



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

**BETWEEN**

**DIANNE F. BURNS**

**Grievor**

**and**

**TREASURY BOARD**  
**(Department of National Defence)**

**Employer**

***Before:*** Donald MacLean, Board Member

***For the grievor:*** Derek Dagger, Public Service Alliance of Canada

***For the employer:*** Richard Fader, Counsel



Heard at Halifax, Nova Scotia,  
June 16, 1998

## DECISION

The bargaining agent alleges that the employer violated the "National Joint Council" collective agreement between the two parties. The bargaining agent says that the employer violated section 7.2 of the "Work Force Adjustment Directive" (WFAD) of that collective agreement. The bargaining agent says that the employer refused to compensate Dianne Burns for the period when she was surplus to the needs of the department.

While the employer recognizes that in May 1996 it gave a notice to Ms. Burns that she was surplus to its needs, it adds that the obligation to pay her during the notice period only arises if there are no extra costs incurred by the department during the notice period. According to the employer, the department told Ms. Burns when she requested early retirement that it needed to replace her in the period after she left. Indeed, according to the employer, the department did replace her after she left. The department brought in replacement employees to carry out her duties.

The parties agree that the NJC collective agreement is to be interpreted purposefully so as to give the agreement an interpretation that reflects the intention of the parties in drafting the agreement, rather than to place an interpretation strictly on the words used by the parties.

According to the objectives of the WFAD, the overall purpose of its provisions is to provide a framework within which to soften the effect of restructuring and reductions for indeterminate employees within the Public Service. The WFAD allows for redeployment of surplus employees to other areas and departments in the Public Service. In section 1.1.12 the WFAD provides for a minimum of 6-months' notice before the effective date of the lay-off of an affected employee. During the notice period the employee normally remains at work. If there's no work for the employee, and the employer decides to lay her off, the employer may be obligated to pay the employee in lieu of the notice. If, under section 7.2, an employee resigns during her (unfulfilled) notice period, the employer, at its discretion, may approve "pay in lieu" of notice. Still, that discretion must not be exercised unreasonably. However, if the work continues after she leaves and there are extra costs incurred during the unfulfilled notice period (to the end of the six-months' notice), and the employer has to get someone else do the employee's work, then under section 7.2.3, the department cannot approve the "pay in

lieu" of the unfulfilled surplus period. If the employee's work can be discontinued, the department can approve the payment.

According to the employer, in this instance the work of the grievor did continue throughout the notice period. The department had to bring in someone else to do her work.

The evidence is that Ms. Burns began working in the Department of National Defence in the Public Service in October 1965 as a Clerk 1 (CR-1). Over the years the employer promoted her in various clerk positions. By 1990 she was a Clerk 3 (CR-3) in the Ship Repair Shop (in Dartmouth). She was the clerk for a group of managers in the shop. She saw herself as an administrative "Girl Friday." She looked after time keeping and overtime in the shop. She was the connection to the personnel office for all employees in the shop. She kept the leave records for over 100 employees. She ordered in stationery and supplies for the office. She did the odd jobs in the office, including typing and paperwork, for the 4 to 5 managers and 11 charge hands in the shop.

In 1994 she was seconded to the base civilian personnel office, across the harbour in Halifax. At that job she became an acting CR-4. There was lots of work for her to do. That work kept her, and the others in that office, very occupied. Despite the heavy workload, the work was enjoyable.

In mid-1995 Ms. Burns had discussions with her managers back at the ship repair shop in Dartmouth concerning her possible retirement under an "Early Retirement Incentive" plan (ERI). It looked favourable. She was interested in leaving around the end of June of 1996. That date would be about 2 weeks after her 50th birthday (see exhibit 11).

At the beginning of April 1996 the ship repair unit became part of a new base, the "Cape Scott." Ms. Burns' manager told her in March 1996 (exhibit 12) that she was to return to the shop. In his instructions to her she had a new position number. She was to be in the clerical support centre, as an engineering and maintenance clerk, at her clerk 3 level. She understood that she was going to the typing pool. Her manager also recalled the earlier ERI discussions, and he felt that employer would allow her to retire early. They just had to find another clerk 3 to carry out her duties.

Her actual return to the shop was postponed until the end of April 1996 at the request of the personnel office, after which Ms. Burns was on vacation leave for another two weeks.

On her return to her regular work area in the ship repair shop in mid-May 1996, Ms. Burns says that her previous duties in the shop were gone. There was no work for her to do. When she arrived, her new supervisor confirmed to her that she was to be in the typing pool. However, according to Ms. Burns, there was no one in the typing pool who distributed the work. She says: "People just brought in work for you to do".

The department concedes that everything was in turmoil. It was disorganized. Personnel from three bases were being consolidated into the Cape Scott, as a single unit. The start-up date for the Cape Scott was April 1, 1996. The consolidation meant that they had to reduce management and support positions by 20%. Over 300 employees were being relocated. The primary concern was to ensure that all employees had a job to do.

Ms. Burns was supposed to be an administrative support clerk, working in the typing pool. Her main function was the typing of memos, and documents. Other duties included assignments to assist other CR-3's who were merging the three libraries from the former bases. Management had developed a concept to make it all work. However, there were start-up pains, and the concept was not fully developed. They did not know where to sit people from one day to the next. They were not sure how things would be done, or how to set it up. Management of the work was haphazard at best. As time went on, the set-up got better. It became routine.

Still, in six weeks that Ms. Burns was with the Cape Scott, she had no assigned desk or work station. She would work at a desk if someone else were absent. She got a chair when another employee retired. She did some work in the library, destroying manuals. Nevertheless, that work was short-term and irregular. She wanted more work, especially more meaningful work. Her supervisor would tell her on a daily basis that he had no other work for her to do. He had no work to assign to her. She spent on most of her time looking for work, walking around the grounds of the base, or on volunteer committees. Some of the other employees were in the same situation as Ms. Burns. There were times when they had little or no work to do. However, that did not occur as often for them as it did for Ms. Burns.

Ms. Burns was on vacation for the first two weeks of May 1996. She returned from vacation on May 13, 1996. Two days later she received the formal written notice from the employer that she was surplus to their needs (exhibit 7). She would be laid off by November 14, 1996, if no other employment could be found for her. Ms. Burns formally applied to be released early from the Public Service, effective June 26, 1996. She also applied to receive "pay in lieu" instead of working in her notice period. The employer agreed to allow her to leave the Public Service. However, around May 17, 1996, they told her that they could not grant her the "pay in lieu" (of working) for the notice period because the duties of her job (as a CR-3) would continue after she left. Her work still had to be done.

Nevertheless, Ms. Burns says that other employees, who asked for the "pay in lieu" of working the surplus period, got the "pay in lieu" of working. It was a common circumstance.

The evidence of the employer is that no administrative employee received the "pay in lieu" in this particular re-organization.

According to the employer, they did fill in her position after Ms. Burns left. There were 3 casual or part-time employees who were assigned in succession to fill in her duties in the typing pool up until mid-November 1996. Roger Lenton had been working as a casual since April 1996. He started to cover Ms. Burns' position when she left. He took over her duties. He was reassigned from the library supervisor to Ms. Burns' supervisor within the typing pool. Her supervisor began assigning work directly to him. In turn, another employee came in to do his library duties. The evidence of the employer is that when he took over Ms. Burns' duties, Mr. Lenton did not do the library work that he had been doing. Still, he did remain at the same desk where he had been previously. He did Ms. Burns' typing job for a few weeks, until July 19, 1996. Heather Mohammed was hired to fill in for the rest of the period after he left. However, when Ms. Mohammed got a full-time job elsewhere, Danielle Mercer was hired to fill in from September 26 until the mid-November date.

There was also evidence that the supervisors for the typing pool and the library were sharing and moving employees back and forth as they were needed. The employees also shared desks, and computers, when the need arose. Each supervisor had his or her own respective group of employees to supervise. One supervised the typing pool and two supervisors were in the library. From time to time one supervisor would ask another to send

over a clerk to do some particular work. They directly supervised only their respective groups of employees. The supervisors in the two work areas also shared their respective duties during the absences of one another. It was a practice that continued even until the date of the hearing.

### **Argument for the Grievor**

This grievance alleges that the employer violated section 7.2 of the work place adjustment directive.

Ms. Burns was an employee surplus to the needs of the employer

She applied for the early retirement incentive, and she also applied for "pay in lieu" of the unfulfilled surplus period.

In rendering the WFAD decision the employer must not exercise its discretion unreasonably. However, if the employer does allow the "pay in lieu" under section 7.2, the work of the employee must discontinue, and the employer cannot incur other costs.

In the instant case the employer said that they would incur extra costs under section 7.2.3. However, the bargaining agent says that the employer acted unreasonably to an employee with 31 years service.

The employer relies on a series of casual appointments to demonstrate that it did incur extra costs. Yet, those appointments began prior to the departure of Ms. Burns when they appointed Roger Lenton. Mr. Lenton was in the typing pool for three weeks before Ms. Burns returned to the work location. It was also three weeks before she received the letter that she was surplus to the needs of the employer

The employer says that they were re-organizing. In effect, they needed flexibility with the generic employees in the typing pool. The employer says that Mr. Lenton took over Ms. Burns' duties. The bargaining agent says that it was all a sham. The evidence and testimony speaks for itself. Mr. Lenton did not take over her job because all the jobs in the typing pool became generic. In the past she was the clerk for the shop managers. Management says that the job that she had no longer exists. Her job duties are now all rolled into a generic job.

What did in fact occur here?

- 1) The employer re-organized the new structures at the Cape Scott, with an effective start-up date of April 1, 1996. The place was in turmoil.
- 2) In its re-organization the employer sought to create generic positions to be used as, in, and where they are needed.
- 3) The clerks (CR-3's) go into positions as operational service clerks.
- 4) Mr. Lenton is hired as a casual clerk in operational services.
- 5) Ms. Burns returns to work at the shop in the Cape Scott.
- 6) Then, on May 15, 1996, she is declared surplus.
- 7) She was not appointed to a new position after her return to the Cape Scott.
- 8) She retires on June 26, 1996, with an ERI.
- 9) Was Mr. Lenton able to take over her duties?
- 10) The employer took no action to appoint her to a new position. Yet, again according to the employer, her old position as a group clerk no longer exists.

The conclusion is that no one was performing her duties. Mr. Lenton did not perform her old work as a clerk for a group of managers.

The employer was not able to move her over to a new position under the *Public Service Employment Act*. The employer did not attempt to do so under that statute.

In the alternative, the employer's own records clearly indicate that Mr. Lenton did not replace her. He was in a position like Ms. Burns. He was hired and worked until July 19. He did not take-over her duties. It is a sham to say so. It is true that Mr. Lenton had duties in administrative services. Any subsequent appointments of casual employees merely filled in for Mr. Lenton to continue his duties. None of them took over Ms. Burns' duties.

What the employer did to Ms. Burns until June 26 included the fact that she had no duties until then. Mr. Lenton could not take-over her duties, since she had none at that time.

There is no evidence to show that Mr. Lenton took over the work of Ms. Burns in going for walks, or talking to others. Under section 7.2 it was not the work that Ms. Burns might have had that must continue. Rather, what counts is the work that she was doing at the time that she became surplus.

Section 7.2.3 refers to a specific set of duties that were ending. The employer said that Ms. Burns' duties would not end until November. The employer now says that in fact the duties did not end until November. However, that did not happen. What did happen is that the duties of Ms. Burns ended on May 15, 1996, and afterwards she was given no duties to do. Therefore, Mr. Lenton did not do her work. The employer only created a paper sham in this case.

What the employer did here was an attempt to save costs. They attempted to deprive a long service employee of 31 years of the "pay in lieu" that she deserves. The bargaining agent requests a decision to grant the grievance and that Ms. Burns be paid \$13,469.00 for the balance of the surplus period.

#### **Argument for the Employer**

The employer rejects the bargaining agent's attempt to paint management as sham artists.

What happened in this case is that Ms. Burns wanted to get her early-retirement package. She did not want to stay around for the rest of the six months. It is evident that she did not want to work. Ms. Burns did not like it in the typing pool.

The employer granted her the early retirement option. However, they could not grant her the "pay in lieu". It is clear that the "pay in lieu" is not discretionary when the employer incurs additional costs. The employer was not acting unfairly in this instance.

The bargaining agent questions whether Ms. Burns was shifted into a new position. However, the evidence of the employer witnesses is that she was shifted to a new position.



Their testimony was not challenge by the bargaining agent. Under the *PSE Act*, the employer could legally shift her to the position in the typing pool.

Even with all the restructuring and the fact that she was not working, Ms. Burns did not leave as early as she could. She waited until after her 50th birthday, and then she left.

When Mr. Lenton took over her duties, he came under a new supervisor. He was then doing different work in the typing pool. He was not on library work. He had been doing a different job in the library. Someone else filled in for his work in the library area.

Regardless, the employer has a right to assign work to a position. The employer also has the right to declare position surplus when the work of the position is not needed.

The evidence is that nobody in the administrative units got "pay in lieu" for the unfulfilled surplus period.

There was work to be done when Ms. Burns left. This was so despite the fact that she had no assigned desk, or no assigned work area. There was, nevertheless, always a place for her to work. When she did resign, her replacement had work to do.

The aim in restructuring is to protect employees within the provisions of the WFAD. In this case Ms. Burns became surplus to the employer's needs in November 1996. She was the one who decided to leave early.

### **Work Force Adjustment Directive**

#### *Objectives*

*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*

*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.*

*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.*

**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 authorize 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 service period is at the discretion of management, but shall not be unreasonably denied.*

*7.2.3 The deputy head shall ensure that pay in lieu of unfulfilled surplus period is only authorized where the employee's work can be discontinued on the resignation date and no additional costs will be incurred in having the work done in any other way during that period.*

**Conclusion and Reasons for the Decision**

There are three main issues that need to be decided in this case. The first whether the employer violated section 7.2 when it declined to authorize the "pay in lieu" to Ms. Burns, the grievor in this case. The second question is whether management unreasonably declined approval of the "pay in lieu". The third issue in this troika of questions is whether the employer was correct in saying that that Ms. Burns' work was not discontinued on her resignation day, and that the employer did incur additional costs in having the work done in the surplus period.

The short answer to that third question is that the employer decided that the work of Ms. Burns could not be discontinued on her resignation date. They needed her or someone else to remain until the end of her notice period. Management also refers to the additional costs incurred by the employer in having the work done during her surplus period.

The bargaining agent says that Mr. Lenton did not continue Ms. Burns' work after her resignation day. They say that she was doing little or no work in the six weeks leading up to her resignation date. She would visit other employees and walk around the base area. They add that Mr. Lenton did not carry on doing the same type of work that Ms. Burns was doing just before her resignation.

Certainly, I agree with the bargaining agent that Mr. Lenton did not do the sort of things that Ms. Burns had been doing. When he replaced her, he did the normal typing work of the CR-03 classification. Regardless of what Ms. Burns did, when section 7.2.3 talks about an employee's work that can be discontinued, it must refer objectively to work that an employee can find in a job description, or to the work of a classification that a supervisor would assign to her. The evidence in this regard is that Ms. Burns was told that she was in the typing pool. She knew exactly what type work was expected of her in that typing pool. It was primarily typing duties using a computer. That was normal type of work for a clerk 3. There was no suggestion by the bargaining agent that that was not the normal type of work for a clerk 3.

It begs the question when the bargaining agent suggests that Mr. Lenton should have been doing nothing in order to say that he continued the grievor's work after her resignation. It is incorrect to make such a suggestion. The evidence is clear that Mr. Lenton was doing normal work of a clerk 3 in the typing pool when he replaced Ms. Burns in June of 1966. The evidence is also clear that someone replaced him to do his work in regard to the library at the same time. It is my conclusion, therefore, Ms. Burns' work could not be discontinued nor was it discontinued as of her resignation date. Besides, by assigning her duties to Mr. Lenton the employer incurred additional costs in having the work done.

While the answer to the question that arises out of section 7.2.3 is determinative of the substantive issue to be decided in this case, it is appropriate to review the issue of whether the approval of Ms. Burns' "pay in lieu" was unreasonably denied by the employer. In my view it was not unreasonably denied.

Before Ms. Burns returned to the Cape Scott from the civilian personnel office the employer told that her job was to continue. According to exhibit 12, the employer intended to fill her position, when she left it in June 1996. She had this information in the memo of March 20, 1996. She was going to be working as an engineering and maintenance clerk in the clerical support centre. Ms. Burns knew before she retired that the employer needed all the clerk 3's in the typing pool after her retirement date. They told her that her request for the early retirement incentives on June 26, 1996, would occur as soon as they were able to find an alternative employee to replace her. Indeed, the decision to continue her work after the

resignation date was not seriously challenged by the bargaining agent. The bargaining agent says that the work was all generic. Yet, the employer knew that there remained work to be done, and in fact, they continued the work after Ms. Burns' resignation.

I concur with the employer's characterization that Ms. Burns wanted to resign from the department. She did so at the first opportunity that was advantageous to her. That came up within two weeks after her 50th birthday.

I do not fault Ms. Burns for taking the first available opportunity to resign. That was her right to do so. However, there was no simultaneous obligation upon the employer to discontinue her work when she resigned. The work still needed to be done.

The bargaining agent does not say that there was not enough work for the typing staff that remained after her resignation. They do not suggest that there was any reduction in the work of the typing pool, or in its work force, after she resigned. Instead, there were costs incurred in having Ms. Burns' work done. In my opinion therefore, approval of her "pay in lieu" was not unreasonably denied.

The answers to these two questions amount to a complete answer to the grievance.

I conclude that the approval of "pay in lieu" was not unreasonably denied. I also hold that Ms. Burns' work could not be discontinued on her resignation date and there were additional costs incurred in having her work done during her unfulfilled surplus. Therefore, the bargaining agent has not shown that Ms. Burns was entitled to the "pay in lieu" that she claims.

In the result of the grievance of Ms. Burns is hereby denied.

**Donald MacLean,**  
**Board member.**

Moncton, February 5, 1999.