

Library.

Date: 20010321

Files: 466-LP-285 to 323

Citation: 2001 PSSRB 30



Parliamentary Employment
and Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

CONSTANCE AUCLAIR AND OTHERS
(see attached list)

Grievors

and

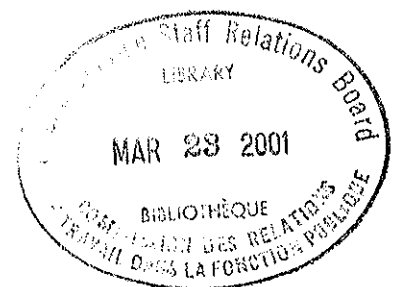
LIBRARY OF PARLIAMENT

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievors: Edith Bramwell, Public Service Alliance of Canada

For the Employer: Carole Piette, Counsel



Heard at Ottawa, Ontario,
February 12, 2001.

DECISION

[1] This decision is in response to grievances from 39 employees of the Library of Parliament (employer) in the Clerical and General Services (CGS) subgroup concerning the application of a *Memorandum of Understanding* signed between the employer and the Public Service Alliance of Canada (PSAC) on September 20, 1990 and attached to the collective agreement (MOU).

[2] The grievances were referred to adjudication on February 22, 2000. At the parties' request, and because of their unavailability, the hearing did not proceed until February 12, 2001.

[3] The MOU reads as follow:

MEMORANDUM OF UNDERSANDING

BETWEEN

THE LIBRARY OF PARLIAMENT

AND

THE PUBLIC SERVICE ALLIANCE OF CANADA

This Memorandum lays out the terms of settlement in the matter of the payment of the equalization adjustment based on the concept of Equal Pay for Work of Equal Value.

- 1) *The Library of Parliament agrees to follow the formula adopted by the Treasury Board of Canada for its employees in the Clerical and Regulatory Group (CR) and the Office Composing Equipment Operator (ST-OCE) sub-group for the Library of Parliament employees in the Clerical and General Services (CGS) and Library Assistant (LA) sub-groups respectively.*
- 2) *This payment will be made on condition that the Public Service Alliance of Canada requests the withdrawal of its Section 11 portion of its complaint for the LA sub-group (file number X00181 dated 9 March, 1989) and undertakes not to resubmit this complaint in the future.*
- 3) *On receipt of confirmation from the PSAC of the request for withdrawal of this complaint, the Employer agrees to take immediate steps to process the payment of the retroactive portion.*

- 4) *Furthermore, the Employer undertakes to ensure that any future adjustments based on Equal Pay which may be made to the CR group and ST-OCE sub-group in the Public Service will be paid to the above Library employees in the same manner as paid to the Treasury Board employees.*

For the sole purpose of future adjustments based on Equal Pay which may be made to the CR group and ST-OCE sub-group in the Public Service, Library employees in the CGS group, levels 1 to 5, will be compared to the CR group, levels 1 to 5 and the LA group, levels 1 to 3, will be compared to the ST-OCE sub-group, levels 1 to 3.

[4] The grievors grieved the failure of the employer to implement equalization payments under paragraph 4 of the MOU and, as corrective action, they request payment.

[5] The interesting twist in this case is that the parties agree on the interpretation of the MOU, but disagree on the interpretation of another document. In particular, the issue is whether or not a Special Pay Adjustment (SPA) negotiated between the Treasury Board, for its CR employees, and the PSAC constitutes a "future adjustment based on Equal Pay" as outlined in paragraph 4 of the MOU.

[6] The *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) is dated December 29, 1998 and reads as follows:

MEMORANDUM OF AGREEMENT
BETWEEN
THE TREASURY BOARD
AND
THE PUBLIC SERVICE ALLIANCE OF CANADA
ON
SPECIAL PAY ADJUSTMENTS

The [Treasury Board] and the Public Service Alliance of Canada agree, subject to this Memorandum of Agreement, that Special Pay Adjustments shall be made, in accordance

with the Table of Adjustments attached hereto as appendix A of this Memorandum of Agreement.

1. Special Pay Adjustments

- 1.1 *The Special Pay Adjustments shall be incorporated into the base pay of each of the occupational groups and subgroups covered by this Memorandum of Agreement.*
- 1.2 *The Special Pay Adjustments will be made to employees occupying positions at any time during the period covered by this Memorandum of Agreement in the following occupational groups and subgroups:*
- *Clerical and Regulatory (CR);*
 - *Data Processing, Data Conversion sub-group (DA-CON);*
 - *Educational Support (EU);*
 - *Secretarial, Stenographic and Typing, Court Reporter sub-group (ST-COR);*
 - *Secretarial, Stenographic and Typing, Office Composing Equipment Operator sub-group (ST-OCE);*
 - *Secretarial, Stenographic and Typing, Secretary sub-group (ST-SCY);*
 - *Secretarial, Stenographic and Typing, Stenographer sub-group (ST-STN);*
 - *Secretarial, Stenographic and Typing, Typist sub-group (ST-TYP).*

2. Conditions of Agreement

- 2.1 *The [Treasury Board] and the Public Service Alliance of Canada remain free to prosecute or defend before the Courts or Human Rights Tribunals any litigation relating to the complaints described in appendix B of this Memorandum of Agreement ("the complaints").*
- 2.2 *The Special Pay Adjustments made in accordance with this Memorandum of Agreement are made and accepted on the condition that neither the [Treasury Board] nor the Public Service Alliance of Canada will contend publicly or in any complaint or litigation that the making of either the agreement or the payments may be construed as an admission that there is any difference in wages of male and female employees of the [Treasury Board] contrary to section 11 of the Canadian Human Rights Act.*

- 2.3 *More specifically, without limiting the generality of the preceding paragraph, no element of this Memorandum of Agreement such as the amounts to be paid, their allocation by group or level, the criteria of payments, the method of calculation of these payments, shall be used against either of the parties in the course of proceedings regarding the complaints or any other complaints made against the [Treasury Board] under section 11 of the Canadian Human Rights Act or under any other section of that Act.*
- 2.4 *It is understood by the [Treasury Board] and the Public Service Alliance of Canada that the Special Pay Adjustments made in accordance with this Memorandum of Agreement, while being incorporated into base pay, will, subject to paragraphs 2.5 to 2.8 hereof, be used in any calculation of the pay equity wage gap that may be required for any given year, as the case may be, by the final resolution of the complaints.*
- 2.5 *The [Treasury Board] and the Public Service Alliance of Canada agree that, in the event that any Special Pay Adjustment payable by the [Treasury Board] as specified herein is greater than that found payable by the Courts or Human Rights Tribunal in respect of the complaints, whether such excess is calculated in respect of a particular level or an entire complainant occupational group, such excess will not be used to offset or reduce the [Treasury Board]'s liability in respect of the complaints in any way, in the subject year or for any other year's liability. In other words, in such instances, for purposes of [Treasury Board] liability under the complaints, any such excess shall be deemed to be zero.*
- 2.6 *Where the [Treasury Board]'s liability under the complaints is found by the Court or the Human Rights Tribunal to be greater than the Special Pay Adjustments as specified herein, whether such greater liability is by level or by occupational group, the [Treasury Board] shall remain fully liable for such additional amounts including interest as has been ordered by the Human Rights Tribunal or as may be ordered by the Courts.*
- 2.7 *The [Treasury Board] and the Public Service Alliance of Canada agree that any Special Pay Adjustments made in accordance with this Memorandum of Agreement will continue to be paid to employees in the event that the final resolution of the complaints results in amounts that are less than the adjustments paid pursuant to this Memorandum of Agreement.*

- 2.8 *The [Treasury Board] and the Public Service Alliance of Canada agree that any Special Pay Adjustments made in accordance with this Memorandum of Agreement will not be recovered from employees in the event that the final resolution of the complaints results in amounts that are less than the adjustments paid pursuant to this Memorandum of Agreement.*

3. Conditions of payments

- 3.1 *The Special Pay Adjustments as specified hereafter will be retroactive to the following dates:*

- *Clerical and Regulatory (CR): **June 12, 1997;***
- *Data Processing, Data Conversion sub-group (DA-CON): **August 29, 1997;***
- *Educational Support (EU): **March 1, 1997;***
- *Secretarial, Stenographic and Typing, Court Reporter sub-group (ST-COR): **July 22, 1997;***
- *Secretarial, Stenographic and Typing, Office Composing Equipment Operator sub-group (ST-OCE): **July 22, 1997;***
- *Secretarial, Stenographic and Typing, Secretary sub-group (ST-SCY): **July 22, 1997;***
- *Secretarial, Stenographic and Typing, Stenographer sub-group (ST-STN): **July 22, 1997;***
- *Secretarial, Stenographic and Typing, Typist sub-group (ST-TYP): **July 22, 1997.***

- 3.2 *The Special Pay Adjustments listed in the Table of Adjustments attached hereto as appendix A of this Memorandum of Agreement are annual and will be prorated in accordance with the period of time each employee will have occupied a position in one or more occupational groups or subgroups covered by this Memorandum of Agreement*

...

[7] The PSAC filed four exhibits and I heard from one witness.

Evidence

[8] Margaret Jaekl, a classification and equal-pay officer with the PSAC, testified that she believed the SPA was negotiated in response to the PSAC's global complaint on pay equity. In other words, it was to be regarded as a down payment on the amount of money owing to certain employees as part of the pay equity complaint.

[9] The pay equity complaint was resolved in October 1999, following a Consent Order issued by a Human Rights Tribunal (Exhibit U-2).

[10] Chart 1 in Exhibit U-2 reveals that the annual pay-equity adjustment amounts decreased substantially in 1997 and 1998 for the comparator Treasury Board groups. The reason for that, according to Ms. Jaekl, was that the SPA was offsetting the wage gap. If the SPA was not to be factored in, Ms. Jaekl would have expected the pay equity adjustment to be higher.

[11] In cross-examination, Ms. Jaekl stated that she was not a member of the team which negotiated the SPA.

Arguments

For the Grievors

[12] Paragraphs 1 and 4 of the MOU impose a liability on the employer. Here the employer is liable for a payment equal to the SPA to its employees in the CGS subgroup.

[13] Paragraph 4 relates to the principle of equal pay. The Treasury Board made an equal-pay payment and termed it a SPA. That being the case, the employer owes an identical payment to its employees.

[14] In order to support the position that the SPA is a "future adjustment based on Equal Pay", as per the provisions of the MOU, a review of paragraph 2.4 of the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) is important. It reads:

2.4 *It is understood by the [Treasury Board] and the Public Service Alliance of Canada that the Special Pay Adjustments made in accordance with this Memorandum of Agreement, while being incorporated into base pay, will, subject to paragraphs 2.5 to 2.8 hereof, be used in any calculation of the pay equity wage gap that may be required for any given year, as the case may be, by the final resolution of the complaints.*

That paragraph indicates clearly that the SPA is a manner of paying Treasury Board employees a pay equity adjustment.

[15] The SPA was used in the calculation of the pay equity wage gap. A failure to include the SPA when calculating the wage gap would not result in full pay equity, which is what the employer had done with its employees.

[16] Paragraph 2.8 of the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) provides as follows:

2.8 *The [Treasury Board] and the Public Service Alliance of Canada agree that any Special Pay Adjustments made in accordance with this Memorandum of Agreement will not be recovered from employees in the event that the final resolution of the complaints results in amounts that are less than the adjustments paid pursuant to this Memorandum of Agreement.*

By agreeing to paragraph 2.8, the parties concurred that there would be no recovery of moneys in the event that the value of the SPA exceeded an award resulting from the pay equity complaint. Again, that ties the SPA to pay equity.

[17] In addition, there should be interest owing on the SPA, and it is requested that interest be awarded from the date the SPA was paid to Treasury Board employees, which was in 1998.

[18] Exhibit U-3, dated September 16, 1998, is an information notice from the Treasury Board and is titled *Collective Bargaining and Pay Equity - PSAC*. Its fourth paragraph states as follows:

Although the government is seeking judicial review of the [Human Rights] Tribunal ruling, our intention is to reach a settlement with PSAC so that we can make pay equity payments to employees who have been waiting too long.

This extract indicates that the SPA, which was negotiated between the Treasury Board and the PSAC in Exhibit U-1, was in fact part of pay equity.

[19] The SPA has to be considered in relation to the pay equity wage gap, because, without it, pay equity has not been achieved.

For the Employer

[20] All pay equity adjustments required to be paid under the collection agreement have been paid.

[21] Paragraph 1 of the MOU deals with a Treasury Board formula adopted in 1990, which saw a lump-sum payment made to the CGS subgroup reflect what was done for the CR group. At that time, the parties did not know what further adjustments, if any, would be made and provided for paragraph 4, which relates to equal-pay payments other than lump-sum payments.

[22] In order for the adjudicator to determine that there is a liability owed by the employer, it must be clear that the SPA was considered to be a "future adjustment based on Equal Pay" as specified in the MOU. The only pay equity memorandum of agreement before the Board by way of an exhibit is the one contained in the Human Rights Tribunal Consent Order (Exhibit U-2). There is no reference in that document to the SPA.

[23] The SPA was simply an increase to the rates of pay, as negotiated by the parties. This view is supported by the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1). This exhibit does not refer to the SPA as being an equal-pay adjustment, nor does it refer to it as being a down payment on any future pay equity increase.

[24] In order for the adjudicator to find that the SPA is an equal-pay adjustment, the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) would have to refer to the SPA specifically as an equal-pay adjustment and it does not.

[25] Paragraph 2.2 of Exhibit U-1 states:

2.2 *The Special Pay Adjustments made in accordance with this Memorandum of Agreement are made and accepted on the condition that neither the [Treasury Board] nor the Public Service Alliance of Canada will contend publicly or in any complaint or litigation that the making of either the agreement or the payments may be construed as an admission that there is any difference in wages of male and female employees of the employer contrary to section 11 of the Canadian Human Rights Act.*

Paragraph 2.2 states specifically that, in making the SPA, there is no admission of liability with respect to there being a remuneration difference between males and females. This buttresses the employer's position that the SPA is not an equal-pay adjustment; it was simply a negotiated increase in the rates of pay.

[26] Paragraph 2.7 of the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) states:

2.7 *The [Treasury Board] and the Public Service Alliance of Canada agree that any Special Pay Adjustments made in accordance with this Memorandum of Agreement will continue to be paid to employees in the event that the final resolution of the complaints results in amounts that are less than the adjustments paid pursuant to this Memorandum of Agreement.*

The SPA continues even though a pay equity adjustment could result in an amount less than the SPA. Therefore, the SPA was, in reality, simply a part of rates of pay. If the Human Rights Tribunal had found that there was no violation of the *Canadian Human Rights Act*, and no pay equity was owed, how would the SPA be considered? It would be considered as an increase to the rates of pay only, as that is what it was.

[27] Unless there is clear language in the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) to say that the SPA is an equal pay adjustment, the employer's position is that it should not be required to pay this amount of money. The onus in this case rests with the grievors, and the onus has not been met.

[28] With respect to the issue of interest, the grievances are silent. Moreover, when the SPA was paid to Treasury Board employees, no interest accompanied it. Furthermore, there have been delays in the hearing of this matter which cannot be attributable to the employer; therefore, the employer should not suffer the consequences here.

Reply

[29] The grievors request payment consistent with the MOU and pay equity adjustments attract interest as provided at article 3 of the Memorandum of Agreement incorporated in the Human Rights Tribunal Consent Order (Exhibit U-2).

[30] All pay equity adjustments are adjustments to the rates of pay. Any pay equity settlement involves a change to base rates. The SPA is no different.

[31] Paragraph 2.4 of the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) states that the SPA will be used in the calculation of the pay equity wage gap. Therefore, there can be no question that the SPA relates to pay equity.

Reasons for Decision

[32] The grievors alleged a failure to implement a provision of their collective agreement.

[33] This is a situation where the provisions of the collective agreement, per se, are not in dispute, but rather where the parties do not agree on an issue surrounding the payment of a SPA by another employer, the Treasury Board, to its own employees.

[34] Specifically, the grievors alleged that a SPA was paid by the Treasury Board to its employees in furtherance of the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) and that this adjustment was, in reality, made as a result of pay equity. Therefore, according to paragraph 4 of the MOU, this SPA should also have been paid by the employer to its employees.

[35] The employer states that nowhere in the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) is there any reference to these adjustments being “based on Equal Pay”, as is required by paragraph 4 of the MOU.

[36] Insofar as the issue of onus is concerned, the grievors alleged a breach of the collective agreement and, as such, they bear the initial onus of persuasion. If they can show that the SPA was an adjustment based on equal pay, then the provisions of paragraph 4 of the MOU are clear. In that case, the employer would be liable for a similar payment to its employees.

[37] Furthermore, the employer states that, in order for these grievances to succeed, there must be clear and cogent evidence to support the proposition that the SPA is based on equal pay. Since the grievors bear the onus of establishing their claim, and since there is no evidence to support the proposition they made, they did not discharge their burden of persuasion.

[38] Unfortunately, no one who negotiated the SPA testified. Any member of the negotiating team who negotiated the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) on behalf of the PSAC may have been able to verify the claim made here, but no such witness was proffered. Consequently, the only evidence before me in this regard is the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1).

[39] As the grievors bear the onus in this case, it is incumbent upon them to show clearly that the SPA is a “future adjustment based on Equal Pay” as described in paragraph 4 of the MOU and is therefore subject to payment. I concur with the employer that the grievors have not met that onus.

[40] Indeed, the *Memorandum of Agreement on Special Pay Adjustments* signed by the Treasury Board and the PSAC (Exhibit U-1) was negotiated in 1998, and the Human Rights Tribunal Consent Order (Exhibit U-2) was made in 1999. I am not satisfied, on a balance of probabilities, that the SPA was an increase to the rates of pay negotiated by the Treasury Board and the PSAC for pay equity reasons.

[41] The grievors claimed that because the SPA was incorporated into base pay and, subsequently, used in the calculation of the pay equity wage gap, as outlined in paragraph 2.4 of Exhibit U-1, the SPA was a “future adjustment based on pay equity”.

[42] The employer responded that any pay adjustment which was incorporated into base pay would be used in the calculation of the pay equity wage gap, regardless of the reason why it was negotiated. Therefore, the grievors' argument is not determinative of the issue as to whether the SPA was a “future adjustment based on Equal Pay”.

[43] I concur with the employer's position on this issue. Nowhere can I find that the SPA was “based on Equal Pay”, as is required by paragraph 4 of the MOU. Certainly, when the SPA was negotiated and included in the rates of pay, it was to be used in calculating the pay equity wage gap that may have existed between the CR group and its comparator group. That would be true with any increase to base rates, including an economic increase. If the CR group negotiated an economic increase larger than its comparator group, then the pay equity wage gap would lessen. However, this does not mean that the difference between the two negotiated increases is necessarily a “future adjustment based on Equal Pay.” The same is true of the SPA.

[44] Consequently, absent more compelling evidence to support the claim that the SPA was a “future adjustment based on Equal Pay”, I cannot support such a proposition. I concur with the employer that the grievors' onus of proof has not been discharged in this case.

[45] For this reason, the grievances must be denied.

**Joseph W. Potter,
Deputy Chairperson**

OTTAWA, March 21, 2001.

LIST OF GRIEVORS

<u>FILE NO.</u>	<u>GRIEVOR</u>
466-LP-285	AUCLAIR, Constance
466-LP-286	BEAUCHAMPS, Lise G.
466-LP-287	BEAULNE, Ghislaine
466-LP-288	BÉLANGER-JOLY, Sylvie
466-LP-289	BÉLANGER, Pierre
466-LP-290	BEAULNE, Pierre
466-LP-291	BESNER, Carole
466-LP-292	BLAIS, Glen
466-LP-293	BRUNETTE, Nicole
466-LP-294	CHARPENTIER, Jacques
466-LP-295	DERY, Lynne
466-LP-296	DUMAIS, Francine
466-LP-297	FRYE, Robert
466-LP-298	HALL, Mélissa
466-LP-299	HARVEY, Rolande
466-LP-300	HODGINS, Hugh Terrence
466-LP-301	HODGSON, Amanda Christine
466-LP-302	JOINER, Alice
466-LP-303	LABELLE, Claudette
466-LP-304	LANDRIAULT, Suzanne
466-LP-305	LANDRY, Charles
466-LP-306	LANGÉVIN, Nadine
466-LP-307	LAUZON IDONE, Sylvie
466-LP-308	LEBLANC, Jean R.
466-LP-309	LEONARD, Marcel

466-LP-310	MALETTE, Hélène
466-LP-311	MARLEAU, Marie-France
466-LP-312	McCARTHY, Terri Lee
466-LP-313	MIGNEAULT, Maurice
466-LP-314	PICHECA, Loretta A.
466-LP-315	QUEVILLON, Luc
466-LP-316	QUEVILLON, Michael
466-LP-317	RAYMOND, Jean-Claude
466-LP-318	ROEMMELE, Doug
466-LP-319	SARRAZIN, Joanne
466-LP-320	SIGNORETTI, Franca
466-LP-321	WARNER, Susan
466-LP-322	WHITMORE, Suzanne
466-LP-323	WILSON, Jeremy