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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PATRICK M. FREY

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Before: Stephen Kelleher, Q.C., Board Member

For the Grievor: Chris Dann, Public Service Alliance of Canada

For the Employer: Harvey Newman

Heard at Calgary, Alberta
July 6, 2000

[1] These proceedings concern the grievance of Patrick Frey. It is a claim for acting pay. The grievance alleges a violation of Clause M-27.07 (a) and (b) of the Master Agreement between the Treasury Board and the Public Service Alliance of Canada:

> *M-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 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,*
>
> ****
>
> *for the number of consecutive working days as follows:*

Group	*Levels*	*No. of Days or Shifts*
LS	*ALL*	*10*
AS	*ALL*	*10*
IS	*ALL*	*10*
PM	*ALL*	*10*
PG	*ALL*	*10*
DD	*ALL*	*4*
EG	*ALL*	*4*
GT	*ALL*	*4*
PY	*ALL*	*4*
PI	*ALL*	*4*
SI	*ALL*	*4*
TI	*ALL*	*4*
CM	*ALL*	*4*
DA	*ALL*	*4*
CR	*ALL*	*4*
OE	*ALL*	*4*
ST	*ALL*	*4*
CX (S&NS)	*1 to 6*	*1*
	7 and 8	*4*
FR (S&NS)	*ALL*	*1 shift*
GL (S&NS)	*ALL*	*2*
GS (S&NS)	*ALL*	*2*
HP (S&NS)	*ALL*	*3*
LI (S&NS)	*ALL*	*3*

[2] There is no dispute about the facts. The Grievor is employed as an indeterminate Storesperson (GS-STS-04) for the Department of National Defence at Canadian Forces Base Edmonton (Canadian Forces Depot - 7 CFSD).

[3] From June 4 to October 31, 1997, the military Sergeant who supervised repair and disposal was absent, performing tasks elsewhere. While he was away Mr. Frey looked after the supervisory duties. The position he held during this period was classified by the Department of National Defence as Public Service Civilian Term Position 73240-70144. It was classified at the GS-STS-05 level.

[4] Mr. Frey's claim is that he should have been paid at a higher rate, namely the rate that the Sergeant earns as a member of the military.

[5] The issue of the application of Article 27.07 when employees temporarily replace persons who are not "employees" within the meaning of the Public Service Staff Relations Act has arisen on previous occasions. The first decision is Julie Francoeur -and- Treasury Board (RCMP), P.S.S.R.B., July 15, 1993, Files 166-2-23158 and 166-2-23592 (Korngold Wexler). Ms. Francoeur performed in an acting capacity the duties of a non-commissioned officer in charge of the compensation section. She claimed to be entitled to be paid as a Sergeant level 2. The incumbent of the Sergeant level 2 position was employed under the Royal Canadian Mounted Police Act, not the Public Service Staff Relations Act.

[6] Ms. Francoeur was paid at the AS-02 level. That was because the Employer used the public service classification standards to convert the Sergeant position to an equivalent position in the public service. The Sergeant level 2 position was paid more than the AS-02.

[7] Deputy Chair Korngold Wexler upheld the grievance. In her view the AS-02 position did not "exist". It was created solely for the purpose of acting pay. The "higher classification" within the meaning of Article 27.07 was the rank of Sergeant.

[8] The question came before the Board again in 1994. In Julie Francoeur -and- Treasury Board (Royal Canadian Mounted Police), P.S.S.R.B. File No. 166-2-25922, November 10, 1994 (Tarte) the same grievor relieved in the Assistant Budget Analyst position. This time she claimed the pay of an RCMP Corporal. Deputy Chair Tarte (as he then was) reached a different conclusion.

[9] Mr. Tarte reasoned that Article M-27.07 required that the employee substantially perform on an acting basis the duties of an "employee" in a higher classification level. He then considered the definition of "employee" in the Collective Agreement:

> *M-2.01 For the purpose of this Agreement and the Group Specific Agreements:*
>
> *"employee" means a person so defined in the Public Service Staff Relations Act, and who is a member of one of the bargaining units specified in Article M-7.*

[10] The word "employee" to describe the person being replaced is not found in the English version of Article M27.07. It refers to the classification level. However "employé" is used in the French language version of Article M27.07(a):

> *M-27.07*
>
> *Lorsque l'employé-e est tenu par l'employeur d'exécuter à titre intérimaire une grande partie des fonctions d'un employé-e d'un niveau de classification supérieur et qu'il exécute ces fonctions pendant au moins la période indiquée à l'alinéa b) ci-dessous, il touche, pendant la période d'intérim, une rémunération d'intérim calculée à compter de la data à laquelle il commence à remplir ces fonctions, comme s'il avait été nommé à ce niveau supérieur,*

[11] Mr. Tarte made reference to this:

> *I note that the English version of Clause M-27.07 does not appear to contain the same restrictions as the French version. However, the clear and I precise language of the French version does not enable me to decide otherwise.*

[12] That decision was the subject of an application to the Federal Court of Canada Trial Division for judicial review: Francoeur v. Canada (Attorney General), [1996] F.C.J. No. 199. The application succeeded. Mr. Justice Richard noted the difference between the English and French versions:

> *The English version of M-27.07 does not provide that the employee must substantially perform the duties of an employee at a higher classification level. It provides that the employee must substantially perform the duties of a higher classification level.*

[13] Mr. Justice Richard noted that Clause 3.02 provides that both the English and French versions of the Agreement are official. He went on:

> *Each Article of the Master Agreement must be interpreted having regard to the context and the other Articles, so that whenever possible the entire Master Agreement forms a logical whole. This is a fundamental rule of interpretation. If there is a difference between the two versions, preference is given to the version which best achieves the objectives of the document, based on its spirit, intention and true meaning.*

[14] He concluded:

> *The English version of the passage is clear: if the employee performs the duties of a higher classification, the employee must be paid as if he or she had been appointed to that position. This version is most faithful to the scheme of the agreement.*

The Attorney General of Canada appealed to the Federal Court of Appeal: Francoeur v. Canada (1997), F.C.J. No. 758.

[15] The Federal Court of Appeal allowed the appeal. The Court held that the original decision by Mr. Tarte could not be set aside unless it was obviously and clearly wrong. The Court continued:

> *It certainly does not seem that the judge in this case performed his role using the approach required by these principles. He simply took it upon himself to consider the interpretation problem raised by the apparent conflict between the English and French versions of the clause in question and he criticized the adjudicator for preferring the more restrictive French version, ultimately because he felt that the English version seemed more consistent with the entire agreement and could prevent future staff relations problems. That is far from being a conclusion that the adjudicator's interpretation was clearly wrong.*

[16] On the contrary we believe that it is certainly not unreasonable to prefer the more restrictive version, as the adjudicator did - a basic rule when interpreting two official versions that differ, and a rule that the interpreter cannot disregard without a serious reason, because doing so leads the interpreter to ignore an express restriction in the provision - and thereby to sanction the idea that questions concerning the remuneration of employees in a bargaining unit must be resolved on the basis of the hierarchical classification of positions reserved for those employees alone.

[17] The next decision is Gerald Joseph Cleary -and- Treasury Board (National Defence), P.S.S.R.B. File No. 166-2-26108, May 29, 1996 (Labelle). The issue was similar:

> *The issue here is does a civilian employee receive the military rate of pay of a Major when on an acting basis he is performing the duties of a position previously held by a Major.*
>
> (at 1)

[18] Mr. Labelle decided this case after the Federal Court had set aside the second Francoeur decision and before the Federal Court of Appeal restored it. He concluded:

> *In the instant case, the grievor performed on an acting basis the duties of a position that was classified at the rank of Major and the Master Agreement provides that Mr. Cleary is entitled to acting pay as if he had been appointed to that higher classification level.*
>
> (at 7)

[19] The Attorney General of Canada appealed. The Federal Court of Canada Trial Division in Attorney General of Canada -and- Gerald Joseph Cleary, (unreported), January 11, 1999 (Rothstein, J.) noted that the standard of review is patent unreasonableness.

[20] Mr. Justice Rothstein stated the issue as follows:

> *The issue here is whether clause M-27.07 allows for recognition of a higher classification outside the hierarchy of classifications of the collective agreement applicable to the respondent. In other words, was the respondent entitled to be classified as a Major? The adjudicator appears to have interpreted clause M-27.07 in this manner and in doing so, appears to have relied on the decision of Richard J. in the Federal Court Trial Division, the Federal Court of Appeal decision not having been issued at that time. The applicant says that on the basis of the subsequent Federal Court of Appeal decision, the adjudicator's decision is patently unreasonable and judicial review should be allowed.*

[21] Mr. Justice Rothstein expressed the view that the adjudicator "may not have been correct". But two factors, taken together, led him to dismiss the application. First, the Federal Court of Appeal had simply held that the decision in Francoeur by Deputy Chair Tarte was "certainly not unreasonable" but did not determine that it was

correct. Second, he was not prepared to say that the decision by Board Member Labelle was "patently unreasonable". That is because the Court did not have the full Collective Agreement in the record. He put it this way:

> *In particular, I have nothing other than clause M-27.07 to help me interpret the word "classification" as it is used in that provision and in particular, whether it precludes consideration of classifications outside the collective agreement. As I have said, it seems as if the classifications should be those recognized by the collective agreement only. However, without something more to go on, I am not prepared to say that the adjudicator's decision was patently unreasonable.*
>
> (at 5-6)

[22] What emerges from these decisions? There are some conflicting points of view about the issue. But in my view the reasoning of Mr. Tarte in Francoeur must be preferred. In the first place, the Board in Cleary did not have the benefit of the Federal Court of Appeal's reasoning in Francoeur. Second, the Federal Court in Cleary, although it did not set the decision aside, expressed the view that the adjudicator "...may not have been correct". Finally, I find Mr. Tarte's reasoning to be persuasive. I agree with the decision in that case that a position cannot be a higher classification level for purposes of clause M-27.07 if the position is not that of an employee within the meaning of the Collective Agreement or the Public Service Staff Relations Act.

[23] Counsel for Treasury Board argued that there is an independent reason for denying the grievance. Clause M-27.07 contains two paragraphs, (a) and (b). When they are considered together in either the French or English version of the Master Agreement, they point clearly to a decision in the Employer's favour.

[24] Paragraph (b) lists the number of days or shifts an employee must work in a classification before being eligible for acting pay. The "groups" in paragraph (b) refer to the classifications in which they relieve. For example, LS refers to Library Science, AS to Administrative Services and so on. All of these groups are of employees in the bargaining unit of the Alliance: see Article M-7.

[25] When paragraphs (a) and (b) are read together, in either the French or English version, it is clear that the mutual intention of the parties was that "higher

classification level" or "d'un niveau de classification supérieur" refers to those of an employee within the meaning of the Collective Agreement.

[26] I agree with that submission.

[27] For all of these reasons, the grievance must be dismissed.

STEPHEN KELLEHER, Q.C.
Board Member

Vancouver, August 18, 2000