy has been raised in cases where the employer decides not to adduce evidence to justify disciplinary action. He referred to the *Puxley* decision (Board file 166-2-22284). Mr. Newman added that Ms. Marinos was not properly appointed to enable her to acquire indeterminate status and, in this regard, he cited the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Public Service Alliance of Canada (Econosult)* [1991] 1 S.C.R. 614.

Mr. Newman submitted that Ms. Marinos was a casual or, at best, a term employee and, even though the evidence may demonstrate a staffing need, she could not claim indeterminate status. In support of this, Mr. Newman referred to the following decisions: *Laird* (Board file 166-2-19981); *Thomas* (Board files 166-2-25493 and 25494 and 149-2-140); and *Attorney General of Canada v. Jones* [1978] 2 F.C. 39.

Mr. Newman argued that the three offers of employment which were accepted by Ms. Marinos establish clearly that she could not work more than 125 days within a period of 12 months in the same department (Exhibit 1). Ms. Marinos had a limited appointment under section 21.2 of the *Public Service Employment Act* and this adjudicator has no authority to make appointments under the *Public Service Employment Act.* Hence, Ms. Marinos is only entitled to 10 days' pay. Moreover, she is not entitled to damages for wrongful dismissal and mental distress as requested by Mr. Letendre in his opening remarks. In this regard, Mr. Newman referred me to the decision in *Lussier* (Federal Court of Appeal No. A-1235-91, unreported); *Gendron* (Board files 166-2-22152 and 22164); and *Canada (Attorney General) v. Hester* [1997] 2 F.C. 706. There is simply no basis for awarding damages for pain and suffering. The employer is under no obligation to offer term employment to persons hired on a casual basis.

Mr. Richard Letendre, counsel for the grievor, submitted that the evidence demonstrates that the employer would have renewed indefinitely Ms. Marinos' offer of employment. The employer has a serious need for the services of correctional officers. Mr. Letendre explained that the provision of the *Public Service Employment Act* on which the employer is relying to consider Ms. Marinos a person employed on a casual basis is an artifice. The case of Ms. Marinos does not fall under section 21.2 of the *Public Service Employment Act.* The employer is merely trying to skirt the law.

Mr. Letendre insisted that the evidence demonstrates that Ms. Marinos would have continued her employment had she not been dismissed. The employer limited artificially her number of working days. The facts are that her services were required continuously and this limitation is an administrative manipulation of the law. The need for correctional services is a reality. Thus, Ms. Marinos was not appointed under section 21.2 of the *Public Service Employment Act.* She was an indeterminate employee. Mr. Letendre added that the three offers of employment have no probative

value and they are a tool to skirt the law. He argued that the employer conceded the grievance concerning the termination of her employment. Ms. Marinos requested that she be reinstated. In light of the employer's actions, Ms. Marinos is entitled further to damages for the improper termination of her employment and for mental distress, and the reimbursement of her legal expenses.

Concerning her request for reinstatement, Mr. Letendre distinguished the jurisprudence cited by Mr. Newman. Mr. Letendre submitted that in the case of Ms. Marinos, there was a serious need for her services. The Cowansville Institution has a severe and chronic need for correctional officers. There is a consistent lack of at least seven correctional officers and Ms. Marinos' services were used regularly during her seven months' service. Hence, had Ms. Marinos' employment not been terminated, she would have worked regularly and there was continuous employment in the case of Ms. Marinos. An adjudicator has the authority to render Ms. Marinos whole and reinstate her in the position she occupied prior to her unjust dismissal. Moreover, the evidence is to the effect that Ms. Marinos would have been offered further and subsequent contracts. Her "offer of employment" would have been renewed indefinitely. The 90-day limit provided under section 21.2 of the *Public Service Employment Act* is an administrative fiction. This 90-day period is not constraining because, had Ms. Marinos' employment not been terminated, she would still be employed.

With respect to Ms. Marinos' claim for damages for wrongful dismissal and mental distress, Mr. Letendre cited *Patcom Inc. v. Arseneault*, D.T.E. 95T-68; *Compagnie canadienne d'équipement de bureau v. Blouin*, D.T.E. 94T-563 and *Puxley* (supra). Mr. Letendre explained that Ms. Marinos is entitled to damages for wrongful dismissal and mental distress in the amount of $6,000. Mr. Letendre referred to the Supreme Court of Canada decisions in *Murray Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 and *New Brunswick v. O'Leary* [1995] 2 S.C.R. 967 and concluded that an adjudicator has the authority to grant damages to compensate a grievor who was unjustly dismissed.

Mr. Newman replied that the decisions cited by Mr. Letendre in support of Ms. Marinos' claim for damages have no application in this case. Mr. Newman referred to the text *Canadian Labour Arbitration*, Third edition, chapter 2:1410, by

Messrs. Brown and Beatty and pointed out that arbitrators have recognized the general rule that damages should be restricted to remedying monetary loss and not be awarded generally for hurt feelings or loss of reputation which may flow from an unjust dismissal.

Mr. Newman explained that the courts only in the rarest of cases will grant damages over and above actual monetary loss (salary and benefits) in employment matters. Mr. Newman added that there are no special circumstances in this case which would even permit an adjudicator to consider corrective action over and above the actual monetary loss of Ms. Marinos as a result of not being permitted to complete her term of employment, assuming an adjudicator would have such jurisdiction.

Reasons for Decision

The evidence demonstrated that as of January 5, 1996, Ms. Marinos was employed at the Cowansville Institution on the basis of her acceptance of three consecutive offers of employment. Had Ms. Marinos' employment not been terminated on July 16, 1996, she would have signed the last offer of employment for a term ending on September 30, 1996 (Exhibit 1). Each of these offers of employment stipulates identical terms and conditions of employment except for the particular three-month period covered. They provide clearly that the period is for three months, that she is not subject to the provisions of the *Public Service Employment Act*, other than section 21.2, and she could not work more than 125 days within a 12-month period. Furthermore, the offer of employment could not be interpreted and considered as an offer for indeterminate employment (Exhibit 1).

The employer required Ms. Marinos to enter into a separate agreement for each of the three-month periods. The evidence showed that at the end of the first two three-month periods, the employer provided a new offer of employment. The third and last offer of employment stipulates that the period covered commenced on July 3, 1996 and ended September 30, 1996. It is clear that the periods were not simply extended but that new contracts were offered.

Moreover, these three consecutive offers of employment and the evidence that some of the correctional offers were offered full-time term appointments consecutive to these three-month "casual" offers of employment, are not indicative and evidence

that Ms. Marinos' employment would have continued indefinitely. Even though the employer may have had a need for the services of correctional officers and there were a number of vacant positions, this does not necessarily translate into a permanent or indeterminate position for Ms. Marinos. I have no authority to make appointments. This falls under the exclusive authority of the Public Service Commission and the employer. Furthermore, the employer has the absolute authority and right to decide whether Ms. Marinos' services were or were not to be continued. It was up to the employer to decide whether or not to make further offers of employment. In this regard, Mr. Roger Young, former Board Member of this Board, decided in the *Laird* (supra) decision, at pages 33 and 34:

> *While, on the evidence before me, I believe that Ms. Laird was worthy of having her contract renewed in priority to either Ms. Burningham or Ms. Banks, it is clear that I have no authority to declare this to be the case as this would be tantamount to making an appointment and, thus, beyond my jurisdiction. Although I am inclined to feel that Ms. Laird has a moral claim to compensation beyond 30 June 1989, possibly for as much as a year past that date, I make no order in this regard for want of authority to do so.*

I concur with Mr. Young's interpretation of the *PSSRA* and his conclusion that an adjudicator has no authority to renew a term appointment which is tantamount to making an appointment.

In the case of Ms. Marinos, the evidence is to the effect that there was simply no guarantee that her last 90-day term of employment would have been renewed or extended indefinitely. The grievor submitted evidence that some persons who had been employed in a similar fashion had had their employment extended beyond the 125-day limit specified in subsection 21.2(2) of the *Public Service Employment Act* by means of an offer of a full-time term appointment. However, there is no evidence that all correctional officers employed on a 90-day offer of employment pursuant to subsection 21.2(1) of the *Public Service Employment Act* had been offered full-time term appointments. On the basis of the evidence adduced and the authority conferred on me as an adjudicator under the *PSSRA*, I conclude that Ms. Marinos is only entitled to remuneration up to the expiry date of her last contract, namely, September 30, 1996, and provided it does not exceed 125 days in any year. The

evidence is that she had already worked 115 days as of July 17, 1996. Thus, Ms. Marinos is only entitled to a further 10 days of compensation.

Concerning her claim for damages for the termination of her employment and mental distress, the award of compensation beyond lost wages and terms and conditions of employment provided in the collective agreement is extremely rare and I found no decisions of this Board in this regard, except for the *Lussier* (supra) case where the Federal Court of Appeal decided that an adjudicator under the *PSSRA* could not award punitive damages, and *Canada (Attorney General) v. Hester* (supra). In *Hester*, Gibson, J. of the Federal Court of Canada, Trial Division, was seized of only one issue: Did the adjudicator exceed his jurisdiction under the *PSSRA* or err in law when he ordered the employer to grant the grievor an additional day of leave in excess of his entitlements under the terms of the collective agreement? Gibson, J. wrote that the adjudicator had the authority to impose a remedy in circumstances where it found the grievor to have suffered a loss. However, Gibson, J. found that the remedy awarded by the adjudicator was punitive in nature. The Court added that the adjudicator in making such an award in the nature of an award of punitive damages had exceeded his jurisdiction and erred in law on the ground that there was no evidence on the face of the adjudicator's decision and on the record before the Court to justify such a remedy in the nature of punitive damages (page 717).

In *Vorvis v. Insurance Corporation of British Columbia* [1989] 1 S.C.R. 1085, Mr. Justice McIntyre decided that (pages 1107 and 1108):

> *... punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. ... where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and of punishment. ...*

In addition, Arbitrator Bora Laskin, Q.C., as he was then, decided on July 3, 1964, in the case of *Re Brotherhood of Maintenance of Way Employees and Canadian Pacific Railway Co.*, 15 L.A.C. 160, that:

> *... the grievor* [was] *not entitled to compensation for the unfavourable community atmosphere created against him by reason of his dismissal, since this* [was] *not a compensable item flowing from the breach of the collective agreement by the company.*

Furthermore, on October 30, 1997, the Supreme Court of Canada rendered a decision in the case of *Jack Wallace v. United Grain Growers Limited* (File No.: 24986). The *Wallace* case concerned a number of issues, one of which was the award of damages for mental distress. The termination of Mr. Wallace's employment and the allegations of cause created emotional difficulties for him and he was forced to seek psychiatric help. He was unsuccessful in finding similar employment. He commenced an action for wrongful dismissal and claimed, in addition, punitive and aggravated damages. The Manitoba Court of Queen's Bench awarded him damages for wrongful dismissal based on a 24-month notice period and $15,000 in aggravated damages resulting from mental distress in both tort and contract. However, the trial judge refused to award punitive damages. The Court of Appeal for Manitoba reduced the notice period to 15 months and overturned the award of aggravated damages.

Iacobucci, J., wrote for the majority of the Supreme Court that the trial judge in an action for wrongful dismissal has discretion to extend the period of reasonable notice to which an employee is entitled. Bad faith conduct by the employer in the manner of dismissal is a factor that is properly compensated by an addition to the notice period. The majority of the Supreme Court restored the 24-month notice period awarded by the Trial Judge but did not award either aggravated or punitive damages to the employee.

At pages 27 and 28, the majority of the Supreme Court of Canada clearly stated that:

> *Relying upon the principles enunciated in Vorvis, supra, the Court of Appeal held that any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination "must be founded on a separately actionable course of conduct" (p. 184). ....*
>
> *The Court of Appeal concluded that there was insufficient evidence to support a finding that the actions of UGG constituted a separate actionable wrong either in tort or in contract. I agree with these findings and see no reason to disturb them. ....*

Mr. Letendre has not convinced me that Ms. Marinos' case warrants the award of extra compensation for her pain and suffering. I am conscious that the decision of the employer to terminate her employment caused her great grief and embarrassment. However, in Ms. Marinos' case, even if I had jurisdiction to award aggravated damages in a proper case, she has failed to establish a separately actionable course of conduct and the evidence adduced did not convince me to grant her request to be awarded $6,000 for damages for wrongful dismissal and mental distress.

For these reasons, Ms. Marinos' grievance is granted in part. The employer is to compensate Ms. Marinos for all lost wages and benefits to which she was entitled for 10 days work.

Muriel Korngold Wexler,
Deputy Chairperson

OTTAWA, December 24, 1997.