

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

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BETWEEN

LÉO R. LEDUC

Grievor

and

**TREASURY BOARD**  
(Department of Foreign Affairs and International Trade)

Employer

***Before:*** P. Chodos, Vice-Chairperson.

***For the Grievor:*** James Shields, Counsel, and Ian Mackenzie, Executive Director,  
Professional Association of Foreign Service Officers

***For the Employer:*** Richard Fader, Counsel, and Karl Chemsí, Student-at-Law

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Heard at Ottawa, Ontario,  
July 26, 1999.

## DECISION

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The grievor is a Foreign Service Officer (FS-2) with the Department of Foreign Affairs and International Trade (D.F.A.I.T.) who is currently on secondment to the Department of Industry Canada where he is working as a Senior Trade Commissioner in Moncton, New Brunswick. That position is classified as CO-3; there is no dispute that this classification is at a higher level than the grievor's substantive classification. Mr. Leduc has grieved the employer's decision to deny his request for acting pay pursuant to what is now clause 42.11 of the current collective agreement between the Treasury Board and the Professional Association of Foreign Service Officers (Code: 312/99). (It should be noted that, while Mr. Leduc in his grievance referred to the predecessor acting pay provision, i.e. clause 11.08, the parties throughout these proceedings made reference only to the current provision, i.e. clause 42.11. I have followed their lead in this regard. In any case, the two provisions are virtually identical apart from the qualifying period which was 20 days in the previous collective agreement Code: 312/91.) Clause 42.11 reads as follows:

### **42.11 Acting Pay**

*An employee who is assigned to a posting abroad or an assignment in Canada, pursuant to a rotational pattern, is not entitled to acting pay pursuant to this clause by virtue of such assignment. However, if in the course of such an assignment he is required by the Employer to substantially perform and performs the duties of a position which is classified at a higher classification level on an acting basis for a period in excess of 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 he acts.*

The facts in this case are largely not in dispute and have, for the most part, been set out in a Joint Statement of Facts prepared by the parties; the parties have supplemented this evidence with testimony from the grievor, as well as one witness who testified on behalf of the employer, Mr. John McNee.

The Joint Statement of Facts states:

### **JOINT STATEMENT OF FACTS**

1. *Mr. Leo Leduc is a trade officer in the Department of Foreign Affairs. His position is classified as FS-02. Mr. Leduc is on secondment from the Department of Foreign Affairs and International Trade to Industry*

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*Canada as the Senior Trade Commissioner in the International Trade Centre in Moncton, New Brunswick, a position that is classified as CO-03.*

2. *International Trade Centres are the result of a joint venture between Industry Canada and the Department of Foreign Affairs and International Trade to raise the profile of the federal government's trade service role in the provinces. International Trade Centres are mandated to manage the delivery of trade services and programs to the business community of the provinces in which they are located and to coordinate trade development activities in the provinces.*
3. *International Trade Centres were created as distinct organizations to promote the federal government's trade services and role in each of the provinces. Senior trade officers of the Department of Foreign Affairs and International Trade head up the Centres and are assigned to the position of Senior Trade Commissioners. Senior members of the Department of Foreign Affairs and International Trade are seconded to Industry Canada under this joint venture.*
4. *Senior Trade Commissioners are under the direct control, supervision and direction of Industry Canada. Industry Canada funds the positions and Senior Trade Commissioners are, during the term of their secondments, required to report to Industry Canada rather than the Department of Foreign Affairs and International Trade. They report directly to the Regional Executive Director of the region or province in which they are located.*
5. *Senior Trade Commissioners receive their work description from Industry Canada. The requirements of the position are identical to those of a position classified at the CO-03 level. Key activities of the position include:*
  - a) *leading the development of regional trade strategy with federal, provincial and private sector partners;*
  - b) *leading the regional trade network of the province of New Brunswick;*
  - c) *setting policies on trade development in the ITC and its role in the RTN;*
  - d) *managing and planning the operations and activities of the International Trade Centre;*
  - e) *participating as a member of the regional Management Committee for Industry Canada;*

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- f) *developing commercial strategies to promote and expand the international business capabilities of Canadian companies in the Region;*
  - g) *developing and distributing strategic information and intelligence for use by clients and Team Canada Inc. partners;*
  - h) *approving or refusing government financial assistance and access to programs for international business; and*
  - i) *developing and managing Canadian and foreign initiatives supportive of international business development.*
6. *Mr. Leduc commenced his duties as Senior Trade Commissioner in the International Trade Centre in Moncton, New Brunswick on or about September 10, 1997.*
  7. *Mr. Leduc applied on February 25<sup>th</sup>, 1998, pursuant to Article 11.08 of the Professional Association Foreign Service Officers' collective agreement, for acting pay retroactive to September 10, 1997, as the duties he was on assignment as Senior Trade Commissioner were identical to those classified at the CO-03 level.*
  8. *Mr. Leduc's application for acting pay was denied. On March 3, 1998 he filed a grievance of this denial.*
  9. *On September 18, 1998 Mr. Leduc's grievance was denied on the ground that his assignment as the Senior Trade Commissioner was pursuant to a rotational pattern and, in accordance with the terms of Article 11.08 of the collective agreement, he was not entitled to acting pay.*
  10. *On October 28, 1998, a reference to adjudication was made to the Public Service Staff Relations Board.*
  11. *Subject to this Joint Statement of Facts, the parties reserve the right to call additional evidence.*

As noted above, pursuant to a secondment agreement (Exhibit G-1) between the D.F.A.I.T. and Industry Canada, Mr. Leduc assumed his current position as Senior Trade Commissioner effective September 10, 1997. In his capacity as Senior Trade Commissioner in the International Trade Centre in Moncton, he is under the direction of the Regional Executive Director, Mr. Robert Russell, who is an employee of Industry Canada. Mr. Leduc supervises four CO-02's and two CO-03's, as well as support staff classified in the AS and CR classifications.

Mr. Leduc testified that he was advised upon assuming his current duties that he was in effect an Industry Canada employee and was to receive his instructions and directions from that Department; he has in fact been conducting himself accordingly since his arrival there. It is Mr. Leduc's contention that, since assuming the position of Senior Trade Commissioner, he has performed all of the duties of that position, which is classified at a higher level than his substantive position with the D.F.A.I.T.

Mr. Leduc acknowledged that pursuant to the secondment agreement he was and remains an employee of the D.F.A.I.T. at his present group and level, and that as a Foreign Service Officer he is a "rotational" employee. He identified Exhibit E-1, his Foreign Service Appraisal Report covering the period September 1997 to June 1998 signed by him on November 12, 1998, which, among other things, notes that he remains "fully rotational". This appraisal report was in respect of Mr. Leduc's assignment as Senior Trade Commissioner with Industry Canada and was prepared by the Regional Director of that Department on behalf of the D.F.A.I.T. Mr. Leduc also identified a letter addressed to him dated February 24, 1982 (Exhibit E-2) advising him of his then promotion to the FS-2 level. In this letter it is noted that:

...

*This offer is made with the understanding that you and your dependents are able and willing to be rotational. This means that you will be available to work in any Canadian Post abroad or Regional office in Canada, where your services might be needed.*

...

Mr. Leduc observed that there are two Senior Trade Commissioners based in Halifax and Saskatoon who, although they are employees of the D.F.A.I.T., are in receipt of acting pay at the CO-03 level; in both instances the employees in question, Ms. Alison Tait and Ms. Lyn Tate, are "non-converted" CO-02's. Mr. Leduc also noted that in 1979 he took a leave of absence for a period of three years to work for a private company; he maintained that, notwithstanding that he had remained fully rotational, he was paid by the company for the actual job that he was performing.

Mr. John McNee is currently the Director of Trade and Political Personnel Operations Division, D.F.A.I.T. Mr. McNee testified that all Foreign Service Officers are rotational; that is, as part of their normal career progression they are expected to serve both in Canada and abroad; he described this aspect of their employment as “their defining characteristic”. He noted that Mr. Leduc is a rotational officer and remained as such when he assumed the Senior Trade Commissioner position as part of his secondment agreement. He stated that it is standard practice within the D.F.A.I.T. that Foreign Service Officers remain employees of the D.F.A.I.T. while on secondment. Mr. Leduc’s secondment agreement was in fact no different from a number of other secondment programs in which the Department participates. Mr. McNee referred to a document noted as “Memorandum of Understanding Regarding the Secondment Program Between External Affairs and International Trade Canada (now D.F.A.I.T) and Industry, Science and Technology Canada (now known as Industry Canada)” dated October 30, 1989 (Exhibit E-4). The document notes among other things that International Trade Centres will be headed by a Senior Trade Commissioner from what is now the D.F.A.I.T., and that Foreign Service Officers will “rotate” through these positions.

Mr. McNee also referred to the Public Service Commission’s Exclusion Order (SOR/93-281, 25 May 1993) respecting the appointment and deployment of employees of the D.F.A.I.T., among other things, to rotational positions. That Order refers to Chapter four of the Department’s Human Resources Manual in respect of the definition of “Assignment to Rotational Positions System”; the Manual defines rotationality as “... the requirement made of an employee to serve at any location in Canada or elsewhere as determined by the Department.” It further notes, at paragraph 4.6.4, that secondments are “... an integral component of the assignments process.”

In cross-examination, Mr. McNee acknowledged that Mr. Leduc does in fact report to an Industry Canada Officer and that his immediate superior on the job is the Regional Executive Director of Industry Canada, who had prepared Mr. Leduc’s performance appraisal on behalf of the D.F.A.I.T.

Argument

Counsel for the grievor noted that there is no dispute that Mr. Leduc was performing all of the duties of the higher CO-3 classification, and that he had performed those duties for more than the requisite fifteen days which would entitle him to acting pay in accordance with clause 42.11 of the collective agreement.

Counsel submitted that there are several principles which should guide an adjudicator in interpreting this provision. Firstly, the intention of the parties must be ascertained based on the ordinary everyday meaning of the language used in the provision in question. Furthermore, it is presumed that all the words used by the parties were intended to have some meaning and that any ambiguity should be resolved in a manner which should give effect to the purpose of the clause.

Clearly the purpose of this clause is to provide for acting pay in the circumstances set out in the provision. The employer's position is that if an employee is part of a rotational pattern he does not receive acting pay. However, clause 42.11 does not say that if you are a rotational employee you are forever barred from acting pay. The provision provides that there is no acting pay, only "by virtue of such assignment". That is, the assignment to a higher classification does not guarantee acting pay by that fact alone; the employee must still perform the core duties of the position for the required period of time in order to receive acting pay. That is, the phrase "by virtue of such assignment" means that the employee has to perform the substantive duties of the higher position; the mere assignment to the position is not sufficient to trigger acting pay. However, once the grievor substantially performs the core duties of the higher classification, that is the CO-03 position, he is entitled to acting pay in accordance with the second sentence of clause 42.11. Counsel for the grievor maintained that to hold otherwise would render the second sentence of clause 42.11 devoid of any meaning.

Counsel for the employer replied that if the intent of clause 42.11 was simply to provide for acting pay when the employee performs the duties of the seconded position, there would be no need for the first sentence of that provision. In fact, this clause recognizes that the Foreign Service is a different creature from other parts of the Public Service. The higher classification as a result of the assignment does not

trigger the acting pay, but any subsequent assumption of a higher position on an acting basis would result in an entitlement to acting pay.

Counsel for the employer agreed that the adjudicator must search out the intent of the parties; he noted that in *Canadian Labour Arbitration* by Donald Brown and David Beatty (Canada Law Book, 3<sup>rd</sup> edition), the authors noted that there are a number of aids to interpretation, including statutory provisions (ref. Chapter 4:2230), for example, the Public Service Exclusion Order (*supra*). Counsel submitted that, when the collective agreement was negotiated, the parties knew the meaning of rotational pattern which includes assignments and secondments within Canada. The phrase “by virtue of such assignment” in this context means that by virtue of his assignment to the CO-03 position Mr. Leduc does not get acting pay. He would only be entitled to acting pay at “a higher classification level” if he is assigned to a position higher than the CO-03 level. To find otherwise would create an irresolvable conflict in the application of this provision. Finally, Mr. Fader noted that the grievor has not discharged the onus of demonstrating that the employer has not lived up to its obligations.

Mr. Shields responded that the employer has not adduced evidence demonstrating that the provision’s intent was to require, in effect, a double assignment to a higher level before an entitlement to acting pay is triggered. He submitted that there would have to be additional language in this clause to justify such an interpretation.

### Reasons for Decision

It should be noted that counsel for the employer advised at the outset of this hearing that, notwithstanding his letter dated July 16, 1999 to that effect, the employer no longer disputes the timeliness of this grievance, and hence the adjudicator’s ability to address the grievance at adjudication.

The parties are in agreement that this case turns solely on the interpretation of clause 42.11, which is the successor to clause 11.08, the provision identified by Mr. Leduc in his grievance. There is no dispute that Mr. Leduc’s substantive position is in the Foreign Service Officer classification and in that capacity he is what is termed a “rotational” employee. It is also clear from the evidence that when Mr. Leduc was



seconded to Industry Canada, this was considered a rotational assignment, which is part of the normal terms and conditions of employment for Foreign Service Officers. Accordingly, Mr. Leduc's secondment as Senior Trade Commissioner is subsumed by the term "rotational pattern" used in clause 42.11, and indeed, there is no dispute as to this conclusion. However, counsel for the grievor argues that notwithstanding this conclusion, when Mr. Leduc assumed the full scope of the duties of the higher classification, that is at the CO-03 level, this was sufficient to trigger the entitlement to acting pay. With all due respect, in my view this fails to adequately address the effects of the first sentence in that provision, which appears to preclude acting pay as a result of someone assuming a higher classification in the context of a rotational assignment. This is precisely Mr. Leduc's situation.

It cannot be disputed that generally speaking, in the Public Service the assumption of a substantial portion of the duties of a higher position for the requisite threshold period is sufficient to generate an entitlement to acting pay. However, as Mr. Shields acknowledged in response to a question I posed to him, the first sentence of clause 42.11 is unique to the Foreign Service Group, that is, it is not found in any other collective agreement in the Public Service. The net result is that there is an additional obstacle that employees in the Foreign Service Group must overcome before they are entitled to acting pay, namely the prohibition against receiving acting pay when one participates in a rotational assignment. In light of this, I believe that the interpretation urged upon me by Mr. Fader is the most consistent with the entire wording of clause 42.11. That is, I am in agreement with him that persons subject to that provision are only entitled to acting pay when they substantially perform the duties of a position which is at a higher classification than the position which they assumed by virtue of their rotational assignment. Since, in the instant case, Mr. Leduc's grievance is in respect only of his initial rotational assignment as a CO-03, Senior Trade Commissioner, he is therefore not entitled to acting pay.

Accordingly, this grievance is denied.

**P. Chodos,  
Vice-Chairperson.**

OTTAWA, August 17, 1999.