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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ROBIN J. WILSON

Grievor and Applicant

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer and Respondent

Before: P. Chodos, Deputy Chairperson

For the Grievor/Applicant: Daniel Rafferty,
The Professional Institute of the Public Service of Canada

For the Employer/Respondent: Peter Hajecek, Counsel

Heard at Toronto, Ontario,
February 18, 1997.

Dr. Wilson (formerly named Watson) has grieved that he should have been permitted to negotiate his initial salary when he was appointed in 1994 to an indeterminate position with the Correctional Service. He has also filed a request for an extension of time concerning the presentation of his grievance, pursuant to section 63(b) of the *P.S.S.R.B. Regulations and Rules of Procedure*, 1993.

The facts which are relevant to the application for an extension of time and the substantive grievance are closely linked; accordingly, all the relevant facts are summarized together.

The parties submitted a partial agreed Statement of Facts which provides as follows:

> 1. *The grievor is a member of the Psychology (PS) Group. He is governed by the provisions of the PIPS Master Agreement, of which the original expiry date was September 30, 1990.*
>
> 2. *Prior to the proposed resumption of bargaining for a new Master Agreement in 1990, the Psychology Group voted not to participate in another round of master bargaining.*
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> 3. *As a result, a Memorandum of Agreement was signed between the Treasury Board and PIPSC in July, 1990 to provide for an amendment in pay rates. This document is attached as Appendix I.*
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> 4. *The expiry date of the collective agreement for the Psychology group (identical, except for pay rates, to the PIPSC Master Agreement with expiry date of September 30, 1990) was extended by the Public Service Compensation Act from May 1, 1991 to May 1, 1993. New pay rates established in accordance with that legislation became effective on May 2, 1992. A copy of those pay rates is attached as Appendix 2.*
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> 5. *The grievor first worked for Correctional Services Canada (CSC) as a sub-contractor in a Community-Based Sex Offender Treatment program, beginning in August, 1991.*
>
> 6. *On October 19, 1992, CSC offered the grievor a part-time, specified period appointment as a Community Psychologist in the Central Ontario District Office in Toronto. The position was at the PS-03 level; the salary on appointment was $47,512 (the first step in the range of rates at the PS-03 level). The appointment was for the period from October 26, 1992 to March 31, 1993. The*

grievor accepted by signing and dated page 2 of the offer on November 2, 1992. This document is attached as Appendix 3.

7. *The grievor's appointment in the part-time, term position was subsequently extended to May, 1993, at which time he accepted a full-time term appointment in the same position to December 1993. His appointment was subsequently extended to March 31, 1994 and further to March 31, 1995.*

8. *During the course of the last extension referred to in paragraph 8, the grievor was the successful candidate in a competition for an indeterminate position as a Psychologist at the PS-03 level in the Central District Office, Toronto. He received a letter of offer dated October 18, 1994 and accepted the position by signing page 2 of the offer on November 7, 1994. This letter is attached as Appendix 4.*

9. *On January 16, 1995, the grievor wrote a letter to the Treasury Board of Canada. This letter is attached as Appendix 5.*

10. *On February 6, 1995, T.A. Smith, Director, Pay Administration Group, Treasury Board of Canada, acknowledged the grievor's letter of January 16, 1995. This letter is attached as Appendix 6.*

11. *The parties reserve the right to introduce such other evidence as may be required.*

Dr. Wilson testified on his own behalf; Dr. Lynn Stewart was called to testify on behalf of the employer.

Dr. Wilson stated that he had been actively recruited by Dr. Lynn Stewart, as well as the Regional Psychologist, Mr. Bob Cannon, prior to accepting a term appointment in 1992. When he accepted the term appointment in October, 1992 he was a doctoral candidate with the Ontario Institute for Studies in Education (University of Toronto); he obtained his doctorate in January, 1996. He testified that at the time of his term appointment his salary expectations were based on the salary ranges offered at other organizations, for example, the Clarke Institute; according to Dr. Wilson an employee with less credentials than himself could receive a salary of between $52,000. to $54,000. a year at the Institute. However, he accepted a starting salary of $47,512. per annum, which is the first step of the PS-03 level. Mr. Wilson's recollection was that prior to accepting his part-time term position, he had three different conversations

with the staff of the Correctional Service, during one of which the question of salary came up. According to Dr. Wilson, Dr. Stewart had advised him that he could negotiate his salary upon being offered an indeterminate position. It was his understanding that an indeterminate position would be offered to him "at the next earliest convenience", most likely in the Spring of 1993. In fact the competition was held in 1994, and he was the successful candidate.

He received a written offer of an indeterminate appointment dated October 18, 1994 (Appendix 4 of the Agreed Statement of Facts) which stated that: *"... Your salary will be determined according to the Public Service Terms and Conditions of Employment Regulations."* He accepted the offer of employment on November 7, 1994; within 14 days after his acceptance, he raised the question of his pay with Dr. Stewart. She referred him to the Director of Management Services, Marg Harlang, who subsequently informed him that there could be no salary negotiations, as the appropriate time to negotiate salary terms had been when he was offered the term appointment in 1992. He approached Ms. Harlang again within a week; she suggested that he write to Treasury Board about this matter, and he did so on January 16, 1995. Dr. Wilson stated that his delay in taking action until January 16, 1995 was occasioned by some difficulties he had in finding out who to write to; as well, the Christmas holidays intervened. He received an interim reply dated February 6, 1995, which suggested that Treasury Board needed to do some research on this matter. He received no further communication until he called a Mr. Reg Giekes who was referred to as the Treasury Board contact in the February 6 letter. On May 1st 1995 he received as a fax a copy of a letter dated February 17, 1995 from Mr. Smith. He received no information why this letter had not been sent to him earlier. This letter (Exhibit G-2) stated that his salary treatment was correct, and in accordance with the Regulations. It went on to state that: *"... we will ensure that the persons responsible for this particular section of the PSTCER are apprised of your situation and perhaps some remedial action can be taken once the Public Sector Compensation Restraint Act expires."*

Dr. Wilson discussed this matter with Dr. Stewart at the beginning of May; according to Dr. Wilson, she indicated that she would raise the issue with the then District Director, Peter White. When he heard nothing further, he approached Mr. White himself sometime between mid-June and early July. Mr. White then indicated that he would pursue the matter further; both he and Mr. White went on vacation. He

spoke with him again in late August or early September; at that time Mr. White advised him that he did not believe that anything could be done.

In late September Dr. Wilson was attending a professional conference when he happened to meet Mr. Karl Furr, a psychologist who was also a PIPSC union steward. He raised this issue with Mr. Furr who instructed Dr. Wilson to fax the relevant documents to him. He did so on October 18, 1995; within two weeks Mr. Furr advised Dr. Wilson to contact Mr. Rafferty of PIPSC. Dr. Wilson did so in the first week of November, 1995. He faxed the relevant documents to Mr. Rafferty on November 15, 1995. On December 20, 1995 Mr. Rafferty wrote to Dr. Wilson (Exhibit G-5) enclosing a Grievance Presentation Form. It was not until January 2, 1996 that Dr. Wilson in fact submitted the grievance to the first level of the grievance procedure. Dr. Wilson observed that it was his view that management was approaching this matter in a friendly and collegial manner and that both Dr. Stewart and Mr. White were in favour of a satisfactory outcome for him; he perceived that the grievance procedure was an adversarial process, and that the problem would best be resolved through cooperative discussion.

In cross-examination Dr. Wilson acknowledged that Dr. Stewart had never said that she was his supervisor, although he viewed her as such. He agreed that she did not sign his leave forms and that she had the same classification level as he did. He stated that Dr. Stewart maintained contact with him throughout her period of leave of five months and that in effect she was supervising him from her home while on maternity leave. He was aware that the Assistant District Director, Mr. John Currie, was Dr. Stewart's supervisor. He agreed that he was in receipt of a salary of roughly $47,000. prior to assuming the appointment with the Correctional Service. He also acknowledged that in 1992 he had only a Masters degree. He could not recall the exact words which Dr. Stewart had used with respect to his opportunity to negotiate his salary at the time of his term appointment; he did recall that Dr. Stewart was "of the opinion" that he would have an opportunity to negotiate his salary upon his indeterminate appointment. He did not check out this statement with anyone else, rather he accepted her opinion at face value. He assumed as well that the letter of offer (Appendix 4, Statement of Facts) meant that there would be a process of further negotiations with respect to salary.

Dr. Wilson also acknowledged that he was familiar with the collective agreement, and was aware that it set out a grievance procedure. He agreed as well that the meaning of the February 17th letter was clear, and that he did not file a grievance in response to it.

In November 1995 either Mr. Furr or Mr. Rafferty raised with him the question of timeliness. Mr. Rafferty asked him to discuss with Mr. White whether management would raise the issue of timeliness in the context of his filing a grievance. He spoke with Mr. White and Dr. Stewart at the time and they advised him that they would not object to the grievance on the basis of timeliness; he received nothing in writing in that respect. He acknowledged that the reply at the first level of the grievance procedure raises the question of timeliness; he was not aware of any steps that were taken to ask for an extension of time on that occasion.

Dr. Lynn Stewart testified on behalf of the employer. Dr. Stewart took maternity leave commencing in October, 1992; arrangements were made to hire two persons on contract to fulfill her responsibilities, with the total cost not exceeding her then salary, which was less than the top of the scale. Dr. Wilson's services were retained for approximately one third of her salary, and Dr. Ursula Stych received approximately two thirds of her salary; it was understood that Dr. Stych would assume various administrative responsibilities.

Dr. Stewart stated that she was aware it was not her role to negotiate salaries; according to Dr. Stewart, she made it clear to Dr. Wilson that she could not determine his salary, that either the Pay and Benefits section or a manager would have to make that determination. She stated that in October, 1992 she was not a supervisor, and she did not supervise Dr. Wilson, although he may have called her at home on occasion. She acknowledged that she did tell Dr. Wilson not to bother negotiating his salary when he was appointed as a term employee, but rather to wait until he would be appointed to an indeterminate position. She believed that as they had only a fixed amount of money to deal with in terms of salaries, that she could not offer more than what was in the pot at the time. Also, she was aware that the grievor was close to getting his Doctorate; Dr. Stewart felt that he would have a stronger hand with respect to salary negotiations after he obtained his degree. She maintained that she did not make a promise, however she had "misinterpreted" the situation. She acknowledged that she

had completed performance appraisals for Dr. Wilson; at the time there were no Chief Psychologists (PS-04) in most locations, and therefore the most senior PS-03s was often looked to for advice by other psychologists. Dr. Stewart made a point of noting that Dr. Wilson was a very good employee, with excellent qualifications and that she regrets that his salary was caught by the compensation restraint freeze.

Argument

On behalf of the grievor Mr. Rafferty submitted that Dr. Wilson had conducted himself at all times in a cooperative and consultative fashion, and had patiently explored a resolution with management; he was lead to believe that further efforts and enquiries would be conducted on his behalf; he took them at their word and patiently waited for a collegial resolution. Mr. Rafferty argued that Dr. Wilson had not sat silently on his rights but hoped for an amicable solution, and viewed the grievance procedure as an adversarial process which is to be used only as a last resort. Mr. Rafferty noted that Dr. Wilson had no knowledge of the technicalities of the grievance procedure, or the availability of an extension of time limits; any delays on the part of the bargaining agent should not be attributable to him. Mr. Rafferty argued that given the equitable context in which section 63 of the Regulations is based, an extension is warranted in this case. In support of his submission Mr. Rafferty cited the Board decision in Lusted (Board file 166-2-21370), Butra (Board file 166-2-22221), and Sittig (Board file 166-2-24117), as well as the Federal Court decision in Canada (National Film Board) v. Coallier (F.C.A.) [1983] F.C.J. 813.

In the alternative, the grievor's representative submitted that this matter constitutes a continuing grievance; that is, for each pay period Dr. Wilson received less than he would have received, had he been given an opportunity to negotiate his salary on appointment. In support of this submission Mr. Rafferty referred to the Moyes decision (Board file 166-2-24629).

On the question of the Board's jurisdiction to deal with the substance of this grievance, Mr. Rafferty argued that the principles set out in the Molbak decision (Board file 166-2-26472) with respect to estoppel is applicable in this instance. There were clear representations made here by Dr. Stewart that Dr. Wilson would have an opportunity to negotiate a starting salary upon his indeterminate appointment. Given

that these representations were made in the context of an interview, they were logically perceived by Dr. Wilson as coming from a person in authority, and were clearly relied upon by the grievor. Mr. Rafferty contended that the employer should not be allowed to ignore the mistake of one of its employees. He noted that the Molbak decision (supra) was upheld by the Federal Court (i.e. Attorney General of Canada v. Molbak, Court file T-2287-95). The grievor's representative also submitted that the Board decision in the Mark et al. (Board files 166-2-21451 to 21455) is not applicable in this instance, as the issue in that case concerned an initial hiring situation, and furthermore there had not been detrimental reliance by the grievors.

Counsel for the employer responded that the grievor had not satisfied the commonly accepted criteria for exercising discretion in granting an extension of time limits pursuant to section 63 of the Regulations. In this respect he referred to the Board decisions in Rattew (Board file 149-2-107) which was followed in Stubbe (Board file 149-2-114). Counsel noted that in the Federal Court decision in Stubbe (Court File A-130-93) the court noted that the grievor did not form an intention to file a grievance within the time limits and that this was a sufficient basis for dismissing the application for an extension of time. Mr. Hajecek noted that by May 1st, 1995 the grievor had received Exhibit G-2 advising him of the employer's position; nevertheless, the grievor took no steps to seek out the grievance procedure at that time and did not do so until months later. Even when the employer noted in its grievance response at the first level that the grievance was out of time, the grievor still did not seek an extension of time.

On the substance of the grievance Mr. Hajecek submitted that the Board has no jurisdiction to deal with a complaint of this nature under section 92 of the Act; what is at issue is Dr. Wilson's salary on appointment, which is a matter under the *Public Service Employment Act*; as noted in the Mark et al. (supra) and Guillemette (Board file 166-2-23827) decisions.

Counsel for the employer also maintained that principles governing promissory estoppel are not applicable in this situation. In support of this contention he referred to the text of The Law of Contract in Canada by G.H.L. Fridman (third Edition, Carswell 1994). Counsel maintained that there was no legal relationship since Dr. Stewart was not clothed with any authority to make a promise respecting salary; there was also no clear promise or representation, nor was there any intent to be bound on the part of

Dr. Stewart. Mr. Hajecek also maintained that there was no detrimental reliance since Dr. Wilson has not demonstrated that had he been able to negotiate a salary on his initial appointment he would necessarily have received a higher salary. At best Dr. Wilson had a hope that he might have gotten a better deal at the time. Mr. Hajecek also maintained that the Molbak decision (supra) is distinguishable in that the grievor in that instance was misled in both word and deed and clearly suffered a detriment.

Reasons for Decision

In my view this grievance must fail for several reasons. Firstly, I do not believe this is a proper case for exercising the Board's discretion to grant an extension of time under the Regulations. As noted in the Rattew case (supra) and in others, it is incumbent on the applicant to provide cogent reasons explaining the delay, and to justify why he or she should be relieved of the consequences of their failure to abide by the contractual time limits set out in the relevant collective agreement. It should be understood that the Board will not lightly set aside the duly negotiated time limits, and will in fact only do so where the application of the time limits would "cause an injustice". A significant factor in this consideration is the extent of the delay, and whether the grievor showed due diligence in all the circumstances.

Putting this matter in the most favourable light as far as the grievor is concerned, by May 1st, 1995 the grievor had been informed quite definitively that the employer rejected his submissions about his salary concerns. Notwithstanding this, Dr. Wilson chose to wait until January, 1996 before filing his grievance. This is an inordinate amount of time to delay making a formal grievance; the grievor's explanation that he had hoped that the matter would be dealt with collegially and without any adversarial proceedings is less than convincing, in light of the fact that at least by the fall of 1995 he was seriously contemplating pursuing the grievance procedure, and had discussed that matter with a shop steward. Notwithstanding this, Dr. Wilson continued to act in a dilatory fashion, and again waited several more weeks before filing his grievance. For the Board to exercise its discretion in these circumstances is unwarranted, and would seriously undermine the purpose and intent of the time limits set out in the collective agreement. Accordingly, the application to extend time limits is dismissed.

I would also note that in my view, this is not a case of a continuing grievance. There is no allegation here that the employer had misinterpreted the collective agreement with respect to the payment of wages, such that with each pay cheque there is a recurring breach of the employer's obligations. It is not disputed Dr. Wilson is being properly paid in accordance with the Regulations and the collective agreement; the sole issue in this case is whether Dr. Wilson was denied a one time opportunity to negotiate a higher initial salary. There is in fact a clear crystallizing event here when Dr. Wilson became aware that he could not negotiate his salary on his initial indeterminate appointment.

Dr. Wilson has not succeeded in respect of the threshold issue concerning the filing of his grievance outside the stipulated time limits, and accordingly this matter cannot be pursued further. However, as it may be of assistance to the parties, I would also note that the grievor could not succeed on the substance of this grievance. For the reasons put forward by Mr. Hajecek, I do not believe that this is a proper case for the application of the principle of promissory estoppel; among other things, I agree with counsel for the employer that the grievor has not demonstrated that he suffered real or actual detriment as a result of the alleged representations made by Dr. Stewart. It is in fact quite speculative to conclude that Dr. Wilson would have been able to successfully negotiate a higher salary had he been aware that he could do so at the time of his term appointment, given the evidence that there was a limited amount of money available at the time for Dr. Wilson's salary, and that Dr. Wilson did not then possess a Doctorate. Also, there is no evidence that the grievor would have refused the indeterminate appointment had he known that negotiation of a higher salary was out of the question. In view of these circumstances the employer might well have taken the position at the time that, notwithstanding any representations he could have made, Mr. Wilson should not receive more than the first step in the range of rates at the PS-03 level. In other words, the grievor has not in any event discharged the burden of proof that rests with him in respect of the substance of his grievance.

To reiterate, for the reasons noted above the application for extension of time for the filing of a grievance is dismissed.

P. Chodos,
Deputy Chairperson.

OTTAWA, April 24, 1997.