

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

BETWEEN

LARRY BROWNE AND OTHERS

Grievors

and

TREASURY BOARD  
(Revenue Canada- Customs, Excise and Taxation)

Employer

*Before:* P. Chodos, Deputy Chairperson

*For the Grievors:* Larry Browne

*For the Employer:* Robert Jaworski, Counsel

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Heard at Toronto, Ontario,  
October 14 and 15, 1997

## DECISION

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All of the grievors (Larry Browne, Henry Szczesciuk, Ramesh Jain, Allan M. Pertens, Gurjit Sodha, Reid Villett, Kewal Gupta, Mahendi Ladhani) are employed with Revenue Canada at its offices in Mississauga. With the exception of Mr. Gurjit Sodha, who is classified as an AU-04, the other grievors are classified at the AU-03 level. The grievors allege that they were subject to a demotion and/or a financial penalty following the reorganization of the department and the integration of the Customs and Excise and Taxation functions of the department. It is the employer's contention that the grievors were not subject to either a demotion or financial penalty and consequently their grievances are not adjudicable. This decision addresses the jurisdictional objections raised by the employer.

For the most part, the facts concerning the jurisdictional issue are not in dispute. In 1994 Parliament passed Bill C-2, *an Act to Amend the Department of National Revenue Act* (S.C. 1994, c. 13). The Bill, which received royal assent in May 1994, provided for the consolidation of the Taxation and the Customs and Excise administrative sectors within the Department of National Revenue. As a result of the implementation of this legislation, there was an extensive reorganization within the department affecting many employees within both the Customs and Excise and Taxation sectors, including the grievors. On or about November 1995, the grievors were advised that they would no longer be performing the duties, nor would they have the responsibilities of, their former position of Audit Unit Managers (and in the case of Mr. Sodha, District Chief of Audit). Instead, they were assigned the duties of the new position of Field Auditor - Technical Advisor (and for Mr. Sodha, Team Leader), which had the effect of placing them in the bargaining unit.

Mr. Mahendi Ladhani, one of the grievors, testified that, as an Audit Unit Manager, he had been responsible for supervising a staff of auditors, including assigning them audits and generally administering the audit program at the Unit level; his duties had required him to respond to grievances at the first level, prepare performance appraisals, and to deal with disciplinary matters. In addition, he set objectives, established work priorities, and advised his staff on tax law matters, audit procedures and techniques. Following the November 1995 organization, he no longer performed managerial duties, but rather, was assigned the duties of an Auditor, working side by side with the staff that he had previously supervised.

Mr. Ladhani had the opportunity to work on an acting basis, from July to November 1996, in a new position of Team Leader, which is classified at a higher level than his current substantive AU-03 classification. In Mr. Ladhani's view, he had even more responsibilities as an Audit Unit Manager than does the Team Leader; for example, the latter position does not subsume responsibility for hearing grievances at the first level; also, as Audit Unit Manager, he had the authority to waive certain amounts of penalties assessed under the *Excise Tax Act*; as a Team Leader he did not have that authority. Notwithstanding these differences, Mr. Ladhani maintained that the closest link between his former duties as Audit Unit Manager and the positions within the new organization, is that of Team Leader; however, that is not currently his substantive position.

Mr. Ladhani noted that at no time did his superiors express any reservations about his performance or his conduct as an Audit Unit Manager. Yet, he was deprived of the duties and responsibilities of the position which he had obtained through the competitive process over a 19-year period. In his view, with the loss of the Audit Unit Manager position, he suffered a financial penalty in that he is now required to pay union dues and therefore his net take-home pay is less. Furthermore, by taking away his managerial responsibilities and assigning him less sensitive duties, he feels that he has been in effect demoted, notwithstanding that his classification and salary has remained the same.

Similar evidence was forthcoming from Mr. Gurjit Sodha. Mr. Sodha has been employed with Revenue Canada for 30 years during which time his performance was always at least fully satisfactory. As the former District Chief of Audit, he was responsible for hiring personnel, administering the collective agreement, exercising disciplinary responsibility and approving leave at the second level of management, among other responsibilities. Under the new organization, as a Team Leader, Audit, he has significantly less responsibilities and is lower in the departmental hierarchy, notwithstanding that his classification as an AU-04 and the relevant salary level have not changed. Mr. Sodha was of the view that his former responsibilities as District Chief of Audit are most closely equivalent to the current position of Manager, Audit, rather than as Team Leader, Audit. Both witnesses drew comparisons between their former and current job descriptions to illustrate the changes that had been made (Exhibits G-1, G-2).

On behalf of the grievors, Mr. Browne submitted the following written argument in support of the grievors' contentions:

**CLOSING STATEMENT TO ESTABLISH JURISDICTION**

*Mr. Chairman, in summary, it is our contention that our grievances are indeed adjudicable under paragraph 92(1)(b) of the PSSRA, pursuant to paragraphs 11(2)(f) AND (g) of the Financial Administration Act.*

*We are in no way disputing the authority of the employer to assign duties and to classify. We were appointed AUMS/DCOA as a result of this authority.*

*However, Revenue Canada has established certain criteria to be followed in circumstances arising as a result of a major organizational change. These procedures are outlined in Exhibit G-6 April 10, 1996 memorandum by Revenue Canada ADM. Human Resources, Serge Bastien.*

*It is our contention that our positions of AUM/DCOA were existing in the Administrative Consolidation and merely renamed as TEAM LEADER and MANAGER, AUDIT*

*These principles of **INDIVIDUAL** merit, fairness, consistency and transparency were not followed, since we do not meet the standards of competence required but we are not placed in these positions which are basically the same as AUM/DCOA positions.*

*Through my examination in chief of the witness, I have clearly demonstrated that although our duties still exist in the consolidated organization, i.e. a clear link exists between AUM position with Team Leader position and DCOA position with Manager, Audit Position.*

*We believe that the employer's own criteria for designating a position as new has not been met in a material way. i.e.,  
span of control,  
change in reporting relationships and  
expanded human relations authorities.*

*Since therefore this clear link exists as further evidenced by Exhibit[s] (sic) G-4 & G-5.....Summary of Duties and Duties and Comparative Authority, we contend that we have suffered what amounts to a demotion and being assigned less sensitive duties falls within the ambit of disciplinary action by the employer. Under paragraph 92(1)(b) of the PSSRA, we have suffered a financial penalty as the employer has now forced us to pay union dues to the bargaining agent, whereas*

prior to administrative consolidation we were managerial exclusions.

*In the absence of any communication from the employer to lead us to believe otherwise, we feel that we have been subjected to discipline as we have been removed from all of our managerial job functions or duties that required a high degree of honesty and integrity, and have been given duties of a less sensitive nature. The discipline guidelines are as outlined in the Manager's Handbook, Chapter 4, Section G, paragraph 25 on discipline. Exhibit G-8.*

*Further the widely published organization chart effective November 20, 1995 documents our demotion. Our substantive position in the consolidated organization would have been that of Team Leader in case of AUMS and that of Manager, Audit in case of DCOA and therefore we have been demoted resulting in financial penalty. All organization charts since administrative consolidation show us in a more subordinate position and we are no longer invited to participate in management meetings. We now have to work side by side with staff that we used to supervise and write appraisals for. By not appointing us to existing positions at our substantive level, management clearly sent out a message to us that they were not happy with us. We don't know any reason why except that our only offense is that we belonged to GST branch of Revenue Canada and that the penalty for not coming from Taxation branch of Revenue Canada was demotion to less sensitive duties or to junior jobs that have fewer powers than those of our substantive positions.*

*We plea before the board that the offense that we deemed alleged to have been committed is beyond our control. The penalty (demotion to less sensitive duties/junior jobs with fewer powers) for the offense is too severe, in fact it does not fit the offense as per the Departmental managers Hand book.*

*The manner in which the Department has toyed with our positions is to impress upon us their authority; Telling us where we belong conveys to us that the Department can play with our position as they wish, placing us in acting position perhaps when no one else is available, so that gradually it will kill our desire to fight, and thinking that with the passage of time, we will get used to their mercy treatment, and in confusion will lose sight of our reality.*

*While we agree that the disciplinary action is not in writing, the overwhelming evidence points to the fact that it was a discipline for which the penalty imposed was excessive. On the other hand, the department did not convey to us in the same manner they announced our discipline that it was not*

*discipline, placing a notice on the bulletin board saying that because all the GST managers performed excellent duties in the past therefore they all have been given less sensitive duties or junior jobs as an award for a job well done. Furthermore, the management decided to tell us only in a reply to our grievance that we did a good job and not admitted openly before all, is another reason that it was discipline, as management must have wanted to leave the perception with the staff that all GST managers from Toronto west have been taken to task. In industry, if an employee had his authority taken away and was assigned less responsible duties this would be a clear message of a demotion. If a president of a company is removed from his powers and authorities and is asked to assume lesser tasks, it is a demotion.*

*Based on the above, we do not believe that the employer has acted in good faith and in accordance with the principles of natural justice.*

*We believe we had a right to be selected for the Team Leader and Manager, Audit positions on the basis of the competence principle as outlined in the Federal Court of Canada case number T-692-96 between: ATTORNEY GENERAL OF CANADA and JAMES G LAIDLAW et al. It was pointed out in the decision that although Revenue Canada has the discretion to choose to staff positions in a manner it chooses in the consolidated organization, Revenue Canada's discretion is not unfettered. Such discretion must be exercised in good faith and with the principle of natural justice.*

*Mr. Chairman, the court found in this particular case that the position of the Team Leader/Co-ordinator under modernization was not a new position and that the respondents had a right to be appointed to this position based on their own merit.*

*Based on the above, Mr. Chairman we submit that this hearing does indeed have jurisdiction to hear our grievances.*

Counsel for the employer responded that the issue in respect of jurisdiction is a narrow one, that is, whether there has been a demotion or financial penalty as those terms are used in the *Public Service Staff Relations Act* (PSSRA) and the *Financial Administration Act* (FAA). Mr. Jaworski noted that pursuant to paragraph 11(2)(g) of the FAA "demotion" has a specific meaning, which does not refer to duties, but rather to classification. Counsel for the employer submitted that the facts do not support the conclusion that the grievors had been subjected to any kind of disciplinary action.

Management readily acknowledges that they were all competent employees. However, the merger required a reorganization resulting in the withdrawal of the grievors' managerial responsibilities. Mr. Jaworski maintained that the government had the authority to revise the organization, including the duties and responsibilities of individual employees. He noted that the classification of the grievors was not lowered, nor were their salaries impaired. He also submitted that the duties of the Team Leader position is broader than administering the goods and services tax, as they are also required to deal with the *Income Tax Act*. He noted that in accordance with Exhibit G-7, the Team Leader supervises auditors with tax and GST expertise.

Counsel also argued that one cannot equate the payment of union dues with a financial penalty; the employer is bound by collective agreements to deduct and submit the dues; the deduction of union dues does not detract from their salary entitlement. In support of his submission, Mr. Jaworski cited the adjudication decision in *Bowers* (Board file 166-26-25013) wherein the adjudicator concluded that he had no jurisdiction to address a downgrading of the grievor's classification, as there was no evidence of either covert or overt disciplinary action.

In reply, Mr. Browne noted that the grievors are all professional accountants whether they are from the Taxation or the GST/Excise sectors. He submitted that their duties are much broader than suggested by the employer.

### Reasons for Decision

The statutory authority respecting the adjudication of grievances is found in subsection 92(1) of the *Public Service Staff Relations Act*, which states as follows:

*92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*

*(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*

*(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*

*(i) disciplinary action resulting in suspension or a financial penalty, or*

*(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*

*(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*

*and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

Paragraph 11(2)(f) or (g) of the *Financial Administration Act* states:

*11. (2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*

*...*

*(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;*

*(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;*

It is readily apparent from a consideration of the evidence and argument presented by the grievors, that pursuant to the above-noted provisions, an adjudicator has no authority to address their grievances. Firstly, there is not a scintilla of evidence that the grievors conducted themselves in any way which would attract disciplinary action, nor is there evidence that the employer was in any respect dissatisfied with the conduct or performance of the grievors. On the contrary, the



grievors testified that their performance has always been viewed as being entirely satisfactory; in fact, there is no reason to conclude that the reorganization of the grievors' duties and responsibilities was motivated by any disciplinary concerns. Accordingly, the threshold requirement for the assumption of jurisdiction under subparagraph 92(1)(b)(i), that is, the presence of "disciplinary action", has not been demonstrated.

Furthermore, I do not believe that the requirement to pay union dues, as a result of their loss of managerial responsibility, is *per se* sufficient to establish that the grievors had incurred a "financial penalty" as understood in section 92. As Mr. Jaworski has noted, the deduction of union dues is a contractual obligation incurred by the employer pursuant to a collective agreement; it is by no means a unilateral decision imposed by the employer on employees. The Concise Oxford Dictionary, seventh edition defines "penalty" as *punishment, esp. payment of sum of money, for breach of law, rule or contract, (on or under penalty of dismissal etc.)*. There is nothing inherently punitive in the requirement to pay union dues; moreover, there is clearly a benefit which inures to employees for such payment, namely collective bargaining representation by a certified bargaining agent.

Even a cursory reading of paragraph 11(2)(g) of the *Financial Administration Act* makes it clear that the circumstances in which the grievors found themselves do not constitute a demotion as that term is used in the FAA. The grievors acknowledged that their classification remained the same, with the same rate of pay; accordingly, it cannot be said that they were placed in a position at "a lower maximum rate of pay" as provided under paragraph 11(2)(g). It is true that in the private sector a substantial diminution in responsibilities may well be viewed as a constructive dismissal, which is actionable in common law; however, in order to succeed in their grievances, the grievors must bring themselves within the four corners of the *Public Service Staff Relations Act* and as noted above, this they have failed to do.

Underlying the grievors' dissatisfaction is their belief that they should have been appointed to what they viewed as their equivalent positions in the new organization, that is, as Team Leaders and Manager, Audit (see the last three paragraphs of the grievors' written submissions). These issues, which concern the appointment process, are clearly outside the ambit of the grievance and adjudication

process; if there is any avenue of redress in respect of such matters, it undoubtedly falls within the purview of the *Public Service Employment Act*, and not the *PSSRA*. Indeed, the judgment cited by the grievors ( i. e. *Canada (Attorney General) v. Laidlaw et al* (now reported as (1997), 127 F. T. R. 305 ), which was a judicial review of a Public Service Commission appeal board decision dealing with very similar facts as the instant case, plainly demonstrates this point.

I am struck by the sincerity of the views expressed by the grievors, and their genuine dismay over their perceived treatment following the merger. Large-scale reorganizations such as the integration of the Taxation and Customs and Excise sectors are clearly difficult and complex exercises; however, the dissatisfaction expressed by the grievors, who are longstanding employees, and who undoubtedly have made a valuable contribution to the department, should be a source of serious concern to the senior management of Revenue Canada. Nevertheless, whatever remedy may be available to them, it does not lie with the adjudication procedure under the *PSSRA*.

Accordingly, these grievances must be denied for want of jurisdiction.

**P. Chodos,  
Deputy Chairperson.**

OTTAWA, December 1, 1997.