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to 166-2-28982

Citation: 2000 PSSRB 76



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

CLAUDE H. BEAULIEU, ANNE C. EDGE, ANITA M.E. HARPER,
RONALD PAQUIN AND CHARLES R. PAYETTE

Grievors

and

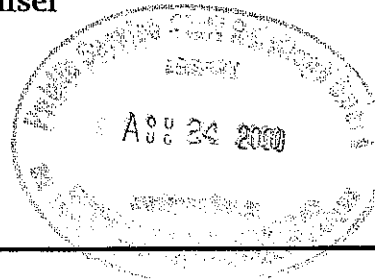
TREASURY BOARD
(Federal Court of Canada)

Employer

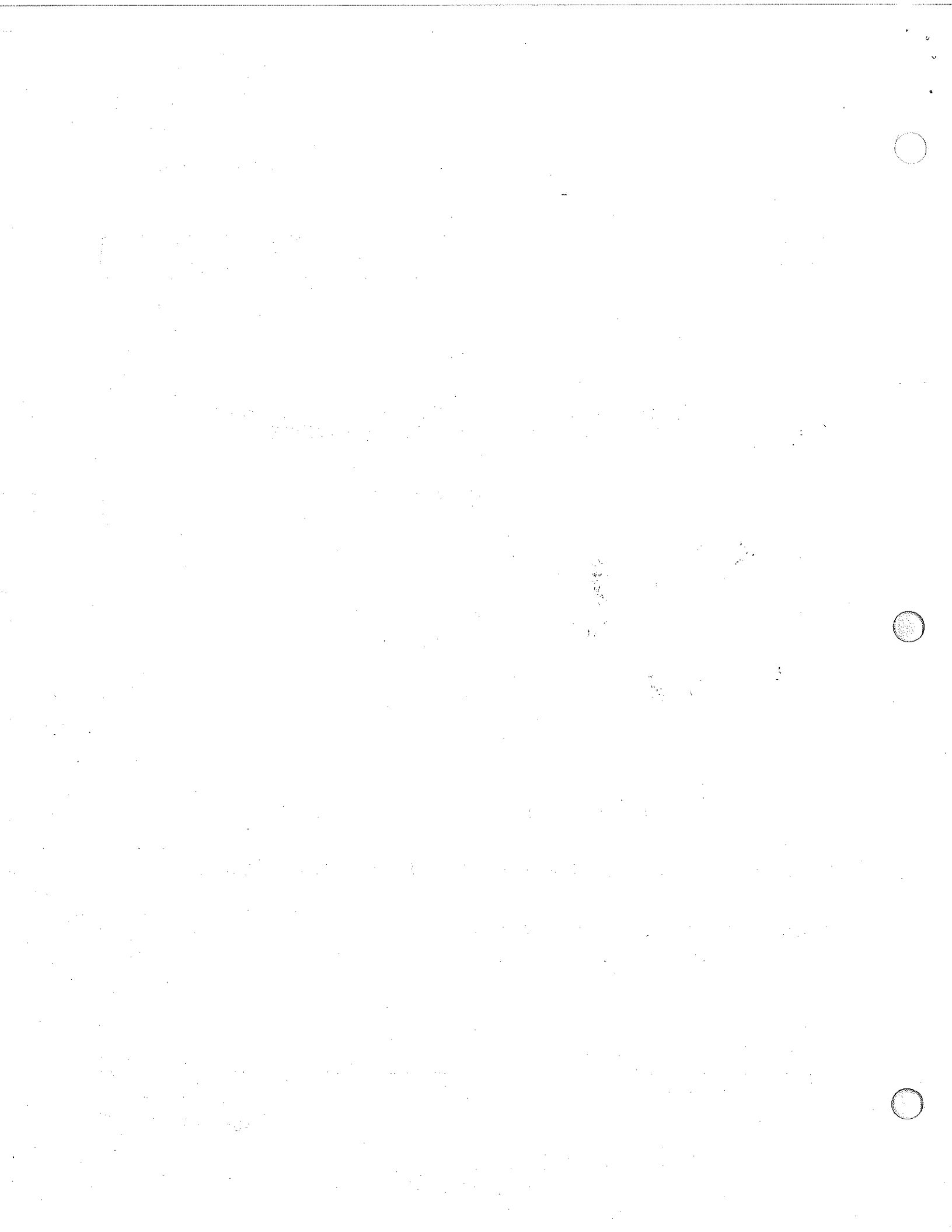
Before: Guy Giguère, Board Member

For the Grievors: Alfred La Bissonnière, Public Service Alliance of Canada

For the Employer: Richard Fader, Counsel



Heard at Ottawa, Ontario,
May 25 and 26, 2000.



DECISION

[1] In May and June 1998, the five grievors, registry officers classified at the PM-01 level in the Immigration Section of the Federal Court in Ottawa, filed these grievances. After several years at the PM-01 level, the grievors had gained experience and felt that they were now performing the same duties as their colleagues in the Immigration Section classified at the PM-03 level. Each grievor filed two grievances: one dealing with Article M-32 and the other with Article M-27 of the Master Agreement between the Treasury Board and the Public Service Alliance of Canada, signed on May 17, 1989.

[2] In the M-32 grievances, the employees grieved that the employer had failed to provide them with a complete and current statement of the duties and responsibilities of their position. At the outset of the hearing, Mr. La Bissonnière, on behalf of the grievors, withdrew all the M-32 grievances (Board files 166-2-28973, 166-2-28975, 166-2-28977, 166-2-28979 and 166-2-28981). Accordingly, the proceedings with respect to those grievances are terminated and the files are hereby closed.

[3] Mr. La Bissonnière explained that only the M-27 grievances would be pursued (Board files 166-2-28974, 166-2-28976, 166-2-28978, 166-2-28980 and 166-2-28982). In those grievances, the employees claimed that they were classified at the PM-01 level, but were substantially performing the duties of the PM-03 level since February 24, 1998, when some grievors first met with management to discuss this issue. Since the grievances were filed, however, all grievors have been appointed to the PM-03 level, starting with Anne Edge and Charles Payette on November 30, 1998 and the other three grievors on April 10, 2000. Therefore, Mr. La Bissonnière claimed, management has violated Article M-27 of the Master Agreement by failing to provide the grievors with acting pay for the period starting February 24, 1998 to the date of their appointment at the PM-03 level.

[4] Mr. Fader stated that the job descriptions for the PM-01 and PM-03 levels were generic job descriptions used across the country for all registry officers. The employer's position was that the employees at the PM-03 level working in the Immigration Section in Ottawa were not substantially performing the duties and requirements of the PM-03 classification level. In essence, they were being under-utilized. There is no dispute that there is an overlap in job requirements of both PM-01's and PM-03's. Mr. Fader explained that the dividing line between both positions is the type of hearing that the registry officers attend. The burden of proof

rests with the grievors to prove that, on the balance of probability, the employer violated the collective agreement.

[5] Mr. Fader agreed with Mr. La Bissonnière that the testimony of only two grievors, Claude Beaulieu and Anne Edge, was necessary since their experience was similar to the experience of all the grievors. It appears that the parties also agreed that the period covered by the grievances started February 24, 1998 and continued until the date of each grievor's appointment to the PM-03 level.

Summary of Evidence

[6] Mr. Claude Beaulieu testified that he started as a registry officer at the Federal Court on May 25, 1992, and that he was classified at the PM-01 level until April 10, 2000 when he was appointed to the PM-03 level. Using Exhibit G-3, a description of the work performed at the PM-03 level, Mr. Beaulieu explained that he performed all the duties of the PM-03 level position requested by the employer while classified at the PM-01 level. However, there were duties he was not asked to perform, such as preparing précis of facts, researching and providing precedents, which were mostly assigned to law clerks, and issuing Writs of *Fieri Facias*, which only certain registry officers had authority to do. Mr. Beaulieu also explained that he had not been assigned to any trials since the *Immigration Act* did not provide for trials.

[7] In cross-examination, Mr. Fader asked Mr. Beaulieu if he acted as a court registrar for trials, contempt of court hearings, committal proceedings, high-profile media cases, pre-trial conferences and Anton Pilar and Mareva injunctions. Mr. Beaulieu answered that he did not act on any of those but acted as a court registrar for all Immigration Section hearings.

[8] When questioned by Mr. La Bissonnière on rebuttal, Mr. Beaulieu specified that there were no trials or contempt of court hearings in the Immigration Section and that pre-trial conferences and Anton Pilar and Mareva injunctions were impossible in the Immigration Section.

[9] Mr. Beaulieu also testified on the periodic assignment of registry officers and court registrars. He said that any PM-01 or PM-03 level employee could be assigned to the counter. The assignment was done by the employer based on perceived abilities of employees and not on the classification of their position or experience. The employees

received very little supervision, which consisted basically in the attribution of tasks. Reading from a printout of the assignment of court registrars in 1998 (Exhibit G-4), Mr. Beaulieu testified that employees at the PM-01 or at the PM-03 level would be assigned, regardless of the classification of their position, different tasks. Mr. Beaulieu also reviewed a recorded-entries printout (Exhibit G-5) and testified that at the PM-01 level he would file the same type of documents as an employee at the PM-03 level.

[10] A memorandum dated July 16, 1993 from R. Misener, Assistant Administrator, Management Services, Federal Court of Canada, to all registry officers was introduced as Exhibit G-7. It describes the responsibilities and classification of PM-01 and PM-03 positions and the differences between them. It specifies that the PM-01 level position was set up as an entry-level position for registry officers in order to provide an opportunity for training. On page 2, paragraph 2, of his memorandum, Mr. Misener compared the work assignment for an employee at the PM-01 level with one at the PM-03 level:

... Hence, a PM-01 is not expected to advise on complex issues or precedents but rather will consult with a senior officer when such situations arise. Similarly, a PM-01 is not expected to be able to act independently as a Court Registrar and provide all the required support to judges and manage hearings in the Court Room but may generally be utilized to assist as Court Registrar on teleconferences or other Court sittings.

[11] Regarding the content of this paragraph, Mr. Beaulieu testified that he, as a court registrar, was acting independently for the whole period covered by the grievance. Mr. Beaulieu explained that, using the abstract of hearings (Exhibit G-6), as a court registrar he would provide all the required support for hearings, motions, teleconferences and different meetings. He would receive no supervision except for the presence of the judge.

[12] In cross-examination, Mr. Beaulieu explained that all the grievors are now classified at the PM-03 level and have remained in the Immigration Section with the exception of Anne Edge and Charles Payette who are now with the Trial Division. There is no schedule to rotate the grievors in the Trial Division.

[13] Ms. Anne Edge testified that she started at the PM-01 level on October 19, 1992 and on November 30, 1998, she was appointed to the PM-03 level. She stayed in the Immigration Section at the PM-03 level until April 1999. Ms. Edge explained that

during the period covered by the grievances, she was in the Immigration Section and performed the same duties as employees at the PM-03 level in that section.

[14] On February 19, 1998, several registry officers at the PM-01 level, including the other grievors and herself, sent a memorandum to Mr. Pierre R. Gaudet, at the time the Deputy Administrator, Trial Division, Federal Court of Canada, asking for a reclassification of their PM-01 level positions (Exhibit G-12). In this memorandum, they explained that the PM-01 level position was originally set up as an entry-level position for registry officers to learn the required skills and techniques. Several of the registry officers at the PM-01 level had been at that level for a period of five years or more, had acted as court registrars on a regular basis and all had taken registry officer development courses. Having outgrown the present job description, the experienced employees at the PM-01 level were now performing the same duties as employees at the PM-03 level and were ready to proceed to the PM-03 level.

[15] Ms. Anita Harper and Ms. Edge then met with Mr. Gaudet on February 24, 1998, and, on February 26, sent Mr. Gaudet a copy of the points of their discussion with him. There was no formal response from Mr. Gaudet or from the employer following this meeting; therefore, by June 1998 the grievors had filed their grievances, taking the date of the meeting with Mr. Gaudet, February 24, 1998, as the starting point for their grievances.

[16] Ms. Edge explained that the only types of hearings that are held in the Immigration Section are motions for a stay and judicial reviews. The Anton Pilar and Mareva injunctions are intellectual property-type of hearings and contempt hearings are never seen in the Immigration Section.

[17] Mr. Pierre Gaudet, Deputy Administrator responsible for operations in the Federal Court, began by describing the background of these grievances. Initially, there were three levels of classification for registry officers: PM-01, PM-02 and PM-03. The PM-01 is the training level, where new employees with no experience are trained and exposed to the work of registry officers and court registrars. The PM-02 classification level was dropped several years ago and all the employees at the PM-02 level were reclassified to the PM-03 level. This left only the PM-01 level position as a training level and the PM-03 level position as a working level. This worked well until a freeze was imposed on new appointments as part of the government austerity program.

The Federal Court then hired priorities from quasi-judicial boards and consequently this arrangement was put on hold.

[18] In 1992-93, major amendments were made to the *Immigration Act*, causing the caseload in the Immigration Section to double and therefore requiring additional resources to process the immigration cases. The Federal Court operates differently in Ottawa than in other regions. Instead of being one big office, the Court in Ottawa is divided into sections. The work done in the Immigration Section in Ottawa is almost like a production line whereby there is a considerable volume of cases, but the work is pretty straightforward. Mr. Gaudet asserted that the employees at the PM-03 level in the Immigration Section in Ottawa are under-utilized and are actually performing work more in line with a PM-01 level position.

[19] Mr. Gaudet said that there are certain types of hearings that employees at the PM-01 level, which is the training level, can attend, such as judicial review, stays and motions, but employees at the PM-03 level attend appeals, trials, Anton Pilar and Mareva injunctions and receive *viva voce* evidence.

[20] A memorandum by Mr. Robert Biljan, Administrator of the Federal Court, dated May 16, 1994 was introduced as Exhibit E-3. Mr. Gaudet explained that, as a result of grievances of some registry officers at the PM-01 level who wanted to be exposed to counter work, management decided that the registry officers at the PM-01 level could be assigned court registrar functions.

[21] Mr. Biljan's memorandum and a second memorandum by Mr. Charles E. Stinson, Regional Director, Western (Federal Court), dated December 20, 1994 (Exhibit E-4), outlined that PM-01 registry officers would not be assigned to court registrar functions for trials, contempt of court hearings, committal proceedings, high-profile media cases, pre-trial conferences, Anton Pilar and Mareva injunctions or where significant experience is essential.

[22] Some new Federal Court Rules, involving more dispute resolutions and attempts of settlement, came into force in 1998 which brought a dramatic decrease in the number of trials.

[23] In cross-examination, Mr. Gaudet testified that none of the employees at the PM-03 level in the Immigration Section attended, for the period covered by the grievances, the hearings listed in Exhibit E-3 (trials, contempt of court hearings, committal proceedings, high-profile media cases, pre-trial conferences or Anton Pilar and Mareva injunctions). Mr. Gaudet acknowledged that, with the changes to the Federal Court Rules in 1998, there were fewer trials available in Ottawa. When asked by Mr. La Bissonnière if it was possible that, after six or seven years in that section, the employees at the PM-01 level in the Immigration Section were doing the same duties as employees at the PM-03 level, Mr. Gaudet answered that it was quite possible and that over 90% of the work in the Immigration Section was very narrow and straightforward. Mr. Gaudet explained that the duties of employees formerly classified at the PM-01 level have not changed since their appointment to the PM-03 level in the Immigration Section, but at the PM-03 level they can be assigned to any case, any section of the Court throughout the registry. Mr. Gaudet said that he was generally aware that employees at the PM-01 level were working independently and that they were acting as court registrars. He found it unfortunate that some PM-03 level employees in the Immigration Section were never assigned outside the Section. Mr. Gaudet testified that he was not pleased when he learned that the employees at the PM-03 level in the Immigration Section had been there for several years without being rotated; however, as a result of the new rules, the employees at the PM-03 level are now rotated to other cities in order to expose them to trials.

Arguments

For the Grievors

[24] Mr. La Bissonnière submitted that the grievors had met the burden of proof by establishing that they performed the duties listed in the statement of duties of the PM-03 level position in the Immigration Section (Exhibit G-3). In their testimony, the grievors showed that they were performing those duties on February 24, 1998 when they met with Mr. Gaudet to discuss the issue of their appointment to the PM-03 level. The employer admitted that none of the employees at the PM-03 level in the Immigration Section, for the period covered by the grievances, attended trials, contempt of court hearings, committal proceedings, high-profile media cases, pre-trial conferences, etc. The employer tried to send the case off the rails by saying that the employees at the PM-01 level were on a training program when it was not so because

there was no structured training program. They had been working independently and performing the same work as employees at the PM-03 level for several years. During the period covered by the grievances, they were all experienced employees classified at the PM-01 level performing the duties of employees classified at the PM-03 level in the Immigration Section.

[25] In support of his argument, Mr. La Bissonnière referred to the decision in *Beauregard, Dupéré and Bourgon* (Board files 166-2-26956, 26957 and 26958) where, in his reasons for decision, Yvon Tarte, Chairperson of the Board (then Vice-Chairperson), said that the issue of the case was not whether the grievors had performed all of the possible duties of an AI-04 air traffic controller position, but whether they performed the duties normally carried out by an employee at the AI-04 level in similar circumstances. In the instant case, it has been clearly established that the grievors acted independently as court registrars. There was no evidence of discrimination in assignments between employees at the PM-01 and PM-03 levels. The argument of the employer that they could not have been assigned to trials of a more complicated nature is not relevant in view of the *Beauregard, Dupéré and Bourgon* decision.

[26] Mr. La Bissonnière also referred to the decision of Board Member Rosemary Vondette Simpson in *Vanier* (Board file 166-2-23562) where she explained, in her reasons for decision, that the main issue in that type of case is whether or not the grievor substantially performed the duties of the higher position for the period in question. In her decision, Mrs. Simpson found that the grievor did not have to perform all of the duties as described in the job description to substantially perform the duties of the higher position. In the instant case, it has been established that registry officers at the PM-03 level in the Immigration Section were never requested to go outside for trials as listed in Exhibit E-3 and it is the grievors' submission that had they gone outside, they would have needed close supervision because they had no experience in such trials in the Immigration Section.

[27] In conclusion, the grievors' case is consistent with previous jurisprudence of the Board and the grievances should therefore be allowed.

For the Employer

[28] Mr. Fader started by stating that these grievances concern acting pay and the burden of proof rests with the grievors to prove that the employer has violated the collective agreement. As stated in section 7 of the *Public Service Staff Relations Act (P.S.S.R.A.)*, it is within the rights of the employer to assign duties and to classify positions and that is what the employer has done. There are two classification levels: PM-01 and PM-03. A position is classified, not an individual. What has been classified is a national generic job description. What the grievors have done is, in fact, say that there is no job description. Mr. Fader submitted that, by comparing both job descriptions, a lot of overlap is found but a sharp line distinguishes both positions. As such, part 2 of the job description (Exhibit G-2) of the PM-01 level position begins with "Acts as a registry officer, with supervision and direction,..." while in the job description for the PM-03 level position (Exhibit G-3), at part 2, it states: "Acts as Court Registrar at trials, motions, hearings, pre-trial conferences and teleconferences..."

[29] Mr. Gaudet explained that two memoranda (Exhibits E-3 and E-4) were sent to clarify any misunderstanding in the duties assigned to employees at the PM-01 level and employees at the PM-03 level and the list of trials was made to make the sharp line even more distinct between the duties at the PM-01 level and the PM-03 level. Mr. Fader submitted that there has been no evidence that the grievors had performed the duties listed in both memoranda. Ottawa is unique because of the explosion in immigration cases and the employer has tried to rotate the employees at the PM-03 level in the Immigration Section. Since the 1998 amendments to the Federal Court Rules, the solution is to rotate the employees at the PM-03 level in Ottawa to other cities where there is a lot more trial work.

[30] Counsel for the employer concluded by arguing that, during the period covered by the grievances, employees at the PM-03 level in the Immigration Section were performing duties of a PM-01 level. Mr. Fader explained that there was no jurisprudence that dealt with this situation and accordingly could not refer to any caselaw. The employer found some value in having experienced employees at the PM-03 level working alongside employees at the PM-01 level in the Immigration Section and, with the explosion of cases, needed to have more employees to perform the work.

[31] Accordingly, counsel for the employer requested that these grievances be dismissed.

Reply

[32] In rebuttal, Mr. La Bissonnière explained that, to meet the burden of proof, the grievors had to prove that they performed the same duties in the same division for the same period of time at the higher classification level. Whether employees at the PM-03 level were under-utilized is not relevant. The factual basis is that, during a period of time, employees at the PM-01 level performed the full range of duties performed by employees at the PM-03 level.

Reasons for Decision

[33] The Master Agreement between the Treasury Board and the Public Service Alliance of Canada sets out, at paragraph M-27.07(a), the following:

M-27.07

- (a) *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 the period specified in (b) below, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts,*

[...]

[34] In essence, Mr. La Bissonnière's argument is that the grievors proved that they substantially performed the same duties as employees classified at the PM-03 level in the Immigration Section for the period of time covered by the grievances and that whether employees at the PM-03 level were under-utilized is not relevant.

[35] Mr. Fader says that the grievors did not meet the burden of proof because they did not perform substantially all of the duties found in the summary of duties of the PM-03 level position. To have substantially performed the duties at the PM-03 level, the grievors would have had to act as court registrars at trials, pre-trial conferences, contempt of court hearings, committal proceedings, high-profile media cases and Anton Pilar and Mareva injunctions as listed in Exhibit E-3.

[36] According to counsel, the fact that the grievors performed the same duties as the employees at the PM-03 level in the Immigration Section is not relevant because those employees were under-utilized and actually performing duties at the PM-01 level position.

[37] A quick review of the Board's jurisprudence on this issue resolves this question. As early as 1970, J.F.W. Weatherill (then an adjudicator with the Public Service Staff Relations Board) concluded in the *Deley* decision (Board file 166-2-289) that in essence the grievor did not have to perform all of the duties of the higher classification to get acting pay as long as the grievor had performed the duties at the higher level of classification that were requested in the position during the period in question. As he said, at page 10:

...Clearly, in the circumstances of this case, the grievor acted as OIC/CFFB. He was entitled to payment as if he had been appointed to the position, even though he might not qualify for such an appointment on a regular basis. In a number of arbitration cases it has been held that where an employee performs substantially the functions of a higher classification he is entitled to the full rate for that classification, even though there may be some aspects of the work which he would be unable for perform. See, for example, the Town of Pembroke case, 18 L.A.C. 125.

[38] Another landmark decision with respect to this issue is a decision rendered in 1977 by Kenneth E. Norman, a part-time member of the Board, in *Shanley* (Board file 166-2-3044). Mr. Norman reiterated that, to substantially perform the duties, the grievor in a similar case did not have to or be able to discharge every job function to receive acting pay. As he said, at page 9:

[...]

The issue is neither whether Mr. Shanley was capable of discharging each and every job function specified in the Group Controller's Position Analysis Schedule, nor is it whether he actually performed virtually all of the various duties set down in the Schedule during the period in question. The question is whether, on balance, Mr. Shanley effectively stood in Mr. Schnack's shoes throughout. In other words, given the season of the year and the demands of the position of Group Controller at that time, did Mr. Shanley cope with those functions which would have arisen to be dealt with, in the normal course of events, had Mr. Schnack not been absent?...

[39] Since then, and as recently as the 1996 decision of Yvon Tarte, then Vice-Chairperson of the Board, in *Beauregard (supra)*, the Board has consistently interpreted similar provisions in collective agreements regarding acting pay. The undisputed evidence received in the instant case is that the grievors performed all of the duties of the PM-03 level position in the Immigration Section of the Federal Court in Ottawa for the period covered by the grievances. Consequently, I find it irrelevant that the grievors did not act as court registrars at trials, contempt of court hearings, committal proceedings, high-profile media cases, pre-trial conferences and Anton Pillar and Mareva injunctions because they did not reflect the duties of the PM-03 level position in the Immigration Section in Ottawa. The undisputed evidence that I received was that the employees at the PM-03 level in the Immigration Section in Ottawa did not attend those types of hearings for the period covered by the grievances.

[40] As suggested by counsel for the employer, I looked at both job descriptions for the PM-01 and PM-03 positions (Exhibits G-2 and G-3). As Mr. Fader said, there is a lot of overlap between both job descriptions but it seems to me that the dividing line between the PM-01 level and the PM-03 level is that employees at the PM-01 level will act under the direct supervision of the manager and will act as registry officers, with supervision and direction (Exhibit G-2, paragraphs 1 and 2) while at the PM-03 level, they will be acting independently (Exhibit G-3, paragraphs 1 and 2). After five or six years as registry officers at the PM-01 level, the grievors had outgrown the training period at the PM-01 level and were performing the same duties as employees at the PM-03 level in the Immigration Section. It is interesting to note that the grievors that are still in the Immigration Section are performing the same duties at the PM-03 level as they were performing at the PM-01 level.

[41] Accordingly, the grievances are therefore allowed. The grievances cover the period from February 24, 1998 until the date the grievors were appointed to the PM-03 level, as argued by Mr. La Bissonnière and not objected to by Mr. Fader. The grievors are to be compensated for the difference between the pay that they actually received for the period in question and the pay applicable to the PM-03 classification level.

[42] It was mentioned by the parties during these proceedings that the bargaining agent and the employer are negotiating a new structured training program for registry officers and court registrars. I am hopeful they will be successful in finding a long term solution to the problem underlying these grievances.

**Guy Giguère,
Board Member**

OTTAWA, August 22, 2000