File: 166-2-28685

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DAVID GRAY

Grievor

and

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

Employer

Before: Guy Giguère, Board Member

For the Grievor: Alan H. Phillips, The Professional Institute of the Public Service of Canada

For the Employer: Jock Climie, Counsel

Heard at Victoria, B.C.,
June 3 and 4, 1999.

Written submissions filed on July 28, August 27, and September 9, 1999

David Gray, an AU-1 Auditor employed at the Victoria office of Revenue Canada, was assigned an amalgamation file in January 1995 and worked on it for over 200 hours until January, 1997. He grieved on May 23, 1997 that he had performed duties at the AU-3 level for this file but was denied acting pay by his employer. He asked in his grievance, as a corrective measure, to receive 150 hours of acting pay at the AU-3 level. Mr. Gray had explained to his supervisor that he did not consider the first 50 hours to be at the AU-3 level and consequently did not grieve on this.

On June 30, 1997, Bruce Donaldson, Assistant Director, Verification and Enforcement in the Victoria office of Revenue Canada, denied his grievance at the first level. He explained that based on prior agreement, this request for acting pay related to a single file requested and assigned to Mr. Gray for development. The number of hours worked on this file was not significant enough to indicate that Mr. Gray was substantially performing the duties at the AU-3 level at that time. Mr. Donaldson also noted that Mr. Gray was always aware of the circumstances surrounding his assignment of the file and had delayed filing any request for acting pay until contacted regarding the appeal.

Attached to the reply at the first level was the following statement of facts:

> *My review of the file indicates the following:*
>
> 1. *The file was assigned to you in January 1995 in response to your specific request for development of technical knowledge at a higher level of complexity than your substantive classification.*
>
> 2. *The supervisor discussed this with you at the file assignment stage and monitored your progress throughout the audit. Additional complexities were encountered as the audit progressed, resulting in over 250* [sic] *hours of applied time over a 12 month period.*
>
> 3. *The file was completed in December 1995 with the reassessment of a principal file (1992 year) and secondary file (1992 and 1993 year).*
>
> 4. *The taxpayer subsequently filed a notice of objection, eventually leading to an appeal referral to the tax court. You were subsequently contacted by the Department of Justice in March 1997 and asked to provide assistance. Based on discussions with your supervisor, a complexity analysis was then prepared and agreement was made to recognize acting pay at the AU3 level for any subsequent time applied by you to resolve the appeal.*

The grievance was also denied at the second, third and final levels of the grievance process. In the final level reply to the grievance on September 9, 1998, Robin D. Glass, Assistant Deputy Minister, Human Resources Branch, Revenue Canada, denied the grievance because it was untimely but he explained that, even if it had been timely, it would have been denied:

…

> *In accordance with clause 38.10 of the Auditing (AU) Group collective agreement, an employee may present a grievance not later than the twenty-fifth (25th) day after the date he or she becomes aware of the action or circumstances giving rise to the grievance. I note that you filed your grievance on May 27, 1997, claiming acting pay for a file you completed in March 1996, some 14 months prior. Thus, your grievance is untimely and on that basis, it is denied.*
>
> *Notwithstanding the foregoing, had your grievance been timely, I would have concurred with the response you were given at the third level of the grievance procedure, which response appropriately concluded that you did not substantially perform the duties of a higher level position for at least 15 consecutive days in accordance with clause 27.07 of the AU collective agreement. Therefore, you are not entitled to acting pay.*

…

Clauses 38.10 and 27.07 of the Auditing Group (AU) collective agreement (Code: 204/88) read as follows:

> *38.10 An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause 38.05, not later than the twenty-fifth (25th) day after the date on which he is notified orally or in writing or on which he first becomes aware of the action or circumstances giving rise to grievance.*
>
> *27.07 When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least fifteen (15) consecutive working days, he shall be paid acting pay calculated from the date on which he commenced to act as if he had been appointed to that higher classification level for the period in which he acts.*

Summary of Evidence

In November 1994, Mr. Gray attended a course on amalgamation, dealing with the fiscal consequences of the merging of companies. In early 1995, Mr. Gray was assigned by his supervisor, John Hoogendoorn, a file that dealt with an amalgamation of companies; this file will be referred to in this decision as EB to maintain the confidentiality of tax information. Mr. Gray testified that his supervisor had approached him to work on this file because amalgamation files were generally considered to constitute work at the AU-2 level. Mr. Gray testified that he never requested an amalgamation file but his supervisor had approached him with this file which was AU-2 level work. He accepted it for the training experience it would give him and therefore he did not request acting pay.

Mr. Hoogendoorn's testimony differed from Mr. Gray's testimony in that he maintained that Mr. Gray requested the assignment of a file which would enable him to apply the knowledge he had gained from the training on amalgamation. Furthermore, even though it was an amalgamation file which he assigned to the grievor, it was still an AU-1 level file based on gross revenue since it was under three million dollars. In any case he could not ask an employee classified at the AU-1 level to perform work at the AU-2 level as a team leader.

On January 5, 1995, Mr. Gray proceeded with a desk review of the EB file and examined it to establish an audit plan. He then arranged to conduct the audit and proceeded to Nanaimo for a full week, starting on January 16, 1995. He was part of an audit group of about 10 auditors, plus their supervisor, Mr. Hoogendoorn, conducting different audits at the same time in Nanaimo.

Mr. Gray testified that, after a few days, it became obvious to him that the EB file involved more than an amalgamation issue; three corporations were involved in significant tax planning and he began to suspect tax avoidance. Therefore, he went to talk to his supervisor to relay his finding to him. Mr. Hoogendoorn then told him that he had confidence in his abilities to handle this case. Mr. Hoogendoorn also gave him a note from a colleague who had audited an affiliated corporation. Mr. Gray then continued to gather the evidence on the tax avoidance issue. The case, as it unfolded, required the grievor to look at the corporation that was the result of the

amalgamation. Mr. Gray discovered that there were four individuals holding shares in the "EB" company, a holding company that owned four different businesses. Three of the four owners of EB wanted to get the money out of the EB company and get the capital gains exemption. These three individuals sold their shares in EB to the fourth owner of EB the day after they each bought one of the four businesses of the EB holding company. The then sole owner of EB was left with the fourth business. This case was complex and involved three different lawyers and four accountants. Mr. Gray believed that it was tax planning and gathered evidence to that effect and then went to the Tax Avoidance Group at the Victoria office of Revenue Canada. A referral was prepared and sent to the Ottawa Headquarters. The EB case was like an octopus and consisted in all of 10 files: four individual files, three corporation files, one amalgamated corporation and two ancillary corporations.

In reviewing the EB case, as Mr. Gray believed he was dealing with a tax planning issue, he took the case to the Tax Avoidance Group in the Victoria office of Revenue Canada in order that a referral could be prepared and sent to Revenue Canada Headquarters in Ottawa. What the Tax Avoidance Group prepared was essentially a report on this case. After September 1995, Mr. Gray continued to work on the case on different issues in regard to wages incorrectly reported, revenues and individuals claiming alimony, and the case was completed by December 1995. Mr. Gray testified in relation to Exhibit G-6 which consisted of copies of his desk calendar for January and March 1996 showing that he had spent several hours working on files related to the EB case. He was contacted by a lawyer who was involved with a taxpayer in the EB case. He had to research and reply to the lawyer and charged the time he spent to an indirect time code because the EB case was closed.

By March 1996, one party in the EB case filed an objection. In 1996, Mr. Gray testified that he was approached by colleagues responsible for appeals within Revenue Canada to discuss the EB case. Mr. Gray testified that he did a lot of research for this case and continued working on it in November 1996; the time he spent on it was charged as assistance to others.

In January 1997, a lawyer from the Department of Justice (DOJ) in Vancouver called Mr. Gray because the EB case was going to court. This call went on for three to four hours and, since the lawyer needed more information from Mr. Gray, he asked

him to go to Vancouver to discuss the file. Mr. Gray testified that, when he went to Vancouver to meet with the DOJ lawyer, he looked at the EB file in its entirety and only then did he realize its complexity. The DOJ lawyer told him that he would have to testify as an expert on the file. Further to that visit, Mr. Gray went to see his supervisor, John Hoogendoorn, and discussed with him the EB case explaining that it was considerably more complex than he originally had envisioned; he asked his supervisor for acting pay retroactively for work he had already done in generating the tax avoidance file and for future work on this file.

Mr. Gray then went on to see Mr. Malette, an officer of Revenue Canada in the Victoria office, who assessed the complexity of the EB case as being at an AU-3 level using a Complexity Rating Schedule (Exhibit G-8). After seeing Mr. Malette, Mr. Gray wrote a memorandum (Exhibit G-7), dated January 24, 1997, to his supervisor, Mr. Hoogendoorn, requesting that he be paid at the AU-3 level for his work on the EB case. Exhibit G-7 reads as follows:

…

> *As you know, I worked on this case last year with the audit work completed in late March 1996. There have however been several follow up letters from the accountants and lawyers which I have responded to and am continuing to respond to. In addition I assisted Appeals in bringing them up to speed on the file and this resulted in them confirming the file. I recently assisted Justice in preparing a response to the preliminaries of Tax Court on part of this file and fully expect to appear in court on behalf of the crown to assist them in their case.*
>
> *My issue is that at the time that I received this file it was an Amalgamation file and I took it as a training file as I had recently completed training on this. Under the attached guidelines this was an AU2 file when it was assigned. As the file progressed it became apparent that this was a complex reorganization involving some 7 + corporations as well as a change of control, crystallization of the capital gains exemption and what later turned out to be Tax Avoidance and an assessment by me using 84.1 and 84 (2). At this point this file became an AU3 file based on the attached guidelines. At all times during this file I was paid at my substantive level which is an AU1. It now appears that the knowledge and experience that I acquired on this file is going to be required for some time to answer the lawyers enquiries and assist Justice both at the Tax Court and I fully expect at the Federal Court of Appeal.*

> *I feel that since this knowledge was acquired by doing AU3 workload that it should be paid as such. In addition I feel it is appropriate that I receive some recompense for the time that I worked on this file at the acting AU3 level. The case and associated case have some 190 hours on them from me and a further 15hrs recently to answer enquiries and assist Justice and Appeals. I enclose a synopsis of the case prepared by GAAR last year for a submission to HO as well as a complexity rating from them, placing it at the AU3 level. I also enclose the general file guidelines which also place this at the AU3 level.*
>
> *I await your timely response.*
>
> …

Mr. Gray met again with Mr. Hoogendoorn who requested that Mr. Gray identify specifically when he believed that the EB case had gone to the AU-3 level. On April 3, 1997, Mr. Gray responded to Mr. Hoogendoorn by memorandum (Exhibit G-9):

> …
>
> *As requested, I have reviewed when this file went from an AU2 file to an AU3 file and in my opinion this was when 50 hours had been completed. This point was on the 4th day of the on site audit when I realised that this audit was going to require a thorough review of the sale of shares and resulting crystallization of the Capital Gains Exemption, the application of 84.1 on a S85 transfer, the change of control on sale of shares by the partners to a numbered corp controlled by one partner and the subsequent sale of the businesses in the parent corp back to the original partners.*
>
> …

Mr. Hoogendoorn answered Mr. Gray by memorandum dated May 21, 1997 (Exhibit G-10) explaining how acting pay was granted in the Victoria office and that he was prepared to authorize acting pay for Mr. Gray at the AU-3 level for time spent at the objection and court level only. A copy of this memorandum was sent to Bruce Donaldson, Assistant Director, Verification and Enforcement of the Victoria office of Revenue Canada; however, Mr. Donaldson testified that Mr. Hoogendoorn could not on his own authorize acting pay for Mr. Gray. Mr. Hoogendoorn's memorandum reads as follows:

Acting pay will be granted in the following situations:

1. *If a case is assigned at a higher then the substantive level, and the auditor accepts the assignment, then by mutual agreement acting pay will be authorized for the time spent on the case assigned.*

2. *If for training purposes, an auditor requests assignment of a case, in a range higher then the substantive level, no acting pay will be awarded as the benefit to the auditor is the additional experience at a more complex level.*

3. *If a file assigned at the substantive level develops, most of the time due to complexity, in to a higher level file then the substantive level, then at the time when this takes place the team leader should be made aware of this and two things can happen:*

A. *Acting pay can be granted if the auditor wants to continue the case or*

B. *The case will be assigned to an auditor at the appropriate level.*

The scenario with (…) *appears to fit item 2 above.*

After you completed a training course dealing with amalgamations you voluntarily accepted this case as you could apply your gained knowledge from the course recently completed. This was by mutual agreement.

The case was successfully completed in March 1996.

During the audit never at any time was any acting pay mentioned or requested. Therefore acting pay at the AU-3 level can not be granted for the time utilized to audit this particular case.

However subsequent to the assessment being raised a notice of objection was filed and at present the case is before the courts.

As it has been determined that the case has the complexity normally handled by an auditor at the AU-3 level, I am of the opinion that any time spent on the case at the objection and court level is eligible for acting pay at the AU-3 level and I am prepared to authorize acting pay for any time spent on the case at the objection and court level.

…

Finding this response unsatisfactory, Mr. Gray filed his grievance on May 27, 1997.

I asked Mr. Gray if he had requested the employer to pay him for the hours he had worked on the EB file at the objection and court level. He answered that he did not bother with it because the amount involved was not significant enough to file a request for about 30 to 40 hours that he had worked at the objection and court level. He added that for the 150 hours that he is asking for in his grievance, the total amount would be about $423, which represents the difference in pay for him between the AU-1 level and the AU-3 level.

Mr. Gray testified that, in January 1997, when he approached his supervisor and asked him for acting pay for some of the hours he had spent on the EB case, he knew that this was contrary to the collective agreement which required that the duties be performed for at least 15 consecutive working days. However, Mr. Gray explained that he made this request because he knew of other colleagues who had received acting pay on a per hour basis for specific files. Karen Etches, George Logan and Wayne Todd testified for the grievor and explained how, being at the AU-2 level, they had been offered by management acting pay at the AU-3 level for handling some specific files on a per hour basis.

Bruce Donaldson testified that he had been approached by Ken Cormack, team leader in the Victoria office, who needed some AU-3 level files to be completed to reach his target for the fiscal year. Mr. Donaldson authorized Ken Cormack to ask AU-2's to work and they would receive AU-3 acting pay on those files on a per hour basis. Mr. Donaldson testified that after honouring this agreement made in the Cormack files, such as Mr. Logan in January of 1998 (Exhibit G-4), this practice stopped in the Victoria office.

Arguments

Jock Climie, counsel for the employer, by letter dated May 28, 1999, submitted to the Public Service Staff Relations Board that an adjudicator is without jurisdiction to adjudicate David Gray's grievance because it is untimely since it had been presented later than the twenty-fifth day after the day on which the employee first had knowledge of the matter giving rise to his grievance.

At the outset of the hearing, Mr. Climie, by way of preliminary objection, repeated his argument on timeliness of the grievance. Mr. Phillips responded that the incident which gave rise to the grievance did not become evident until the employer denied acting pay to the grievor in writing on May 21, 1997. I took note of the objection of Mr. Climie, but reserved my decision until I had heard all of the evidence in order to rule on the preliminary objection.

In his opening statement, Mr. Climie said that the issue starts with the collective agreement. Mr. Phillips replied that he agreed with Mr. Climie that Mr. Gray had not substantially performed the duties of an AU-3 on 15 consecutive days as required by clause 27.07 of the collective agreement for the Auditing Group. Nevertheless, Mr. Phillips maintained that the employer should be estopped from using the language of the collective agreement and that there was evidence of practice both past and current to the effect that the employer ignored the collective agreement. Mr. Climie responded that he would demonstrate that the requirements for either past practice or equitable estoppel were not present in Mr. Gray's case.

Testimony of witnesses for this grievance took all the time scheduled for hearing of the grievance on June 3 and 4, 1999. Therefore, counsel for the employer requested that the parties present written submissions and the grievor's representative agreed. Written submissions were sent both on the issue of time limits and on the merits of the grievance. Mr. Phillips specified in his argument on the merits that, if the grievance was not allowed in total, then the employer should be ordered to pay Mr. Gray 40 hours acting pay at the AU-3 level for time worked at the objection and court level as had been agreed by the employer.

The following is a summary of the written submissions of the parties on the issue of timeliness.

Argument on Behalf of the Grievor

Mr. Phillips submits that the grievance is in fact timely as the grievor only became aware of the complete nature of the file when he saw it together in one place in January of 1997. Once he realized the amount of work and the possible complexity, he requested and received a rating from Mr. Malette for the work done by Mr. Gray on the EB file and was advised in writing (Exhibit G-8) that it was that of an AU-3 level.

Only then did he seek out his supervisor and advise him to that effect. He formally requested acting pay in his memorandum to his supervisor who finally replied on May 21, 1997. Mr. Gray, once he had a decision of the employer in writing, filed his grievance on May 24, 1997.

Clause 38.10 of the AU collective agreement prescribes that an employee may present a grievance not later than the twenty-fifth day after the date on which he was notified orally or in writing or on which he first becomes aware of the action or circumstances giving rise to the grievance.

It is instructive to read Canadian Labour Arbitration, 3rd edition, by Messrs. Brown and Beatty, 2:3128, page 2-88, with respect to time limits:

> *Many collective agreements fix time-limits within which a grievance is to be filed and within which the various steps established by the grievance procedure must be taken. Such provisions may raise questions as to when the grievance first arose, although it has been held that a grievor need not anticipate a breach of the agreement and can wait until the issue crystallizes. Indeed, where a grievance is premature, a dispute will not exist and it may be inarbitrable on that ground…..*

Further, Messrs. Brown and Beatty state at page 2-89:

> *…Generally, arbitrators have held that where the word "may" is used in the time-limit provision, failure to comply strictly will not render the grievance inarbitrable….*

Accordingly, Mr. Gray did comply with clause 38.10, in that he filed the grievance when he became aware of the employer's decision not to grant him the acting pay, in other words, when the issue crystallized.

Mr. Phillips argues that the instant case is similar to the following cases. In each case there was an objection on timeliness raised by the employer. The arbitrator was quite clear in each decision in the denial of the objection. The grievors were justified in waiting to file their grievances until such time as a definitive action by the employer resulted in a "cause" to grieve.

In *Sunar Division of Hauserman Ltd. and the United Steelworkers, Local 3292*, (1979), 23 L.A.C. (2d) 1, Ontario, arbitrator O'Shea found that the time for filing the grievance in this matter ran from when the company's failure to pay the holiday pay first occurred and that was the incident which gave rise to the grievor's complaint as set out in this matter.

In *Gibraltar Mines Ltd. and Canadian Association of Industrial, Mechanical and Allied Worker, Local 18* (1980), 27 L.A.C. (2d) 419, it was found that it is incumbent upon the party raising an issue of timeliness to adduce evidence clearly establishing the factual underpinning for its preliminary objection. Since, in this case, the company had failed to do so, the preliminary objection was dismissed.

In *Re Corporation of the City of Toronto and the Canadian Union of Public Employees, Local 43* (1990), 12 L.A.C. (4th) 220, the employer raised a preliminary objection as to the arbitration board's jurisdiction since there was a delay of two years in filing the grievance. The grievor was suspended for three days as a result of a failure to report an accident and was subsequently charged by the police. The employer agreed that the suspension would be lifted and the grievor would receive pay if he was cleared of the charges in court. Eleven months after the suspension, the charges were dismissed. The grievance was filed the same day. A majority of the board found that differences between the parties arose when the charges were dismissed and the grievance was filed. The subject matter and background circumstances which led to the grievor's suspension occurred two years earlier but the reason for the grievance concerning the suspension could only arise, if at all, after the court's decision on the charges.

Nova Scotia Civil Service Commission and Nova Scotia Government Employees Association (1991), 20 L.A.C. (4th) 61, Mr. Phillips points out, is very much similar to Mr. Gray's case. In that case, the employer filed a preliminary objection that the grievance was untimely as the grievor was advised verbally that his leave request was denied; yet he waited until the request was in writing until he filed the grievance.

The arbitrator concluded from the evidence that the grievor understood that the decision not to grant him the requested leave was still somewhat in abeyance. This would be determined definitely when the grievor received the refusal in writing.

The arbitrator therefore found that the objection to timeliness was without merit and that indeed the grievance was filed within the 25-day limit.

Finally, in *Colonial Cookies, Division of Beatrice Foods Inc. and United Food & Commercial Workers, Local 617P* (1991), 21 L.A.C. (4th) 111, the arbitrator found that the grievor was not made aware that the date of his termination was September 1, 1989 until he received the letter dated December 5, 1990 formally notifying him that he was discharged. Therefore, the arbitrator found that this grievance which was filed on Monday, December 10, 1990, was a timely grievance.

It is clear in these cases that the incident giving rise to the grievance must have occurred, and just having anticipated a potential breach of the agreement is not valid. The issue must have crystallized. Mr. Gray requested acting pay from his supervisor, who in turn asked for information which was provided by the grievor and an answer was finally issued in writing. Then, and only then, did Mr. Gray know that he was being denied acting pay and that was the incident that gave rise to the dispute.

Mr. Phillips submits that if the grievor had grieved earlier, the employer would be here arguing that the adjudicator has no jurisdiction as the matter had not yet crystallized. Clearly in this case the matter is timely; the grievance was filed at the point when the issue crystallized and the grievor then had the right to grieve.

In conclusion, it is submitted that the employer's objection is frivolous and not well founded in law. Therefore, the objection should be dismissed and the adjudicator must determine the matter on the merits.

Argument on Behalf of the Employer

Mr. Climie submitted that the employer has maintained throughout the grievance process that Mr. Gray's grievance is untimely and a letter was written to the PSSRB objecting to the jurisdiction of an adjudicator appointed under the *PSSRA* prior to the start of the hearing.

Within three days of the commencement of the audit in Nanaimo, the grievor realized that the file was of a complex nature and approached Mr. Hoogendoorn to inform him of this. According to the grievor, Mr. Hoogendoorn expressed confidence

in the grievor's ability to conduct the audit and the grievor did in fact complete the audit by December 1995.

At no time did the grievor approach his supervisor and request acting pay or even refuse to continue working on the file. If he had, Mr. Hoogendoorn simply would have assigned the file to someone who could handle it. This alternative was always open to the grievor and he did not take advantage of it because he clearly wanted the opportunity to work on a challenging file for developmental reasons.

The purpose of having time limitations is so that the employer can deal expeditiously with any issues arising with respect to the application of the collective agreement. Otherwise, the net effect would be that any employee could reserve the right to review the work he did on any file, even after it has been completed, and then bring a claim that the work done on it was at a higher level and thus claim for retroactive acting pay. This would effectively negate any chance for the employer to reassign work should a file develop over time into a file that is more properly classified at a higher level.

The employer submits that the grievor had all the information he required and no new information came to the grievor's attention after 1995 which in any way alters the character of the work he performed. In fact, the Guidelines (Exhibit G-8) which the grievor is relying upon to demonstrate that the EB case was an AU-3 file were, according to his own testimony, in his possession in 1994.

The grievor has argued that he was not made aware of the fact that he was working on an AU-3 file until he appeared in Vancouver to assist the Justice Department in preparing for litigation. In essence, he is alleging that he did not know that the employer was requiring him to work in contravention of the collective agreement. The issue of when an employee is deemed to be aware of the circumstances giving rise to his grievance was clearly addressed by the Federal Court of Appeal in *The Queen* (*National Film Board*) v. *Coallier* (Court file A-405-83). In that case, the Court was interpreting a timeliness provision that is for our purposes identical to the one at issue in this grievance. The Court ruled that the twenty-day period began to run as soon as the respondent learned of the facts on which his

grievance was based, and not when the respondent was told that the employer's actions were illegal.

Accordingly, in this case, the time did not begin to run when the grievor viewed the case in its entirety in Vancouver or even when he obtained Mr. Malette's Complexity Rating Schedule (Exhibit G-8). Clearly, the clock begins to run when the facts upon which a grievance is based become known to the grievor, not when the grievor realizes that a provision in the collective agreement has been breached.

The principle that the clock starts to run once the requisite facts are known to the grievor was firmly established in *Roy* (Board file 166-2-21328). Adjudicator M. Wexler ruled that she had no jurisdiction to hear the grievance because the grievor was aware of the necessary facts in March of 1989 and the fact that she did not realize the employer's actions were contrary to the collective agreement is irrelevant.

Similarly, Mr. Gray was well aware that he was not going to receive acting pay while working on the EB case. He even approached Mr. Hoogendoorn to discuss the increasing complexity of the file but the employer still made no commitment to pay acting pay, nor did Mr. Gray request it. The fact that he came across information at a later date, which in his opinion supports the granting of acting pay for the work he did on the EB file, does not in any way restart the clock. This argument is fully supported by both the *Coallier* and *Roy* decisions.

The employer disagrees with the grievor's submission that he complied with clause 38.10 in that he filed the grievance when he became aware of the employer's decision not to grant him acting pay; in other words, when the issue crystallized. Clearly, the issue "crystallized" when the grievor did the work and was not paid acting pay at that time, nor was he promised acting pay at any time in the future.

This concept is amply borne out in the decision in *Re Sunar and the United Steelworkers* (*supra*) cited by the grievor in support of his grievance. In that case the arbitrator ruled that the grievance, which concerned entitlement to pay for a particular holiday, did not crystallize until the grievor received his pay cheque for the period in question. When the grievor failed to receive his holiday pay, the clock then began to run. Similarly, in our case, the clock started to run the moment the grievor received his first pay cheque covering hours he worked on the EB file and there was no acting

pay covering said hours. The only possible exception to this would be, if the grievor had been lead to believe that he would be paid acting pay at a later date — an event that never transpired.

The *Re Gibraltar Mines Ltd.* (*supra*) case cited by the grievor in his written submissions stands for the same proposition as the *Re Sunar* (*supra*) case.

The *Re Corporation of the City of Toronto* (*supra*) case is singularly unhelpful as it deals with a situation where an agreement was reached. No agreement with respect to the timing of any future grievance was ever discussed between the parties in the present case.

The grievor has submitted the *Colonial Cookies* (*supra*) and *Nova Scotia Civil Service Commission* (*supra*) cases to support the proposition that time limits do not begin to run until the employer has notified an employee of a particular decision, whatever it may be, in a clear and unequivocal manner. In our case, the impugned decision was to pay the grievor at the AU-1 level for all work done on the EB case. The grievor is arguing that he had no notice of the employer's position until he received a memorandum from his supervisor advising him that his request for acting pay was denied. This completely ignores the fact that the grievor spent over 200 hours on the EB case without ever receiving any acting pay. Every time the grievor received his pay slip, he was informed in clear and unambiguous terms that he was being paid at the AU-1 level.

It is submitted that all of the cases cited by the grievor in support of his grievance are distinguishable or inapplicable to the subject grievance.

For all of the above reasons, the employer submitted that the adjudicator does not have jurisdiction to decide this grievance. In the alternative, should the adjudicator rule that the grievor's grievance, filed on May 27, 1997 is in fact timely, then it is clear that any remedy can only apply to a time no earlier than 25 days prior to May 27, 1997. The jurisprudence, developed from the leading case of *Coallier* (*supra*), is clear on this point. Therefore, only hours worked on the EB case from May 3, 1997 and onwards can form the substance of the grievor's grievance on the merits.

Reply on Behalf of the Grievor

Counsel for the employer argues that allowing Mr. Gray the ability to review his completed work would allow him to ignore the time limitations set in the legislation and would prejudice the employer. However, the evidence as presented has shown the opposite as true.

The employer, by its actions, prejudiced this employee and totally disregarded the collective agreement. Only through the ability to review the work did Mr. Gray realize the work he had done was work that is normally done by an auditor at the AU-3 level.

Mr. Phillips agrees with counsel for the employer that this case can be compared to *Roy* (*supra)* in so far as it relates to the final statement by Adjudicator Wexler:

> *Moreover, Mrs. Roy's grievance is not a continuing grievance. The right to grieve and the time limit for presenting a grievance were triggered by the decision the employer took in March 1989.*

In addition, the employer confirmed the decision in writing on April 6, 1989, which clearly is the same as Mr. Gray's case. Mr. Gray only requested "acting pay" once it was decided that the work was that of an AU-3 and the employer denied his request.

For all the above reasons, the grievor submitted that the grievance was timely and the grievance should proceed on the merits.

Reasons for Decision

Similarly to clause 38.10 of the Auditing Group collective agreement, subsection 71(3) of the *P.S.S.R.B. Regulations and Rules of Procedure* (1993) sets out the time requirements for filing a grievance:

…

> (3) *An employee shall present a grievance no later than on the twenty-fifth day after the day on which the employee first had knowledge of any act, omission or other matter giving rise to the grievance or the employee was notified of the act, omission or other matter, whichever is the earlier.*

…

Therefore, I have to determine when Mr. Gray first had knowledge or was notified of the act, omission or other matter giving rise to his grievance.

Mr. Phillips, in his written argument, pleads that Mr. Gray only became aware of the complexity of the EB case when he saw all the files for EB together in one place in January of 1997. Thereafter, Mr. Gray formally requested from his supervisor acting pay at the AU-3 level for 150 hours. His supervisor denied this request on May 21, 1997, and once Mr. Gray received the decision of the employer in writing, he filed his grievance on May 24, 1997. Mr. Phillips argues that it is at this moment that Mr. Gray complied with the requirement of clause 38.10 set out in the collective agreement. When he became aware of the employer's decision not to grant him acting pay, he filed a grievance.

Mr. Climie, for the employer, argues that the grievor first had knowledge of the matter or circumstances giving rise to the grievance at an early stage when, after receiving the EB case, in January of 1995, Mr. Gray went to his supervisor to inform him of the complex nature of the file.

The leading case on the issue of timeliness for the federal Public Service was rendered by the Federal Court of Appeal in *The Queen* (*National Film Board*) v. *Coallier* (Court file A-405-83). It was a review of the decision rendered by Adjudicator Jean Galipeault (Board file 166-8-13465). To understand fully the implication of the decision of the Federal Court of Appeal, I think it is important to review the facts as they appeared in Adjudicator Galipeault's decisions on the preliminary objection (Board file 166-8-13465; [1982] C.P.S.S.R.B. No. 184) and on the merits ([1983] C.P.S.S.R.B. No. 28).

The source of the dispute was a letter dated April 14, 1981 to Mr. Coallier from the National Film Board offering him a position at the TCN-4 level as an editing equipment technician. However, the letter mentioned that he needed to be trained properly before he could meet the basic requirements of this position and therefore his starting salary would be at the TCN-3 level. It also mentioned that he would be on probation, commencing May 25, 1981, for the next six months at the end of which he would be confirmed in his position if his performance was satisfactory and he would also be eligible for a merit increase that would raise his salary to the minimum TCN-4

range. He commenced working on May 25, 1981. After six months on probation, he was confirmed in his position on November 25, 1981, but he did not receive a merit increase. When he inquired about this, he got some assurance from his employer that he would receive this increase retroactively, but Mr. Coallier was given to understand that it would be some time before he would actually receive it.

In March 1982, Mr. Coallier then became aware of the collective agreement governing his terms and conditions of employment. He consulted with his bargaining agent and realized that individual agreements, such as the one that he had entered into with the employer in 1981, were contrary to the collective agreement. He then submitted his grievance on March 22, 1982.

Adjudicator Galipeault allowed the grievance on March 8, 1983 and ordered the employer to pay Mr. Coallier the salary of a TCN-4 from the date he was hired by the employer. The employer applied to the Federal Court of Appeal for review of Mr. Galipeault's decision. Mr. Justice Pratte delivered the reasons for the decision on behalf of the Federal Court of Appeal:

…

> *Under clause 25.03 of the collective agreement in effect between the parties, respondent's grievance had to be filed within twenty working days from the date on which respondent was informed or learned "of an action or circumstances giving rise to his grievance".*
>
> *In our opinion this twenty-day period began to run as soon as respondent learned of the facts on which his grievance was based: contrary to what the adjudicator held and counsel for the respondent argued, it did not begin to run on the day on which respondent was told that the employer's actions were illegal.*
>
> *In his grievance respondent complained that he did not receive the salary to which he was entitled. He was appointed to a position and was paid a lesser salary than that provided for the position in the agreement.*
>
> *It appears to the Court that, under clause 25.03 of the collective agreement, respondent's grievance could only concern the salary which the employer should have paid him during the twenty days preceding the filing of the grievance.* (…)

My understanding of this decision is that Mr. Coallier learned of the facts on which his grievance was based when he was advised by letter dated April 14, 1981 that he was hired effective May 25, 1981 as a TCN-4 level technician but that, for a training period, his salary range would be at the TCN-3 level. When he was hired on May 25, 1981, he came under the provisions of the collective agreement covering him and could then grieve. This being a "continuing" grievance, thereafter every time he received his pay cheque the time period began to run from each of the repeated and successive violations.

Using the *Coallier* (*supra*) decision in Mr. Gray's case, when did Mr. Gray first learn of the facts on which his grievance was based? According to the testimony of Mr. Gray and his memorandum to his supervisor, Mr. Hoogendoorn, on April 3, 1997 (Exhibit G-9), "…this file went from an AU2 file to an AU3 file…when 50 hours had been completed. This point was on the fourth day of the on site audit…" Mr. Gray then realized this audit "went far beyond the AU2 screening for an amalgamation and was complicated enough that a prior auditor of the transaction through one of the partners missed the tax issues." I therefore find that Mr. Gray first learned of the facts on which his grievance was based on the fourth day of the on-site audit when he realized that it went beyond AU-2 amalgamation file approximately on January 19, 1995.

Mr. Gray essentially completed the case by December 1995. He worked on the file in early 1996 and, by the end of the year, he was involved at the objection level with the EB case. In January 1997, he had a conversation with a DOJ lawyer and went to meet with him in Vancouver. The evidence presented to me was that this was the last time he worked on the EB case, since the case was later settled. As in *Coallier* (*supra*), I also find that this grievance is of a continuing nature since each time Mr. Gray received his pay cheque he was notified that his employer was not paying him acting pay at the AU-3 level. Therefore, Mr. Gray could have grieved and been within the time limits for the later periods he worked on the EB case but he did not do so.

Further to his conversation with the DOJ lawyer, he met with Mr. Hoogendoorn and wrote him a memorandum dated January 24, 1997 requesting acting pay at the AU-3 level. After a second meeting with his supervisor, who requested that he identify when the EB case went from the AU-2 level to the AU-3 level, Mr. Gray wrote a

memorandum dated April 3, 1997. Mr. Hoogendoorn replied, in his note to Mr. Gray signed on May 21, 1997 (Exhibit G-10), that during the audit Mr. Gray never requested or mentioned acting pay; therefore acting pay at the AU-3 level could not be granted for the time utilized to audit this case. However, he wrote that, since it had been determined that the case had the complexity normally handled by an auditor of the AU-3 level, he was prepared to authorize acting pay for any time spent on the case at the objection and court level.

Mr. Donaldson received a copy of this memorandum and did not comment on it until he responded to the level one grievance, on June 30, 1997. In the attachment to his response, he indicated that there was an agreement by the employer to recognize acting pay at the AU-3 level but it indicated that it was for subsequent time applied to resolve the appeal. Even though Mr. Donaldson testified that Mr. Hoogendoorn could not authorize the acting pay, Mr. Donaldson's actions established that the employer did promise to pay Mr. Gray acting pay at the AU-3 level for any work he did on the EB file at the objection and court level.

Mr. Gray was in a position to grieve in January 1997 for the time he had just spent working on the EB case with the DOJ. Instead, he waited until he received the answer from his employer to his request for acting pay. Does this mean that by applying the *Coallier* (*supra*) decision he would be outside the time limits since he grieved in May, more than 25 days after receiving his pay cheques for the work done on the EB case in January?

In support of his argument that the grievance is timely, Mr. Phillips has quoted a few cases where there had been agreement with the employer or the impression was given to the grievor that the decision was still in abeyance.

Similarly, two decisions of adjudicators appointed under *the Public Service Staff Relations Act* have somewhat softened the strict rule on timeliness as interpreted by the Federal Court of Appeal in *Coallier*. The *Macri* decision (Board file 166-2-15319), upheld by Mr. Justice Urie of the Federal Court of Appeal in *Canada* (*Treasury Board*) v. *Macri* (Court file A-1042-87), and the *Costain* decision (Board files 166-2-18508 to 18511) both have a "promise" by the employer that was relied upon by the grievors. Mr. Phillips, in his arguments, said that the employer had agreed to pay Mr. Gray for

the hours worked at the objection and court level. Could this "promise" relax the strict requirements of the *Coallier* decision as in the *Macri* and *Costain* decisions?

Mr. Gray explained that he did not pursue the employer's undertaking to pay him at the AU-3 level for the time that he worked at the objection and court level because it was not worthwhile, the amount being insignificant. He did not rely on the promise that had been made by his supervisor, Mr. Hoogendoorn, and preferred to file a grievance for a total of 150 hours. Therefore, I find that this promise was not relied upon by the grievor and cannot be invoked.

For all these reasons, I dismiss this grievance for want of timeliness.

Guy Giguère
Board Member

OTTAWA, December 9, 1999.