

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

GERALD GUNN

Grievor

and

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

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievor: Georges Nadeau, Professional Institute of the Public Service
of Canada

For the Employer: Jock Climie, Student-at-Law

Heard at Vancouver, B.C.,
January 13, 1999.

DECISION

On March 30, 1998, Mr. Gerald Gunn, an employee classified at the CS-2 level, filed a grievance claiming entitlement to the Terminable Allowance as specified in Appendix F of the Computer Systems Administration Group collective agreement (Code: 303/97). Mr. Gunn felt he was entitled to the amount listed under the December 2, 1997 column. The employer denied payment because Mr. Gunn was on leave without pay on December 2, 1997.

Appendix F is a Memorandum of Understanding between the Treasury Board and the Professional Institute of the Public Service of Canada and reads as follows:

***APPENDIX F*

*MEMORANDUM OF UNDERSTANDING
BETWEEN THE
TREASURY BOARD
(HEREINAFTER CALLED THE EMPLOYER)
AND
THE PROFESSIONAL INSTITUTE
OF THE PUBLIC SERVICE OF CANADA
(HEREINAFTER CALLED THE INSTITUTE)
IN RESPECT OF
THE COMPUTER SYSTEMS GROUP BARGAINING UNIT*

Preamble

In an effort to resolve retention problems, the Employer will provide an Allowance to incumbents of positions classified at the CS-1 through CS-5 levels for the performance of duties in the Computer Systems Administration Group.

- 1. On the date of signing of this memorandum of understanding, the parties agree that incumbents of positions identified above shall be eligible to receive a "Terminable Allowance" in the following amounts and subject to the following conditions:*

- (i) An Allowance to be paid in accordance with the following grid:*

TERMINABLE ALLOWANCE

<i>Level</i>	<i>December 2, 1997</i>	<i>Monthly Payments January 1, 1998 to April 1, 1999*</i>	<i>April 30, 1999</i>	<i>Total</i>
<i>CS-1</i>	<i>\$ 605</i>	<i>\$130</i>	<i>\$450</i>	<i>\$3,135</i>
<i>CS-2</i>	<i>\$ 770</i>	<i>\$165</i>	<i>\$570</i>	<i>\$3,980</i>
<i>CS-3</i>	<i>\$ 940</i>	<i>\$205</i>	<i>\$695</i>	<i>\$4,915</i>
<i>CS-4</i>	<i>\$1,090</i>	<i>\$235</i>	<i>\$805</i>	<i>\$5,655</i>
<i>CS-5</i>	<i>\$1,250</i>	<i>\$270</i>	<i>\$925</i>	<i>\$6,495</i>

**Allowance is effective on the 1st day of each month.*

- (ii) The Terminable Allowance specified above does not form part of an employee's salary.*
- (iii) Effective December 2, 1997, all employees in the bargaining unit shall receive the amount indicated in the grid outlined in (i) on December 2, 1997.*
- (iv) Effective January 1, 1998, an employee shall be paid the Terminable Allowance for each calendar month for which the employee receives at least ten (10) days' pay in the previous month.*
- (v) All employees in the bargaining unit on April 30, 1999, shall be paid the specified allowance due that date.*
- (vi) The Terminable Allowance shall not be paid to or in respect of a person who ceased to be a member of the bargaining unit prior to the date of signing of this Collective Agreement.*
- (vii) Subject to 1 (viii) below, the amount of the Terminable Allowance payable is that amount specified in 1 (i) for the level prescribed in the certificate of appointment of the employee's substantive position.*
- (viii) When an employee is required by the Employer to perform the duties of a higher classification level in accordance with clause 44.05, the Terminable Allowance payable shall be proportionate to the time at each level.*
- (ix) Part-time employees shall be entitled to the Terminable Allowance on a pro rata basis.*
- 2. The parties agree that disputes arising from the application of this Memorandum of Understanding may be subject to consultation.*
- 3. This Memorandum of Understanding expires on April 30, 1999.*

SIGNED AT OTTAWA, this 2nd day of the month of December, 1997.

The Professional Institute filed seven exhibits, mostly on consent. The employer filed three exhibits, all on consent.

I heard from one witness, the grievor.

Evidence

Mr. Gunn began his career in the Public Service in November 1991 as a member of the Computer Systems Administration Group. He started as a CS-1; then in May 1997 he became an acting CS-2 as a team leader. On July 8, 1997, Mr. Gunn received written confirmation that he became an indeterminate CS-2 effective June 23, 1997 (Exhibit G-5). At that same time, Mr. Gunn became an acting CS-3 and this, according to Exhibit G-2, would run from June 23 to November 14, 1997.

Mr. Gunn remained an acting CS-3 until November 13, 1997 when he commenced three months leave without pay for personal needs. The grievor testified that, as an opportunity arose for him to acquire some project management experience with Canadian Airlines, he applied for leave and it was granted.

It was during this period of absence that the collective agreement provided for payment of a Terminable Allowance, which the grievor never received.

When the leave was about to expire, Mr. Gunn requested an extension for one year and eventually this was granted (Exhibit G-7). This leave is to expire February 16, 1999.

The grievor testified he has not yet decided whether to return to the Public Service when his leave without pay expires. He did state, in cross-examination, that he is occupying a position as a project analyst for Canadian Airlines, and that the project is still going on.

Argument for the Grievor

Mr. Nadeau argued that the collective agreement had to be read in its entirety.

With respect to the preamble, Mr. Nadeau said as the grievor is an incumbent of a position, he meets this requirement.

Paragraph 1 specifies the amount of the Terminable Allowance owing and in this case, the amount owing is shown under the December 2, 1997 column. More specifically, the amount is \$770 for a CS-2 and \$940 for a CS-3. Mr. Nadeau said the

grievor should receive the \$940 amount, although he also stated there may be a requirement to pro-rate this due to the time spent acting as a CS-3.

Paragraph 1.(iii) states that all employees in the bargaining unit receive the amount listed effective December 2, 1997. There was no dispute, according to Mr. Nadeau, that Mr. Gunn was an employee in the bargaining unit.

In this regard, I was referred to the definition of an “employee” as contained in the *Public Service Staff Relations Act (PSSRA)*. It states:

"employee" means a person employed in the Public Service, other than

- (a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act,*
- (b) a person locally engaged outside Canada,*
- (c) a person whose compensation for the performance of the regular duties of the position or office of the person consists of fees of office, or is related to the revenue of the office in which the person is employed,*
- (d) a person not ordinarily required to work more than one third of the normal period for persons doing similar work,*
- (e) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms and conditions substantially the same as those of a member thereof,*
- (f) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature,*
- (g) a person employed on a casual basis,*
- (h) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more,*
- (i) a person employed by or under the Board,*
- (j) a person who occupies a managerial or confidential position, or*

(k) *a person who is employed in a portion of the public service of Canada specified in Part I of Schedule I under a program designated by the Treasury Board as a student employment program,*

and, for the purposes of this definition, a person does not cease to be employed in the Public Service by reason only that the person ceases to work as a result of a strike or by reason only of the termination of employment of that person contrary to this Act or any other Act of Parliament.

As the exceptions listed in (a) to (k) do not apply to the grievor, Mr. Gunn is to be considered as an employee.

If the parties had intended to exclude payment to someone who was on leave without pay, subparagraph 1.(iii) would specifically have that exclusion.

There is nothing in Appendix F that states the employee has to be working on December 2, 1997 in order to receive the payment. As the grievor complied with the conditions in subparagraph 1.(iii), he is entitled to the payment.

Mr. Nadeau referred me to the following cases : *Re Air Canada and Canadian Air Line Flight Attendants' Association* (1981), 1 L.A.C. (3d) 37; and *Canadian Union of Public Employees, Local 43, and Municipality of Metropolitan Toronto* (1972), 24 L.A.C. 318.

Argument for the Employer

Mr. Climie argued that the employee must meet the conditions set out in the preamble before it can be determined if the employee qualifies for the payment under paragraph 1 and all its accompanying subparagraphs.

It was the employer's position that the grievor did not meet the conditions set out in the preamble; therefore the grievor did not qualify for the allowance.

The word "incumbents" is used in the preamble and therefore it is necessary to see if Mr. Gunn is an incumbent of a CS position, according to Mr. Climie. As there is no definition of the word "incumbent" in the collective agreement, I was referred to the definition in *Black's Law Dictionary* (Fifth Edition). It defines incumbent as:

A person who is in present possession of an office; one who is legally authorized to discharge the duties of an office.

In Mr. Gunn's case, since he was on leave without pay on the date in question, he did not meet the definition of the word incumbent and therefore he fails this condition, according to Mr. Climie.

Again in the preamble, we see the words "for the performance of duties" and we know the grievor was not performing duties on December 2, 1997. As he was not performing duties, nor was he an incumbent on December 2, Mr. Climie stated the grievor is not entitled to the Terminable Allowance.

A Treasury Board memorandum (Exhibit G-4) was issued to clarify the situation of leave without pay. It states, at page 2:

A CS employee on LWOP for one of the following reasons is eligible for the payment: maternity, paternity, adoption and education leave.

Mr. Climie pointed out that all of these situations involve employees receiving some type of allowance while on leave without pay and they qualified for the Terminable Allowance. Mr. Gunn was on leave without pay on December 2, 1997 for a reason other than that cited in the memorandum and was not in receipt of any allowance. He therefore should not qualify for the payment.

Mr. Climie said the concept of a retention bonus was implemented to handle a crisis involving CS employees leaving the Public Service for the private sector. Mr. Gunn has chosen to go to the private sector and Mr. Climie stated it was doubtful Mr. Gunn would return to the Public Service. It therefore makes no sense to apply this Terminable Allowance to someone who has already left.

In the alternative, Mr. Climie stated that the acting assignment for Mr. Gunn ended November 14, 1997 and we do not know with certainty if it would have been extended had Mr. Gunn not left. Therefore, any entitlement would be at the CS-2 level, which was Mr. Gunn's substantive level, and not at the acting CS-3 level.

Mr. Climie conceded that the grievor met the conditions of paragraph 1.(iii) but, as the grievor did not meet the conditions set out in the preamble, there was no entitlement to the Terminable Allowance.

I was referred to the following case: *Poole* (Board file 166-2-19019).

Reply

Mr. Nadeau pointed out that a person who is appointed on an indeterminate basis to a position must be the incumbent. Exhibit G-5 appoints Mr. Gunn on an indeterminate basis, and nothing has been issued to rescind this. Mr. Gunn therefore remains an incumbent.

With respect to the words “performance of duties”, there is no indication this means the employee must be performing the duties on December 2, 1997. It could equally mean that an employee qualifies if the employee performed duties in the CS group during the life of the agreement.

Mr. Gunn performed CS duties up to November 13. If the objective of the parties is to retain employees, then surely not paying the amount is contrary to the intent.

Reasons for Decision

The CS collective agreement provides for payment of what is called a “Terminable Allowance” on December 2, 1997 in ascending amounts depending on the employee’s classification level. Monthly payments begin January 1998 but these do not concern us here. There is no question the grievor is not entitled to these monthly payments as he does not meet the conditions set out in subparagraph 1.(iv).

The only issue to decide is whether or not Mr. Gunn is entitled to a payment listed under the December 2, 1997 column.

Mr. Climie maintained that the grievor had to meet the preconditions set out in the preamble before being entitled to the Terminable Allowance. Mr. Climie conceded that under subparagraph 1.(iii), the grievor would be entitled to the Terminable Allowance, but the grievor was prevented from reaching this part of the collective agreement by virtue of the pre-conditions set out in the preamble.

Specifically, Mr. Climie argued that Mr. Gunn was not an incumbent of a position. Mr. Nadeau stated that Exhibit G-5 confirmed Mr. Gunn in an indeterminate position and nothing has been advanced by the employer to alter his status.

In this regard, I find Mr. Nadeau's reasoning persuasive. Certainly up to the date Mr. Gunn commenced leave without pay (November 13, 1997), there is no dispute that the grievor was an incumbent of a position. In order no longer to be considered as an incumbent of a position, I believe the employer must take some type of action to remove the employee from "incumbent status" as it were. I do not think it is sufficient to simply state that, because the individual did not physically occupy an office he was not an incumbent. What about an individual on a long term illness, or lengthy vacation leave? These individuals may not be in the present possession of an office in the physical sense, but I believe they remain incumbents, and they have not been removed from office.

The employer appointed Mr. Gunn to an indeterminate position and there was no evidence presented to me to show that Mr. Gunn had been removed from an indeterminate position. Therefore, I believe he remained an incumbent of a CS position.

Mr. Climie stated that, as Mr. Gunn was not performing duties on December 2, 1997, there was no entitlement to the Terminable Allowance. Mr. Nadeau pointed out that the collective agreement did not state one had to be performing duties on December 2. If that were a requirement, the parties would have specified as such, but they did not.

I again concur with Mr. Nadeau. It does not state that one must be performing duties on a specified date to qualify for receipt of the Terminable Allowance. Mr. Gunn was doing CS work up to the time he left on November 13. The collective agreement states that the employer will provide an allowance to incumbents for the performance of duties in the CS group. Mr. Gunn did perform duties in the CS group, albeit not on December 2, 1997. However, the agreement does not state one must be performing duties on December 2, 1997 to get the allowance, but rather the allowance is due on December 2, 1997 for the performance of duties. There is a clear distinction between the two in my mind. As the grievor was performing duties during the retroactive period, he meets the conditions set out in the preamble for this criterion.

Having reached the conclusion that Mr. Gunn is not barred from receipt of the Terminable Allowance by the language in the preamble, there is no need to go further.

Mr. Climie had conceded that it was the preamble that prevented Mr. Gunn from receiving the allowance. The remainder of the agreement would not prevent the receipt of the allowance.

There is one issue remaining, and that is the amount of the allowance to which Mr. Gunn is entitled.

Mr. Climie stated that the acting assignment was to end on November 14, 1997 (see Exhibit G-2), and although the assignment may have been extended had Mr. Gunn remained in the Public Service, at this time that is pure conjecture. The document indicates the acting assignment was to end November 14 and thereafter the grievor would occupy his substantive CS-2 position. As such, the grievor's entitlement on December 2, 1997 would be at the CS-2 rate. Specifically, this is \$770, and there would not be an entitlement at the CS-3 rate.

In this regard, I find Mr. Climie is technically correct. The evidence indicates Mr. Gunn's acting assignment would have ended November 14, 1997. He would thereafter revert to his substantive CS-2 position. His collective agreement entitlement, therefore, is at the CS-2 rate.

To the extent above, the grievance is allowed.

**Joseph W. Potter,
Deputy Chairperson**

OTTAWA, February 10, 1999.