

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

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BETWEEN

**BERNICE ROESSEL**

Grievor

and

**TREASURY BOARD  
(Canadian Heritage)**

Employer

***Before:*** [J. Barry Turner, Board Member](#)

***For the Grievor:*** Catherine O'Brien, Social Science Employees Association

***For the Employer:*** Agnes Levesque, Counsel

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Heard at Calgary, Alberta,  
January 23 and 24, 1997.

## DECISION

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Bernice Roessel, a former Socio-Economic Analyst, ES-03 classification level, Business Services, Parks Canada, Canadian Heritage, Calgary, Alberta, is grieving the improper application of the Work Force Adjustment Directive (WFA) under Article 33 of the collective agreement between the Treasury Board and the Economists', Sociologists', and Statisticians' Association (now called the Social Science Employees Association) covering all employees in the Economics, Sociology and Statistics Group, Code 208/90.

Her grievance which she submitted at the first level of the grievance procedure on August 18, 1995, reads:

*I grieve that I have been misled regarding my surplus situation and I have been treated unfairly and discriminated against with respect to the application of the Workforce Adjustment Directive.*

Paragraph 33.03(a)(12) of the collective agreement reads:

### ARTICLE 33

#### NATIONAL JOINT COUNCIL AGREEMENTS

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#### 33.03

*(a) The following directives, policies or regulations, as amended from time to time by National Joint Council recommendation and which have been approved by the Treasury Board of Canada, form part of this Collective Agreement:*

...

*(12) Workforce Adjustment Policy*

The grievor is requesting the following corrective action:

*As had been indicated to me by management, that my position be declared surplus and my request for cash-out be approved and expedited in a timely fashion.*

A request for the exclusion of witnesses was made and granted.

I am being asked to decide if the employer's action in denying the grievor's request for pay in lieu of unfulfilled surplus period was justified under the circumstances.

The hearing lasted two days with four witnesses testifying and twenty-four exhibits were submitted into evidence.

### Summary of Evidence

The following exhibits were admitted on consent: a memorandum from Steve Whittingham to Bernice Roessel dated August 20, 1995 regarding her request for leave without pay (Exhibit E-1); a letter from B. Roessel dated September 19, 1995 to Doug Stewart asking to be declared surplus under the WFA and offering her resignation (Exhibit E-2); an undated response from D. Stewart to Exhibit E-2 (Exhibit E-3); a letter from D. Stewart dated September 29, 1995 declining to accept the grievor's resignation (Exhibit E-4); a grievance response from Michel Desjardins, Departmental Liaison Officer, National Joint Council (NJC) dated November 21, 1995 to the grievor (Exhibit E-5); a letter from Donna Petrachenko, Regional Executive Director, Canadian Heritage, dated May 29, 1996 declaring the grievor surplus sent to Ms. Roessel (Exhibit E-6); a letter dated May 2, 1996 to D. Thompson from Fernand Lalonde, General Secretary, NJC, indicating the grievor should have been declared surplus and was not treated within the intent of the WFA (Exhibit G-2); a letter dated May 17, 1996 from D. Thompson to the grievor indicating she is to be declared surplus (Exhibit G-1).

It is important to note that even though the grievor was declared surplus by the employer on May 29, 1996 (Exhibit E-6) as a result of this grievance, she is still requesting the corrective action pay in lieu of unfulfilled surplus period as stated in sections 7.1 and 7.2 of the WFA.

Sections 7.1 and 7.2 read in part:

***Part VII***  
***Lump-sum payments***

***7.1 General***

*7.1.1 Not including the special provisions regarding contracting out, there are four possible lump-sum payments*

that may be made to employees under this directive. These are:

(a) *pay in lieu of unfulfilled surplus period;*

...

## **7.2 Pay in lieu of unfulfilled surplus period**

*7.2.1 When a surplus employee offers to resign before the end of the surplus period on the understanding that he or she will receive pay in lieu of unfulfilled surplus period, the deputy head may authorise a lump-sum payment equal to the surplus employee's regular pay for the balance of the surplus period, up to a maximum of six months.*

*7.2.2 Approval of pay in lieu of unfulfilled surplus period is at the discretion of management, but shall not be unreasonably denied.*

During 1995, at the time of the grievance, Canadian Heritage was a Least Affected Department (LAD). On June 25, 1996 it became a Most Affected Department (MAD).

1. Bernice Roessel joined the Public Service, Parks Canada, in 1992. At a group meeting in January, 1995, her Director, David Bowes, said their regional office was going to be downsized approximately fifty percent; everyone was affected; there would be no opportunities for promotion or advancement for three years; those who wished to do so should begin to seek opportunities outside the Public Service. In March 1995 the Deputy Head, Marc Rochon, gave a speech to the staff (Exhibit G-3), part of which reads on page 4:

...

*This will happen, despite the downsizing in government, because we intend to carry out our reductions gradually to ensure that they are as humane and fair as possible, and so that we can maintain our high-quality service.*

Even though she missed the speech, she later saw it on video and felt this was the same message Mr. Bowes gave in January, 1995. She concluded the downsizing would be done in a fair manner and decided to look for work elsewhere. Ms. Roessel was aware of the Canadian Heritage Employment Policy, March 1995 (Exhibit G-4), Part 5 - Financial Implications that reads in part:

## **5.2 Cash-outs**

### **5.2.1 Criteria for Approval of Cash-outs**

*The following criteria for approval are intended to clarify for managers the conditions under which the Deputy Minister will approve a cash-out payment:*

- the reason why the employee's position has been declared surplus;*
- proof that the cash-out will result in a net reduction in resources for the Department;*
- proof that the employee's work will cease to be performed the day of the employee's departure and that no additional resources will be used to perform the work in some other manner;*
- proof (Classification Action Form TB 330) of the discontinuance of the position where there is a lack of work or discontinuance of a function;*
- assurance that the recommendation of a cash-out is not being used as a retirement incentive;*
- proof that the cash-out is not being given to an employee on leave without pay; and*
- proof that the employee will resign before the end of his surplus period and will relinquish all priority rights in exchange for the cash-out (maximum of six months).*

*The employee must agree to certain conditions in order to receive the cash-out. These conditions are described by type of work force adjustment action in Section 5.2.3.*

### **5.2.3 Types of Cash-Outs by Work Force Adjustment Action**

#### **5.2.3.1 Lack of Work or Discontinuance of a Function**

*A surplus employee who volunteers to resign and who relinquishes all priority rights before the end of his surplus period is entitled to a cash-out payment equivalent to his normal pay for the remainder of the surplus period, to a maximum of six months.*

On April 21, 1995, the grievor met with Mr. Bowes to talk about a possible move to the Vancouver office as an ES-04. He told her she was affected but he could not offer her any guarantees. She decided not to pursue this for personal reasons. On April 26, 1995 she went to a showcase to learn about cash-outs, tax implications, and so on. By May, the situation had become very stressful, so her group and the business planning group met on May 9 with Directors Bowes, Doug Stewart, and the Regional Executive Director (RED), Donna Petrachenko. The grievor testified that Mr. Stewart used a proposed organizational chart (Exhibit G-5) that showed on page 2, their two existing groups of 18 persons was going to become one Business Services group with only eight persons. Mr. Stewart told them, if someone was interested in leaving, he or she should notify him or Mr. Bowes as soon as possible. The grievor's position was not on page 2 of Exhibit G-5. She assumed it was therefore gone. She added that an overhead of a flow chart (Exhibit G-6) was also shown that outlined what steps to follow depending on the outcome to the continuation of a function. Her understanding as a result of this meeting and the WFA, was that for those who wanted to leave, there would be a cash incentive to go partly in order to assist those who wanted to stay. She told Doug Bowes on the afternoon of May 9 that she was interested in a cash-out. He told her to let him know for sure as soon as possible.

On May 10, 1995, Doug Stewart gave a speech to the staff (Exhibit G-7) that she missed but later saw on video and received a copy of. Part of the speech reads on page 1:

*HOWEVER, I CAN TELL YOU NOW THAT WHAT WILL BE PRESENTED AND DISCUSSED HERE THIS AFTERNOON HAS BEEN APPROVED BY THE REGIONAL EXECUTIVE DIRECTOR AND CAN NOW BE CONSIDERED FINAL.*

Mr. Stewart went on to say at page 8:

*... WE WILL USE THE HUMAN RESOURCE STRATEGY IN THE PARKS CANADA BUSINESS PLAN AS OUR BASE FOR HUMAN RESOURCE MANAGEMENT. A COPY OF THIS IS INCLUDED IN THE PACKAGE OF INFORMATION WHICH WILL BE AVAILABLE AFTER THIS MEETING. I AND ALL OF THE MANAGERS WILL CONTINUE IN OUR COMMITMENT TO SHARE INFORMATION AND TO HAVE OPEN AND EASY COMMUNICATION WITH STAFF. WE WILL IMPLEMENT THIS ORGANIZATION USING FAIR AND EQUITABLE PROCESSES.*

The grievor felt this meant that everyone would be treated the same. She identified an extract from the Department's Human Resources Strategy (Exhibit G-8) that also reads in part, in Chapter 6.2, Strategic Objectives for Human Resource Management:

*Ensure that Parks Canada, as part of the Department of Canadian Heritage:*

...

- *respects the Workforce Adjustment Directive while implementing the restructuring required to achieve the goals and objectives of the Business Plan;*

...

She referred as well to Chapter 6.3, Managerial Accountability that reads in part:

*Managers with responsibility for the Parks Canada Program are accountable for the following human resource management results in the context of Business Plan implementation:*

...

5. *dealing with employees in a respectful manner with full recognition of their rights and interests where Business Plan implementation results in a change in employment status. To the greatest extent possible individual solutions for individuals who are effected will be developed in consultation with those individuals;*

...

Ms. Roessel understood that the WFA would apply to her and she would have to be declared surplus to get a cash-out.

On June 1, 1995, the grievor told Doug Stewart that she wanted to leave with the cash-out option. He told her he did not foresee any problems with her request, and that he would take it to the July meeting of the Alberta Regional Employment Committee (AREC) set up to deal with the downsizing.

On June 28 she attended a staff meeting chaired by Mr. Stewart that showed what positions were being affected (Exhibit G-9). Under the new combined Business Services group, her position was gone, but under the discussion of surplus positions,

Business Services, it appeared as position number 34977 along with her colleague's Paul Lauzon also an ES-03, in position number 34854. Under the proposed new positions for Business Services on page 6/7 of Exhibit G-9, there was only one ES-03 position now called Investment Analyst, with a staffing action indicated as RJO Deployment; RJO meaning reasonable job offer. Ms. Roessel added that, since she wanted to leave, it would be easy for management to choose the only other ES-03 person, Paul Lauzon, to fill this new position.

The grievor said she signed but did not date a form requesting the cash-out. Mr. Stewart was going to take this to the July AREC meeting. She testified that on July 13, 1995, Mr. Stewart told her that the July 5 AREC meeting (Exhibit G-10) delayed making a decision on her request pending the making of a reasonable job offer to her. He said to her that there were two ES-03's and the new organization only needed one, so she should leave the Department and he would process this as a formality at the August AREC meeting.

A closer examination of Exhibit G-10, the July AREC minutes, Appendix 4, New Requests For Surplus/ERI/Cashouts, reads:

...

*b) Bernice Roessel, ES-03; defer pending completion of project work in Business Planning*

...

The grievor said the above was new to her, since in May, staff were told work would have to be re-organized and re-prioritized and that Mr. Stewart had never mentioned anything to her about the completion of project work before or after July 13. Ms. Roessel met on July 31 with Mr. Stewart, his assistant Donna Lee Lentz, and a union representative, Robin Turner-Gyorgy from the Professional Institute of the Public Service of Canada (PIPSC) to advise her. She told Mr. Stewart she was going to file a grievance since she now felt her request was being unreasonably held up. Mr. Stewart asked her not to grieve because he felt that at the August AREC meeting he would be able to resolve the matter. She decided to wait. On August 17, 1995, Steve Whittingham, who had replaced Mr. Stewart at the August 16 AREC meeting (Exhibit G-11), called her to say her request for cash-out had been denied and the employer was going to give her a job offer as an AS-4 since they now apparently had



more positions than persons. She inquired about an alternation process to find a substitute for her to swap positions to allow her to leave. The grievor testified that Mr. Whittingham said the swapping policy was not yet complete but should be in a few weeks. Ms. Roessel told him that the offer of an AS-4 position was not reasonable because it was at a lower pay level than an ES-03. She grieved on August 18.

Ms. Roessel had been on annual leave from the beginning of July until mid-August, followed by marriage leave that took her until almost the end of August after her marriage on August 19. When her leave ran out, it had been almost three months since she first told Mr. Stewart she wanted a cash-out. She requested personal leave for three months without pay but only had three weeks approved by Mr. Whittingham on August 28, 1995 (Exhibit E-1). On September 8, Ms. Roessel met with Mr. Stewart who told her the Department was in the process of declaring her surplus and was going to give her a RJO. He approved three months personal leave thinking her situation would be resolved by then. A series of letters followed (Exhibits E-2, E-3, E-4 and E-5) that denied her grievance. She was finally declared surplus on May 29, 1996, one year less two days from her initial request on June 1, 1995, and after the NJC decided on April 17, 1996 that she should have been declared surplus (Exhibit G-2).

The grievor started at another job with Calgary Co-op in July, 1995.

Paragraph 3, page 2 of Exhibit E-6 her surplus letter dated May 29, 1996 reads in part:

*Another possibility offered under the NJC Workforce Adjustment Directive is a lump sum payment equal to the salary that you would normally receive during the balance of the surplus period, up to a maximum of six months. ...*

The grievor said she believed all along that she could have requested pay in lieu of unfulfilled surplus and that she met the criteria for approval of cash-outs in Exhibit G-4, 5.2.1 without a RJO.

Ms. Roessel added that even though the proposed Human Resources action plan (Exhibit G-9) came out later in June, she told Mr. Stewart on June 1 that she wanted to leave.

Ms. Roessel added that she liked her job at Parks Canada but that Mr. Bowes' comments in January, 1995 scared her and caused a lot of stress and tension in the office, so she sought work elsewhere especially when she heard about the cash-out opportunity. She said Mr. Stewart is a man of his word and that all who went before her had their requests approved, especially Mr. deLange who had his done in a week.

During cross-examination, Ms. Roessel said she did not know if Exhibit G-5, the organizational chart presented on May 9, was official or not but the Regional Executive Director was at the meeting and the grievor's position was not on the chart. She believed on May 9 that what she saw on Exhibit G-5 was going to happen. The more detailed plan (Exhibit G-9) was presented in late June, long after she advised Mr. Stewart she wanted to leave. Ms. Roessel believed Exhibit G-9 was prepared to accommodate employees who wished to leave. She agreed that Mr. Stewart made it clear to her that he did not have final say in the decision, but she added he implied her request would be approved. She said that she took a new job at the Calgary Co-op because she wanted somewhere else to go before the final decision from Parks Canada. She added that Mr. Stewart told her she was a good employee and that he was disappointed that she wanted to leave. Nonetheless because there was so much uncertainty in her office, she still wanted to leave. The cash-out was the incentive to leave.

Ms. Roessel acknowledged a letter from Gloria Roach, dated December 4, 1995 (Exhibit E-7), asking her if she wished to be considered for the ES-03 position in Business Services to which she responded with a letter on December 11, 1995 (Exhibit E-8), saying she had already been declared surplus in her mind because of what Mr. Stewart wrote to her in his undated letter (Exhibit E-3). Exhibit E-3 reads in part in paragraph 2:

*You are quite correct in your interpretation of 1.1.7 of the Workforce Adjustment Directive, and we are in the process of now declaring your position surplus to requirements.*

She noted that Exhibit E-3 also talked about a reasonable job offer that she said was also referred to in Ms. Petrachenko's letter (Exhibit E-6) almost one year after she advised Mr. Stewart she wanted the cash-out. Paragraph 3 of Exhibit E-3 reads:

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*Your request, under 7.2.1 of the Directive, tendering your resignation on the understanding that you will received (sic) six months pay in lieu has been noted. However, it is the Department's intention to make you a reasonable job offer, under 1.1.14 of the Directive. Your option of resigning is, of course, your choice.*

Ms. Roessel acknowledged receiving a job offer in a letter from Gloria Roach dated May 29, 1996 (Exhibit E-9) as a Socio-Economic Analyst, position number 4415-34854/ES-03. She declined this offer in a letter dated June 11, 1996 (Exhibit E-10).

During re-examination, Ms. Roessel pointed out on Exhibit G-9, Surplus Positions, her position was listed under Business Services on page 6. Ms. Roach's letter of December 4, 1995 (Exhibit E-7) that asked her if she was interested in being considered for an ES-03 position related to a position which was encumbered by Paul Lauzon. She added that the position number 4415-34854/ES-03 referred to in Exhibit E-9 dated May 29, 1996, is Paul Lauzon's position number that was also listed on Exhibit G-9, page 6 in June, 1995 as surplus as well. She added Mr. Lauzon left Parks Canada in June, 1996.

In June, 1995, the grievor thought this entire episode would be clear cut.

2. David deLange, former Manager, Strategic Research Analysis, Parks Canada, worked in the Alberta Regional office for fourteen years. He was the grievor's direct supervisor in 1995. He testified that in January, 1995, David Bowes told his unit that there was going to be a fifty percent downsizing exercise with no positions exempt and that staff should look for other work immediately. He was shocked, and categorized this and subsequent actions as "the worst display of management I have ever seen in my life". He added that it was stressful for all employees since he felt they were left on their own.

The witness had seen the Deputy Minister's speech from March, 1995 (Exhibit G-3) and concluded from it that the Department was going to look after the best interests of its employees. Page 4, paragraph 2 of Exhibit G-3 reads:

*This will happen, despite the downsizing in government, because we intend to carry out our reductions gradually to*

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*ensure that they are as humane and fair as possible, and so that we can maintain our high-quality service.*

Mr. deLange added that in early 1995 he could not get a straight message from the senior executive how anything was going to proceed. He said a turf war began between Mr. Bowes and Mr. Stewart to see who would acquire Mr. deLange's unit. He went to see the Regional Executive Director (RED) to tell her that he felt his staff were not being well treated.

A meeting was arranged on May 9, 1995 for all concerned in the Regional Executive Director's Boardroom during which Mr. Stewart used Exhibits G-5 and G-6, organizational charts to explain to staff what was going to happen. The RED joined them part way through the meeting. Mr. deLange said that Mr. Stewart told the staff that if they wanted to leave they should say so as soon as possible and that everyone was going to be treated in a fair manner. Mr. deLange said they were told at this meeting that it was the employee's choice to request a cash-out, as a way to make room for those who wanted to stay.

Mr. deLange said that for the new Investment Analyst positions on page 2 of Exhibit G-5, there would be a competitive process. If someone wanted to leave the Department, they should do this early enough before the positions on the new organizational chart were classified. He testified that the next day, May 10, there was a larger meeting to bring all staff up-to-date on Exhibits G-5 and G-6.

Mr. deLange told Mr. Stewart on May 10 that he would be leaving and wanted the cash-out. His request was expedited as was a colleague's, Mark Cameron. Mr. deLange left in a couple of weeks.

The witness said he gave a copy of the criteria for approval of cash-outs (Exhibit G-4) to his staff. He added that the Deputy Head and Mr. Stewart said they would be fair to everyone and in his case they were. His workload never came up in any discussions.

As far as Ms. Roessel was concerned, he said there was never any indication that her position was going to stay. They were told the investment analyst positions: "were up for grabs". Mr. deLange advised the grievor to speak to Mr. Stewart about her interest in a cash-out as soon as possible. He said there were no discussions how

outside job offers might affect the process for anyone; he added that the employer's message at the January, 1995 meeting was clear: "Go elsewhere". He said the RJO option was always the choice of an employee and that this was made clear to everyone at the meeting with Mr. Bowes, Mr. Stewart and the RED. Mr. deLange said that the reference in Exhibit G-8, page 3, number 5, recognizing rights and interests of employees where a business plan implementation results in a change in employment status as referred to is consistent with what the Deputy Head and Mr. Stewart told the employees.

When asked if Ms. Roessel was treated fairly, he responded: "Absolutely not. Her situation was almost identical to mine and Mark Cameron's, yet ours were resolved in a matter of days."

During cross-examination, Mr. deLange said he knew that the Deputy Head had to give final approval for his cash-out. One of his projects was contracted out because there was no one else at Parks Canada who could do his job. Because of all the confusion about everyone's future between January and May, 1995, he trusted no one, since there was a "total lack of leadership during early 1995".

3. Robin Turner-Gyorgy has worked at the Parks Canada regional office in Calgary as an Historic Parks Planner since 1989. She was Chairman of the PIPSC response team to workforce adjustments and received special training on this from PIPSC. She helped the grievor in 1995 by giving her information on presenting her grievance. She identified a memorandum to all staff from Mr. Stewart dated May 4, 1995 (Exhibit G-12) that reads:

*The announcement of the new organization will be made early next week. If you want to take the 50/10 or the cash out, it is very important that you let me know, **as quickly as possible**, as some benefits will no longer be available after June 15, 1995. You should make an appointment to see me, **no later than May 11, 1995**. At that time, I will be able to go over the organization with you, and answer any questions you may have on it. Would you please phone Evelyne Middleton at 292-6592 and she will set it up for you.*

She said anyone who wanted to leave should have informed their manager as soon as possible. She agreed the grievor met the requirements of the WFA and that is why she assisted her.

During cross-examination, Ms. Turner-Gyorgy agreed that the Deputy Head has final say regarding the WFA. She is now an affected employee and has asked for the cash-out since her position is now gone from the organizational chart.

4. Doug Stewart, the current Director, Professional, Technical, and Corporate Services has been with Parks Canada for nineteen years. He was previously Director, Professional and Technical Services in 1995. He testified that the organizational chart in Exhibit G-5, page 1 reflected the new management structure in May, 1995, and that page 2 showing the proposed positions for the new Business Services was an early version but was not final. Business Services was a combination of Professional and Technical Services and Corporate Services as of April 1, 1995.

Mr. Stewart believed the employees in Corporate Services under Mr. Bowes, where Ms. Roessel worked, were first told about the upcoming downsizing in late December, 1994 or early 1995. He identified a list of staff meetings and meetings with Ms. Roessel as Exhibit E-11.

The witness said the overall message the Department tried to create regarding the WFA was an open, optimistic approach, with a three year time frame that encouraged volunteers to come forward who wished to leave. The AREC would recommend departures but the Deputy Head gave final approval. He identified a memorandum sent to all staff on April 7, 1995 after the Deputy Head's visit, that expressed caution regarding cash-outs (Exhibit E-12). It reads in part:

*I would advise staff to be very careful in making decisions based on assumption. Although the cash-out provisions will be available, all authority in this regard rests with the Deputy Minister and is subject to both scrutiny and discretion. The number one requirement for cash-out consideration will be the legitimate surplus declaration of the incumbent in a function being discontinued or downsized. In other words, it is entirely possible a request for cash-out could be denied in certain circumstances.*

Mr. Stewart said Ms. Roessel first told him on May 9 that she was interested in a cash-out and confirmed that she indeed wanted it on June 1, 1995. He thought that, since there were two ES-03's and the new organization was only going to have one, this was an opportunity to do some downsizing. He told Ms. Roessel he would take her request to the AREC and did so on July 5, 1995 after putting her name forward on

June 8. He added that she wanted to leave because she had career advancement concerns because of the downsizing and she had been offered another job outside government.

Mr. Stewart testified that by July, 1995, it was becoming clear that the Department was not going to have an open door policy on cash-outs and that this option was becoming more complex.

Mr. Stewart presented her request at the July 5 AREC but it was deferred pending RJO needs. He asked Ms. Roessel to delay her grievance until after the August 16 AREC meeting. Steve Whittingham replaced Mr. Stewart at this meeting. Her request for cash-out was refused. Not all cash-outs were approved. The witness said Mr. deLange's cash-out was approved in a week in May because at the time it was more "clear cut", since he was an ES-6 at a high salary, and was probably going to be re-classified and would have required a high salary protection.

Regarding Ms. Roessel, he said there was no need to do a reverse order of merit exercise since there were only two ES-03's and she wanted to leave. With reference to Exhibit G-11, Appendix 2, the Minutes of the AREC meeting of August 16, 1995, the decision part, Mr. Stewart did not believe that Ms. Roessel ever proposed an "alternation" process. This decision reads:

*Surplus approved; no approval for Cashout as RJO available;  
wait on signing letter as "alternation" may be possible.*

He testified that the grievor was refused the cash-out because an AS-4 position was available to her as a RJO, even though it was not clear she would get this job since two IS-03's had to be evaluated for it.

When asked if he felt Ms. Roessel was treated unfairly or discriminated against, he said she was not, even though in early 1995, the Department was looking for volunteers but later on changed its view on the issue. There was a process to go through and headquarters became more cautious spending money on cash-outs. He added: "We wanted to make sure we were only approving cash-outs for people who could not get a RJO."

He recommended Ms. Roessel for the cash-out in July, 1995.

During cross-examination, Mr. Stewart said he had been aware of the WFA for many years and read its updates. He added there was no link between subsection 7.2.2 of the WFA and a RJO since they are two completely separate issues. Subsection 7.2.2 reads:

*7.2.2 Approval of pay in lieu of unfulfilled surplus period is at the discretion of management, but shall not be unreasonably denied.*

He agreed there was also no link therefore to subsection 7.2.2 and the decision cited above in Exhibit G-11, Appendix 2, regarding a RJO.

Mr. Stewart said the AREC agreed on a consensus basis but the RED could override the consensus.

When asked if Ms. Roessel's decision was deferred pending completion of project work as is stated in Exhibit G-10, Appendix 4, the Minutes of the AREC meeting of July 5, 1995, Mr. Stewart said: "No, it was deferred on the RJO issue".

Mr. Stewart was aware of subsections 1.1.14 and 1.1.15 of the WFA that read:

*1.1.14 Departments shall guarantee every affected or surplus employee who is both mobile and retrainable a reasonable job offer during the surplus period, and shall extend any such surplus period until at least one such offer has been made. Where practicable, a reasonable job offer shall be within the employee's headquarters area as defined in the Travel Policy. Deputy heads shall apply this directive so as to keep actual involuntary lay-offs to a minimum, and lay-offs shall normally only occur where an individual has refused a reasonable job offer, or is not mobile, or cannot be retrained within two years, or is laid off at his or her own request.*

*1.1.15 Appointment of surplus employees to alternative positions, whether with or without retraining, shall normally be at a level equivalent to that previously held by the employee, but this does not preclude appointment to a higher or lower level. Departments shall avoid appointment to a lower level except where all other avenues have been exhausted.*

Regarding a RJO to Ms. Roessel as an AS-4, Mr. Stewart agreed that her ES-03 and an AS-4 were not equivalent positions since the AS-4 was at a lower salary range.



Mr. Stewart said that since one ES-03 position had to go and Ms. Roessel volunteered, he felt her ES-03 position would go. The new organization positions on Exhibit G-5 were classified over many months between May and December, 1995. When the grievor grieved, the new positions had not been classified. He agreed both ES-03 positions in the new Human Resources action plan were identified in Exhibit G-9 under surplus positions, and he was aware in June, 1995 when Exhibit G-9 was produced, that Ms. Roessel wanted a cash-out.

Mr. Stewart said that the new organization map or lay-out (Exhibit G-6) did not exist on May 9 but was prepared in June. Mr. Stewart also said that at the May 10 staff meeting someone asked if the cash-out was the employee's decision; he responded it was the employee's choice but management's decision.

When asked what he meant by the opening paragraph in his speech at the staff meeting on May 10 (Exhibit G-7), Mr. Stewart said the new organization could not have been 'final' since the charts were not signed off yet. Paragraph one of Exhibit G-7 reads in part:

*... HOWEVER, I CAN TELL YOU NOW THAT WHAT WILL BE PRESENTED AND DISCUSSED HERE THIS AFTERNOON HAS BEEN APPROVED BY THE REGIONAL EXECUTIVE DIRECTOR AND CAN NOW BE CONSIDERED FINAL.*

When asked if he could understand how an employee could have been misled by the above paragraph he responded: "No, I went on in the meeting to explain more". It appeared confusing here regarding Exhibit G-9 with five continued functions under Business Services on page 3, and six proposed new ones on page 11, for a total of eleven. If one looks at page 2 of Exhibit G-5, the organizational chart for Business Services, there are eight positions.

Mr. Stewart said as far as the new Human Resources Management Strategy (Exhibit G-8) was concerned, he and his colleagues were not going to deal with affected employees in the normal bureaucratic fashion. He also added it was better value to the Crown to try to do fewer cash-outs; otherwise they might have overshot their downsizing targets. He said: "Justifying cash-outs changed as time went on".

He did not know if her proposal for cash-out was ever sent to the Deputy Head, but he recalled telling the grievor the RED had the ultimate decision in Calgary and

that he told her about the RJO requirement in July. At the July AREC meeting, Mr. Stewart was only aware of Pat Inglis being turned down for cash-out. Regarding the August AREC meeting in Mr. Stewart's view, alternation was "never on the table for Ms. Roessel".

Mr. Stewart recalled meeting with the grievor on July 31 and saying to her that she should probably be prepared to put in her grievance after the AREC meeting in August. He testified his sense was that an AS-4 was not a good job offer for Ms. Roessel because it constituted salary protection for the Department of around \$5,000. She would have been underemployed, and other employees within the Department might have also been considered for the AS-4 position.

Mr. Stewart could not say if a surplus employee who refused a RJO would be laid off or not. He could also not recall if Ms. Roessel wrote to him to say she did not wish to be redeployed. He added that Canadian Heritage is now a Most Affected Department (MAD), that the grievor's employer was the Government of Canada and that his Department changed its interpretation of the WFA process as the downsizing exercise evolved after the RED consulted with headquarters in Ottawa.

During re-examination regarding the organizational charts (Exhibit G-5), Mr. Stewart said they were just intended to show the staff what Business Services was eventually going to look like down the road.

#### Argument for the Grievor

Ms. O'Brien referred me to subsections 1.1.15, 1.1.31, 1.1.32, 7.1.1(a), 7.2.1, 7.2.2, 7.2.3 of the WFA all dated July 14, 1995. She argued the Executive Committee of the National Joint Council (NJC) decided that the employer breached subsection 1.1.7 of the WFA by failing to declare the grievor surplus. She was consequently not granted pay in lieu of unfulfilled surplus period and there was therefore a breach of paragraph 7.1.1(a) of the WFA. Under subsection 7.2.1 the Deputy Head may authorize a lump-sum payment but the grievor's request was never sent to the Deputy Head. She added that under subsection 7.2.2 of the WFA, approval of pay in lieu of unfulfilled surplus is at the discretion of management and shall not be unreasonably denied, but there is no evidence AREC had a mandate to deny pay in lieu of unfulfilled surplus. Ms. O'Brien reminded me that the Deputy Head said in his

speech (Exhibit G-3, page 8) that the AREC could review all staffing actions but only the WFA could deal with pay in lieu of unfulfilled surplus period.

She argued Mr. Stewart did not attend the AREC in August and no one who did attend this meeting appeared before me; therefore, the AREC decision in August 1995 set out in Exhibit G-11, Appendix 2, is only hearsay. She reminded me that Mr. Stewart testified that the decision part from the July AREC meeting (Exhibit G-10) did in fact not properly reflect his recollection of why Ms. Roessel's request was denied and is therefore a contradiction. Ms. O'Brien reminded me that the RED tendered no evidence.

Under subsection 7.2.3 of the WFA that refers to the discontinuance of an employee's work, Ms. O'Brien reminded me that this never arose in Ms. Roessel's case, especially since the grievor was away for most of July and August, 1995. There was therefore no breach of subsection 7.2.3. She reminded me of the Deputy Head's words in Exhibit G-3, page 4 that read in part:

...

*This will happen, despite the downsizing in government, because we intend to carry out our reductions gradually to ensure that they are as humane and fair as possible, and so that we can maintain our high-quality service.*

Ms. O'Brien argued that the grievor met all the requirements for cash-out criteria in the extract from the March, 1995 Employment Policy (Exhibit G-4), in subsection 5.2.1 and in subsection 5.2.3, the reference to discontinuance of a function.

Regarding Mr. Stewart's speech on May 10, 1995 (Exhibit G-7), both Mr. deLange and Ms. Roessel testified that they felt the organizational charts were approved especially when Mr. Stewart said what he was going to present "can now be considered final". This included the organizational charts (Exhibits G-5 and G-6) and the Human Resource Management Strategy (Exhibit G-8). The decision to depart rested with the employee as was shown in Exhibit G-6. Ms. O'Brien wondered how could employees conclude otherwise, especially since the RED attended the meeting. Exhibit G-5 showed only eight positions for which there were eighteen persons available and Exhibit G-9, the June, 1995 Human Resources Action Plan, under continuance of

function Business Services, there were two positions noted that were to be reviewed on April 1, 1996 to further assess their continuance. This may have meant even greater downsizing. Exhibit G-9 showed the grievor listed under the surplus positions section. Ms. O'Brien argued that even the Human Resources Management Strategy (Exhibit G-8) must respect the WFA and talks about the need to consult with affected individuals.

Ms. O'Brien concluded that the grievor's request was not handled fairly, equitably or humanely, since the process for Mr. deLange was done in a week. The process seemed to change after June 1, 1995 for the grievor, especially since there were no staff meetings after May 10 until June 28 according to Exhibit E-11. The downsizing implementation process seemed to change from a people focus to a process focus. Ms. O'Brien could not see where the WFA pay in lieu reference tied into a RJO especially since the grievor was not advised of this on June 1, 1995. Mr. Stewart said pay in lieu and the RJO are two different issues. Ms. O'Brien agreed. The delay for the grievor was not typical and she never received an explanation why her request was not handled as others were.

Mr. Bowes said in January, 1995 to seek alternate employment. In May a new structure was presented with an ES-03 position gone with no job descriptions or job classifications done. By the time Exhibit G-9 came out with more details, the grievor had already said she wanted out. There was therefore no need for a reverse order of merit (ROM) exercise since there was going to be only one ES-03 left. Even if the employer offered the grievor an AS-4 position, it was at a lower level and was not reasonable according to subsection 1.1.15 of the WFA. In August the grievor was not yet surplus, nor was her name put to the Public Service Commission. Ms. O'Brien concluded it was clear to all concerned that the grievor did not wish to be redeployed as per subsection 1.1.32 of the WFA. Subsections 7.2.1 and 7.2.2 say nothing about a RJO.

The grievor did not act precipitously on June 1 or when she filed her grievance since she gave management ample opportunity to resolve the matter.

Ms. O'Brien argued that the grievor had been very patient and that the remedy she is asking for must be viewed as of the time she filed her grievance, not now. She

reminded me about Mr. Egan's memorandum (Exhibit E-12) in April, 1995 that reads in part:

*... The number one requirement for cash-out consideration will be the legitimate surplus declaration of the incumbent in a function being discontinued or downsized.*

Ms. Roessel should have been declared surplus and paid accordingly, since she was unfairly denied at the local regional level in Calgary.

### Argument for the Employer

Ms. Levesque referred me to the objectives of the WFA that read:

*It is the policy of the Treasury Board to minimize the impact of work force adjustment situations on indeterminate employees, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to affected employees. It is, however, recognized that it is impracticable to guarantee the continuation of a specific position or job. The emphasis of this directive is, therefore, upon the concept of employment security rather than job security. To this end, every indeterminate employee whose services will no longer be required because of a work force adjustment will be guaranteed a reasonable job offer within the Public Service, subject to the provisions of the directive.*

She also referred to the definition of a RJO in the WFA that reads:

*A reasonable job offer is an offer of indeterminate employment within the Public Service, normally at an equivalent level but not precluding higher or lower levels, and is guaranteed to an employee affected by normal work force adjustment who is both trainable and mobile. Where practicable, a reasonable job offer shall be within the employee's headquarters area as defined in the Travel Policy;*

Counsel also indicated she would argue subsections 1.1.1, 1.1.15 and 1.4.1(a) and (e). Ms. Levesque also referred to the Deputy Head's speech that indicates the Department intends to invest in its employees and their talents, that the downsizing was going to be done over a period of three years, and that the objective was to reach a balance between operational needs and the continuation of employment.

Counsel argued that after she read Mr. Stewart's speech (Exhibit G-7), if Ms. Roessel had any questions he was there to answer them. However, Ms. Levesque

concluded, the grievor was left with the impression that she wanted to have for her own reasons. She argued the grievor did not attend on the day Mr. Stewart spoke and that there were a lot of documents around, some not signed off yet.

Ms. Levesque referred me to Exhibit G-8, the Human Resource Management Strategy, in particular, section 6.3, number 6 and part of section 6.4. Section 6.3, number 6 reads:

*6.3 Managerial Accountability*

*Managers with responsibility for the Parks Canada Program are accountable for the following human resource management results in the context of Business Plan implementation:*

...

- 6. making every effort to minimize human resource impacts and to keep employees employed with Parks Canada or other federal agencies in some capacity, where the workforce must be adjusted to meet operational and Program management needs;*

Section 6.4 reads in part:

...

- Alternative work arrangements will be explored and rigorous vacancy management will minimize the number of affected employees.*

She concluded that the WFA is not meant to give cash-out to all who want it. Regarding Exhibit G-9, the Human Resources Action Plan, counsel argued that it was the intention of the Department to give a fair chance to both ES-03's for the remaining ES-03 position. She argued the grievor concluded that she was not going to be considered for it and that it was not an indeterminate position at the time. Counsel also reminded me that Mr. Egan's memorandum (Exhibit E-12) indicated requests for cash-out were not automatic, but since the grievor saw her supervisor Mr. deLange get one, she thought she could get one just as easily and this is all she wanted.

Ms. Levesque argued that in May, 1996 when the grievor was declared surplus (Exhibit E-6), she was still considered to be on leave without pay and that there would have been work for her if she returned. She also argued that there was no

discrimination towards Ms. Roessel, only a change of approach to the WFA since the Department had goals to meet.

Ms. Levesque also argued that between Mr. deLange's cash-out approval and June 1, when Ms. Roessel told Mr. Stewart she also wanted one, management should have told staff how its thinking was changing. Mr. Stewart cannot be blamed for this since he could only recommend to the AREC what he wanted for Ms. Roessel. Counsel concluded that the entire matter before me was at the employer's discretion and that I should therefore dismiss the grievance.

Counsel referred me to the decision in Allad (Board file 166-2-24466); Legare (Board file 166-2-15018); Turner et al. (Board file 166-2-26033).

In rebuttal argument, Ms. O'Brien said that I must look at the wording of the grievance and determine if Ms. Roessel did in fact receive different treatment regarding her request for cash-out. She also argued that the word "primarily" in the WFA objectives is noteworthy; that the word "equitably" in WFA subsection 1.1.1 is also noteworthy and subsection 1.1.15 applies "where all other avenues have been exhausted". Ms. O'Brien also argued that under paragraph 1.4.1(a) the grievor did advise her department that she was not available for appointment.

As far as the employer's argument is concerned regarding the grievor just wanting a cash-out, Ms. O'Brien agreed this is exactly what she wanted based on the meetings she attended, the documentation she received, and on the WFA. Mr. Stewart's reference in his speech (Exhibit G-7) to "final" made the grievor assume that what she saw on video and read was indeed final. She reminded me in fact that when Exhibit G-9 came out there was not an ES-03 position left, but a proposed Investment Analyst at the ES-03 level as shown on Exhibit G-5. This impressed Ms. Roessel even further that it was time to make her choice to request pay in lieu of unfulfilled surplus period and leave Parks Canada. The employer was merely speculating in Exhibit G-10, the July AREC meeting, that Ms. Roessel could not leave pending completion of project work.

Ms. O'Brien clarified that the reference to "discrimination" in the grievance refers only to how the WFA was applied to Ms. Roessel, nothing else. She also argued that I do not have to rely on Allad (supra), that there is no estoppel as in Legare

(supra), and unlike Turner et al. (supra), there is a combination of many things before me to consider.

### Decision

The Workforce Adjustment Directive (WFA) is a comprehensive policy that is incorporated into the grievor's collective agreement under Article 33. The main issue for me to decide is whether or not the grievor should be granted pay in lieu of unfulfilled surplus period as described in paragraph 7.1.1(a) of the WFA, since the National Joint Council (NJC) already ordered the employer to declare the grievor surplus when it wrote in Exhibit G-2 that she was not treated within the intent of the WFA. Ms. Roessel was declared surplus on May 29, 1996 (Exhibit E-6). By this declaration, I conclude that the employer and the NJC are satisfied that the grievor demonstrated her job had already ceased to exist as subsection 1.1.7 of the WFA requires.

Subsection 1.1.7 reads:

*1.1.7 A department shall declare surplus, upon request, any affected employee who can demonstrate that his or her job has already ceased to exist.*

I believe this should have ended the matter.

However the employer's cuteness in purporting to make the grievor a "reasonable job offer" in Exhibit E-9 on the same day it declared her surplus in Exhibit E-6, that is May 29, 1996, is completely unacceptable. In fact, the position number it offered Ms. Roessel was the same as that of her former colleague, Paul Lauzon, who left Parks Canada in June, 1996. Even though the employer still maintained Ms. Roessel on its human resource file as being on leave without pay, the grievor had been working for the Calgary Co-op for almost one year when the employer made her what it deemed to be a RJO.

Should the grievor have been declared surplus under the circumstances going back to June, 1995? Yes. Should the grievor now be paid cash in lieu of unfulfilled surplus period under the circumstances going back to June, 1995? Yes, she should be paid accordingly.



After being told in early 1995 to find work elsewhere because a large downsizing exercise was going to take place, the grievor did just that. She attended meetings; she looked at videos; she read speeches; she spoke to her supervisor; she spoke to Mr. Stewart more than once, and finally decided that the signals for career opportunities for her in the Public Service were not good, particularly in light of the fact that an ES-03 position was going to disappear. After being offered a job elsewhere, Ms. Roessel finally decided to leave Parks Canada and requested a cash-out on June 1, 1995. Mr. Stewart expressed his regret but told her he would recommend to the AREC that her request be approved. It was not approved on two occasions (Exhibits G-10 and G-11) with different reasons given both times, both of which Mr. Stewart contradicted. To his recollection, the first AREC discussed a RJO to the grievor, not the completion of project work, and the second did not discuss "alternation" as far as Mr. Stewart knew, even though he did not attend the August AREC meeting.

I fail to see how it is possible for management to think that the grievor would not believe that what Mr. Stewart said and showed in the presence of the Regional Executive Director on May 10 was not final, especially since I believe Exhibits G-5 and G-6, the organizational charts, were shown on May 10 as Mr. deLange and the grievor testified. The grievor had been thoroughly warned leading up to the May 10 staff meeting that significant downsizing was coming. Ms. Roessel therefore believed that what took place on May 10 was final. I cannot imagine how she or anyone else in the same position could have thought otherwise. If there was some greater plan at work in the minds of management, it was not evident to Ms. Roessel in May and June of 1995. She reacted quickly as she was asked to do, told Mr. Stewart on June 1, 1995 she wanted to be declared surplus and get a cash-out. Her suspicions about the future were confirmed later in June when her position was listed under the surplus positions, and under the new positions in Business Services, only one ES-03 was listed (Exhibit G-9).

The NJC decided that the grievor had demonstrated she should be declared surplus under subsection 1.1.7 of the WFA as did Mr. Stewart in his undated letter (Exhibit E-3), but probably written in late September. Since I must return to the situation as it existed in June-July, 1995, had the employer acted properly at that time by declaring the grievor surplus, the six month RJO clock would have begun to tick

under an entirely different set of circumstances. The employer did not declare her surplus at that time however, even though fairness and equitable treatment was stressed throughout the entire downsizing exercise, as was shown for Mr. deLange who was at a much higher salary level than the grievor and therefore received a more lucrative cash-out. The employer therefore cannot now, in my opinion, start the RJO clock in May, 1996 as it has tried to do since it did not get it right the first time. If indeed departmental thinking on the application and interpretation of the WFA was evolving as Mr. Stewart said, a staff meeting should have been called early in June to inform Ms. Roessel and others what this evolution would mean regarding obtaining a cash-out. Ms. Roessel had an expectation created in her mind by the words and deeds of Parks' management as late as June 8, 1995 when Mr. Stewart put her name forward to the July AREC and recommended that her request be approved.

At the time when the grievor should have been declared surplus, a RJO was not made to her other than some discussions in August with Mr. Whittingham regarding an AS-04 position. Although this may have been a job possibility it was not reasonable since it was at a lower level and all other avenues had not been exhausted at the time. The employer was therefore in breach of subsection 1.1.15 of the WFA.

Ms. Roessel did not wish to be redeployed and indicated this to her employer in writing on September 19, 1995 (Exhibit E-2) as is required in subsection 1.1.32 and paragraph 1.4.1(a) of the WFA.

There was no indication that there was a need to continue the grievor's work functions other than in the July AREC record of decisions (Exhibit G-10). Mr. Stewart attended this AREC meeting and contradicted the decision in Exhibit G-10. I believe Mr. Stewart. The grievor was therefore in conformity with subsection 7.2.3 of the WFA. If her work was so important, it is worth noting that she was allowed to be on leave for July and August.

Since the grievor's request was never sent to the Deputy Head, it would have been impossible for him to have authorized a lump-sum payment under subsection 7.2.1. Because I believe management acted unreasonably in initially denying the grievor's request to be declared surplus, management in effect breached subsection 7.2.2 of the WFA.

Ms. Roessel also met the criteria for cash-out in the Employment Policy (Exhibit G-4), subsections 5.2.1 and 5.2.3.

If the employer had properly declared Ms. Roessel surplus in July, 1995, coupled with the fact that the grievor's function was being discontinued, Mr. Egan's memorandum of April 7, 1995, (Exhibit E-12) would have allowed her to receive a cash-out at that time. The key element of Exhibit E-12 reads:

*... The number one requirement for cash-out consideration will be the legitimate surplus declaration of the incumbent in a function being discontinued or downsized.*

Ms. Roessel was not treated equitably under subsection 1.1.1 of the WFA since the employer refused to declare her surplus and refused to give her a cash-out under subsection 7.2.2 of the WFA. She therefore received discriminatory treatment as a result when compared to other employees, most of whom received their requested cash-out.

I therefore order the employer to compensate the grievor in the amount of six months' pay in lieu of unfulfilled surplus period. I shall remain seized with this matter in the event that the parties encounter any difficulties in implementing my decision.

For all these reasons, this grievance is allowed.

**J. Barry Turner,  
Board Member.**

OTTAWA, March 12, 1997.