LiB

Date: 20000106

File: 166-2-28990

Citation: 2000 PSSRB 1

Public Service Staff Relations Act

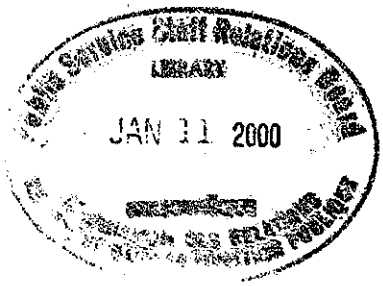
Before the Public Service Staff Relations Board

BETWEEN

THEA M. KREUGER

Grievor

and



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

Employer

Before: Evelyne Henry, Deputy Chairperson

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

For the Employer: Richard Fader, Counsel

Heard at Vancouver, B.C.,
October 26, 1999.

[1] Thea Kreuger grieved that the employer denied her a pay increment, for all periods of acting assignment at the AU-4 level, after August 6, 1996. Her grievance was submitted at the first level of the grievance procedure on October 8, 1997. The employer denied the grievance at the four separate levels of the grievance procedure on grounds relating to the merits of her case. She referred her grievance to adjudication on May 3, 1999.

[2] Two months prior to this hearing, in a letter to the parties dated August 18, 1999, the employer raised for the first time an objection to the jurisdiction of an adjudicator appointed under the *Public Service Staff Relations Act* (P.S.S.R.A.) to hear this grievance on the basis of timeliness.

[3] The employer proceeded to present evidence relating to its objection by calling Ms. Kreuger as a witness.

[4] Ms. Kreuger introduced her memorandum of January 15, 1997 to Nadiya Gulamhussein (Exhibit E1) in which she requests payment of an increment. Her memorandum reads in part:

> ...
>
> *Starting February 21, 1994 and ending November 1, 1996 I have had several acting AU-4 appointments totaling 64 weeks and 4 days. During these acting appointments I have received the same pay without consideration being given to the fact that I was entitled to an increment effective August 6, 1996. On August 5, 1996 I had accumulated 52 weeks of AU-4 acting pay at the same level of pay. However I did not receive the increment effective August 6, 1996 to which I believe I am entitled. I should have received a weekly increment of $40.27 starting August 6, 1996. According to my calculations I should receive additional gross pay of $515.46.*
>
> *I am enclosing a schedule detailing my acting AU-4 assignments and the pay I received.*
>
> *Please issue me a cheque for the incremental pay of $515.46 less any applicable deductions.*
>
> ...

Ms. Kreuger explained that Ms. Gulamhussein was a payroll clerk.

[5] Ms. Kreuger remembers receiving a memorandum dated February 6, 1997 (Exhibit E2) from Nadiya Gulamhussein in answer to hers. This memorandum states in part:

> ...
>
> *You were acting as an AU-04 from 21.02.94 until 15.04.94; and from 30.08.94 until 31.03.95; and from 06.05.96 until 01.11.96. You did not receive an increment in your acting assignment as all these acting assignments were less than 52 weeks and there was a break between all periods of acting.*
>
> ...

[6] Ms. Kreuger did not grieve at this time because she did not have the regulations, nor were they available in the library.

[7] On March 26, 1997, Ms. Kreuger wrote again to Nadiya Gulamhussein (Exhibit E3) disagreeing with her interpretation and asking for the relevant pages of the *Public Service Terms and Conditions of Employment Regulations* (*P.S.T.C.E.R.*). On May 14, 1997 Nadiya Gulamhussein wrote a memorandum to Ms. Kreuger (Exhibit E4) sending copies of documents and referring Ms. Kreuger to Caroline Bradfield, a Staff Relations Advisor.

[8] On May 20, 1997 Ms. Kreuger wrote to another Pay Advisor, Amy Pieschel, (Exhibit E5) again requesting the relevant pages of the *P.S.T.C.E.R.* and reiterating that she was entitled to a pay increment effective August 6, 1996. On May 27, 1997 Amy Pieschel replied to Ms. Kreuger (Exhibit E6) repeating Ms. Gulamhussein's message of Exhibit E4.

[9] Ms. Kreuger did not grieve because she felt the payroll clerks were not representatives of management but merely advisors providing opinions.

[10] On June 17, 1997, Caroline Bradfield sent an e-mail to Ms. Kreuger (Exhibit E7) in which she states:

> ...
>
> *Based upon the material provided to me you would be entitled to acting pay but you would NOT be entitled to a pay increment as there were significant breaks in your acting assignments during the period in question.*

...

[11] Ms. Kreuger did not grieve then because she believed she was being told that she had to go through her manager.

[12] Ms. Kreuger wrote a memorandum to Alan Farres, Manager of Technical Services, on August 14, 1997 (Exhibit E8) in which she disagreed with the response she had obtained, from Staff Relations, to her request for a pay increment effective August 6, 1996.

[13] Ms. Kreuger indicated that she believed she received the memorandum from the Supervisor of Compensation, Sue Fleming, (Exhibit E9) on or around October 7, 1997. This memorandum replied to her memorandum to Alan Farres and maintained that Ms. Kreuger was not entitled to an increment because of breaks in her acting assignments. Ms. Kreuger grieved the next day.

[14] In cross-examination, Ms. Kreuger introduced an extract from the Taxation Operations Manual dealing with grievances and staff relations (Exhibit U1). Ms. Kreuger explained that she was following the instruction in paragraph 4 on the fourth page and this was the reason she delayed in filing her grievance. This paragraph reads:

> *Every effort should be made to encourage an employee to attempt to resolve a problem through discussion with the immediate supervisor. From a practical standpoint, it makes good sense for an employee to discuss a complaint with the supervisor before resorting to the submission of a formal grievance. An employee's interests will generally be more quickly served in this manner, and it is possible that the supervisor can provide information which could help the employee decide whether a formal grievance is necessary. Moreover, good management practice depends on the supervisor being made aware as quickly as possible that an employee is concerned about a particular situation. Obviously, it is important, whenever possible, to remove problems that tend to preoccupy employees and therefore reduce work output.*

[15] Ms. Kreuger explained that there was a backlog of pay changes that the payroll clerks had to deal with, and that acting pay and pay increments were "put on the back burner", as they were considered of a lesser priority. Ms. Kreuger was not surprised at the delays she was experiencing in getting the matter resolved.

[16] An e-mail exchange with Barbara Fulton (Exhibit U2) was introduced. It demonstrates that, in September 1999, Ms. Kreuger had been acting at the AU-5 level for five and a half months and was still waiting for her acting pay. In her e-mail, Ms. Fulton requests Ms. Kreuger's patience and explains that: "...Priority is being given by compensation staff to the processing of base pay, and the management of staff joining and leaving the department...."

[17] Ms. Kreuger introduced a document (Exhibit U3) which lists the sequence of events from her memorandum of January 15, 1997 to her filing her grievance on October 8, 1997. Ms. Kreuger introduced as Exhibit U4 (A) to (S) the documents referred to in the sequence of event.

[18] Ms. Kreuger explained that she kept pursuing her claim because she felt she had not been given an answer "that spelled out how the law flows". She decided to contact the bargaining agent to file a grievance when her manager told her he had received a copy of the answer she got from Sue Fleming and that he was in agreement with it.

[19] Ms. Kreuger confirmed that when she made her first inquiry she was no longer acting in a higher level position and she had received the acting pay.

[20] The parties submitted an agreed statement of facts that reads:

STATEMENT OF FACTS

At the material time, Ms. Kreuger was a substantive AU-03 at the maximum pay rate in the Verification and Enforcement Division at the Vancouver Tax Services Office in British Columbia.

At the material time, Ms. Kreuger was covered by the Auditing Agreement, Code 204/88 between the Public Service Alliance of Canada/Professional Institute of the Public Service of Canada and the Treasury Board.

Ms. Kreuger had three separate acting appointments as an AU-04 and received AU-04 pay at the 3rd level of the pay scale.

The acting appointments were as follows:

February 21, 1994 to April 15, 1994	*8 weeks*
August 30, 1994 to March 31, 1995	*31 weeks*
May 6, 1996 to November 1, 1996	*26 weeks*

> *Ms. Kreuger alleged she should have received a pay increment at the AU-04 level for the period of August 6, 1996 to November 1, 1996 during which time she was acting at the AU-04 level.*
>
> *The parties reserve the right to call additional evidence and/or witnesses at the hearing.*

[21] The Auditing Group collective agreement, Code: 204/88, was introduced as Exhibit U5.

[22] A Compensation Bulletin issued April 16, 1996 was introduced as Exhibit E11.

[23] Mr. Fader, on behalf of the employer, proceeded first with his arguments on the objection to jurisdiction on the basis of timeliness.

[24] The employer indicated that the grievor was put on notice, in August 1999, of the employer's intention to raise the timeliness issue; this was two months before this hearing. The employer referred to the *Ouellette* case (Board file 166-2-21255). The employer pointed to the failure of the grievor to request an extension of time limits for the filing of the grievance pursuant to section 83 of the *P.S.S.R.B. Regulations and Rules of Procedure*. Without such an application, the grievor is limited to arguments that she has met the 25-day limit.

[25] The employer claimed that the evidence was clear that the "timeline" was missed by the grievor. There is a statutory and contractual obligation of timeliness under subsection 71(3) of the Regulations and under clause 38.10 of the collective agreement which reads:

> *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.*

[26] The latest that the grievance could have been filed was twenty-five days after the memorandum of February 6, 1997 (Exhibit E2) was received. The last acting period ended in November 1996; this is not a continuing grievance. The employer claimed that post grievance evidence was not admissible and relied on the decision of the Supreme Court of Canada in *Cie minière Quebec Cartier v. Quebec* (Grievances Arbitration) [1995] 2 S.C.R. 1095 in support of this position.

[27] The employer argued that Ms. Kreuger had known since February 1997 that she was not getting the increment but she chose to challenge the reasons relied upon by the employer rather than file a grievance. She was clearly outside the 25-day limit when she submitted her grievance in October 1997.

[28] The employer relied on the decision in *Sittig* (Board file 166-2-24117), page 4, paragraph 26, which contains an excellent statement of the situation in the present case. The proper test to apply is to ask whether the situation was unresolved, whether the employer was waffling or indecisive when the memorandum in Exhibit E2 was issued. The employer maintained the same answer from February to October in Sue Fleming's memorandum. The letters became shorter and more trite but never changed.

[29] The employer then referred to the decision in *Rinke* (Board file 166-2-27705), page 8, paragraph 50, which describes the "became aware test". The evidence shows that Ms. Kreuger became aware in February 1997 that she was not getting an increment.

[30] The employer then referred to the decision of the Federal Court of Appeal in *Stubbe v. Canada (Treasury Board)* [1994] F.C.J. No. 508, where it is indicated that there is no need to prove prejudice for an objection to timeliness to be maintained.

[31] The employer then referred to the decision in *Roy* (Board file 166-2-21328), page 5, first paragraph.

[32] The employer maintained that there is no jurisdiction to exercise discretion because no application for an extension of time was ever made. However, should I find that an application for extension is being brought, the employer submitted as an alternative argument that the facts did not justify granting the extension. The employer requested that the grievance be dismissed on the grounds that it was untimely.

[33] For the grievor, Mr. Phillips argued that the grievance was timely; therefore there was no requirement to file for an extension of time. He also pointed to the fact that the timeliness issue was not brought to light through the grievance process. In Revenue Canada when there is an issue with time limits, it is raised by the employer during the grievance process.

[34] Ms. Kreuger contacted Human Resources when she realized she was not getting an increment. She followed the procedures in the Taxation Operations Manual. Then she received the opinion of various people in Human Resources. Those were not line managers; they were advisors; as such they could not bind the Department. In fact, in one memorandum, that of June 17, 1997, Ms. Kreuger is advised:

> ...
>
> *For your information, enquiries of this nature should correctly be referred through your manager, whom I am certain would be able to provide you with the necessary guidance in these matters. While Human Resources is pleased to provide assistance to staff at the request of their managers, I am sure you can appreciate that with over 4,000 employees in the Pacific Region, it is not possible to provide individual advice in response to independent enquiries.*
>
> ...

[35] This confirmed that Human Resources provide advice to management. Only when Ms. Kreuger received the definitive answer through her manager and Sue Fleming was it appropriate for the grievor to file her grievance on the next day.

[36] Mr. Phillips read clause 38.10 of the collective agreement and pointed out that it reads that an employee "may" present a grievance. He referred to Brown and Beatty, Canadian Labour Arbitration, 3rd edition, 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. ...*

Mr. Phillips also referred to the beginning of paragraph 2:3128 which reads:

> *2:3128 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,[1] although it has been held that a grievor need not anticipate a breach of the agreement and can wait until the issue crystallizes.[2]...*

Mr. Phillips submitted that the issue did not crystallize until Ms. Kreuger received a response from her manager to the effect that he concurred with Sue Fleming.

[37] Mr. Phillips referred to the decision in *Re Sunar Division of Hauserman Ltd. and United Steelworkers, Local 3292*, (1979), 23 L.A.C. (2d) 1, and referred to page 3, third paragraph, as an illustration of his point.

[38] He also referred to the decision in *Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union*, (1991), 20 L.A.C. (4th) 61. In that case a verbal notice was found not to be determinative; the grievor waited until he received a response from the manager in writing.

[39] In response to the employer's submission, Mr. Phillips distinguished the *Sittig* case (*supra*) on the basis that Mr. Sittig had received a decision from his line supervisor, Mr. Labonté. In that case, the decision came from a supervisor, not an advisor. In the *Rinke* case (*supra*), the decision was made by a director general, who was definitely someone in the grievor's line management.

[40] Mr. Phillips pointed out that the Department was busy with processing pay changes. It was just out of the freeze period and many employees were waiting for money. Ms. Kreuger waited a reasonable length of time and made inquiries.

[41] Mr. Phillips requested that I rule against the objection.

[42] In reply, the employer indicated that the words "may present a grievance" only mean that employees don't have to grieve. The operative words are "not later than the twenty-five (25th) day". This is not a discretionary time limit.

[43] I decided to take the objection under reserve and asked the parties to proceed with the arguments on the merits of the case.

[44] Mr. Phillips, on behalf of the grievor, proceeded first and submitted that Ms. Kreuger was being paid at the top increment rate of her substantive AU-3 position at the time of the increment freeze under Bill C-17 (see Exhibit E11). The statutory increment freeze ended June 15, 1996. Ms. Kreuger was offered a series of acting assignments starting in February 1994 until November 1996. She performed acting duties for 65 weeks out of a total period of 130 weeks.

[45] In accordance with Pay Notes on page A-3 of the collective agreement (Exhibit U5), the pay increment period is 52 weeks. As of the end of the first week in August 1996, Ms. Kreuger had accumulated 52 weeks at the AU-4 level. She should have received an increment at the end of a period of 52 weeks. The increment pay period says "52 weeks"; it does not say 52 consecutive weeks.

[46] In this particular collective agreement, when the parties meant days to be consecutive, they so stated. Clause 27.07, for example, provides:

> *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.*

Again in clause 20.03 the second paragraph reads:

> *When two (2) days designated as holidays under clause 20.01 coincide with an employee's **consecutive** days of rest, the holidays shall be moved to the employee's first two (2) scheduled working days following the days of rest. ...*

Subclause 21.02(a) states:

> *(a) When a member of his immediate family dies, an employee shall be entitled to a bereavement period of four (4) **consecutive** calendar days which does not extend beyond the day following the day of the funeral. During such period he shall be paid for those days which are not regularly scheduled days of rest for the employee....*

Clause 26.02 again provides:

> ***26.02 When an employee is required by the Employer to work on a normal day of rest, compensation shall be granted on the basis of time and one-half (1 1/2) for each hour worked on the first day of rest, and on the basis of double (2) time on the second or subsequent day of rest. Second or subsequent day of rest means the second or subsequent day in an unbroken series of **consecutive** and contiguous calendar days of rest.*

Finally clause 30.01 states:

> *30.01 Where the Employer requires an employee to be available on standby during off-duty hours, an employee shall be entitled to a standby payment of seven dollars ($7) for each eight (8) **consecutive** hours or portion thereof that he is on standby, except on his days of rest and designated paid holidays. For all standby on a day of rest or designated paid holiday, he shall be paid fourteen dollars ($14).*
>
> (emphasis added throughout)

[47] In short, the word "consecutive" does not follow "days" if it is not meant to be, but there is a clear description of it where the parties to the collective agreement wanted the days or other units of time to be consecutive.

[48] Mr. Phillips requested that the grievance be granted and that I remain seized, until it is completely resolved, should there be problems with implementation.

[49] The employer stated that this is a case dealing with a straightforward interpretation of clause 27.07 of the collective agreement. What was the intent when the parties used the term "period"? The grievor must prove that, on a balance of probabilities, the employer violated the words of the collective agreement. If the parties had intended for days to be cumulative, they would not have used the term "period" in the singular. It was not meant to cover time periods that go over two or three years; it was meant to cover one period.

[50] The first and primary argument of the employer focussed on the term "period" which is a clear and unambiguous word, meaning a discrete unit of time, with one beginning and one end. Two decisions are on all fours with this situation. The first decision is *Horton* (Board files 166-2-14746 to 14749), and it deals with the meaning of the word "period". The adjudicator stated at page 12, paragraphs 28 and 29:

> *28. The essence of the argument for the grievors is that the word "period" as it is used in Article 22.12(d) can be taken to mean a series of distinct segments of time stitched together to form a single "period".*
>
> *29. The word "period" as it is used in Article 22.12(d), seems to me to have the usual meaning of a single and discrete segment of time having a single beginning and a single end. The entire structure of the collective agreement appears to tend in this direction, especially the provisions of Article 22.01. The representative of the grievors cited no*

> *jurisprudence, neither the Board's nor that of the private sector, in support of his contention that a single "period" of time can consist of a number of discrete segments of time taken together. Nor have I been able to find any such jurisprudence. I must, therefore, find that the word "period" as employed in the collective agreement must be understood to mean a discrete and unbroken span of time having a single end and a single beginning. From which it must follow that the meaning of Article 22.12(d) is clear and unambiguous insofar as the word "period" is concerned.*

[51] The second decision is *Lichter* (Board file 166-2-17085) where the adjudicator stated on page 4 in the reasons for decision:

> *I agree with Board Member David Kwavnick when he said in the well-reasoned decision in Horton et al that "the word 'period' as employed in the collective agreement must be understood to mean a discrete and unbroken span of time having a single end and a single beginning." (page 12). If such was not the case, I fail to see why the parties would have referred in the agreement to a four (4) hour period. It would have been useless to refer to such a four (4) hour period if the parties had in mind to compensate standby duty of let us say one hour only.*
>
> ...

[52] There is no sense in reading a different meaning of the term "period" as the bargaining agent negotiated the collective agreement after the *Horton* decision (*supra*) was published.

[53] The second point the employer submitted is found in Article 46 of the Terms and Conditions of Employment Policy which is incorporated in the collective agreement by clause 27.01. Article 46 deals with remuneration during acting assignment and Article 46.(D) concerns pay increments. It states:

> ***46.(D) Pay increments***
>
> *(1) Notwithstanding paragraph 46.(C)(1) above, an employee*
>
> ...
>
> *shall be eligible to receive pay increments in the higher classification level at the end of the increment period for the higher classification level, calculated from the date on which the acting assignment commenced.*
>
> ...

[54] The next point raised by the employer involved the "exclusio unius" rule. Articles 43 to 45 of the Terms and Conditions of Employment Policy provide for a gap in the increment period. The Policy provides for the service to be cumulative in specific circumstances. Article 46 does not provide for it. Clearly, Articles 43 to 45 provide for the exclusion of Article 46.

[55] The fourth point concerned the definition of "year" and subclause 2.02(b) of the collective agreement which provides:

> *2.02 Except as otherwise provided in this Agreement, expressions used in this Agreement:*
>
> . . .
>
> *(b) if defined in the Interpretation Act, but not defined in the Public Service Staff Relations Act, have the same meaning as given to them in the Interpretation Act.*

[56] Pay Note number 1 in Appendix A reads:

> *1. Subject to Note 2 the pay increment period for employees paid in these scales, is one year.*

This note clearly specifies that the period is "one year" and a year is defined in subsection 37(1) of the *Interpretation Act* as:

> *The expression "year" means any period of twelve consecutive months,...*

[57] The employer submitted that the intent of the parties was that the 52 weeks be consecutive in order to constitute a period creating an entitlement to an increment. Accordingly, the grievance should be dismissed.

[58] In reply, Mr. Phillips cited the decision in *Canada v. Salter* [1985] F.C.J. No. 906. It is a case that deals with income tax but it does refer to the term "period" on page 3 it reads:

> *... Counsel contended that "period" does not necessarily have to be one discrete time period, it can import the whole taxation year, in a sense as yeast permeates dough, so long as any such selling or negotiating of contracts occurred at any time during the taxation year. The subparagraph might possibly bear such an interpretation if it provided, "... in respect of a taxation year during which he was employed for some period in connection with...". The subparagraph does*

> *not so provide. The subparagraph, in expressing "a period" means "any period" or "a discrete period" and they may be totalled for the year, but they cannot subsume the year unless the selling and negotiating referred to occupied the taxpayer all day, every day.*

This reasoning can be applied here as there is no word qualifying the 52 weeks. One can only assume the intent from the words used.

Reasons for Decision

[59] There are two issues I am asked to decide: whether Ms. Kreuger was entitled to an increment after 52 weeks of cumulative, but not consecutive, acting assignments and whether she grieved in a timely manner.

[60] The answer to the first question is in the negative. I will deal first with the merits for two reasons: first, the issue is likely to come up again as Ms. Kreuger is frequently required to take acting assignments, and second, the employer addressed the merits without raising the question of timeliness through four levels of the grievance procedure.

[61] The pertinent clauses of the collective agreement are clauses 27.01, 27.02 27.07 and the pay notes in Appendix A which provide:

> *27.01 Except as provides in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.*
>
> *27.02 An employee is entitled to be paid for services rendered at:*
>
> *(a) the pay specified in Appendix "A", for the classification of the position to which he is appointed, if the classification coincides with that prescribed in his certificate of appointment;*
>
> *or*
>
> *(b) the pay specified in Appendix "A", for the classification prescribed in his certificate of appointment, if that classification and the classification of the position to which he is appointed do not coincide.*
>
> *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.*
>
> *NOTES:*
>
> 1. *Subject to Note 2 the pay increment period for employees paid in these scales, is one year.*
>
> 2. *The pay increment period for an employee appointed to a position in the bargaining unit on promotion, demotion or from outside the Public Service, after May 20, 1976 shall be the first Monday following the pay increment period listed below as calculated from the date of the promotion, demotion or appointment from outside the Public Service.*

[62] It is clear from the above that the employee's acting pay is calculated for "the period" in which she acts. At the end of the period, the employee reverts to the pay she is entitled to, in accordance with clause 27.02. Clause 27.07 does not provide for the cumulation of acting pay periods. Each new period of acting pay requires a calculation as if the employee is being appointed to the higher classification from the date on which she commenced to act in that period.

[63] The Terms and Conditions of Employment Policy governing the application of pay provides a variety of scenarios which may occur when an employee is being appointed. It also provides for the calculation of pay increments in the situations of regular appointments whether initial, or on promotion, demotion, deployment or transfer, and in relation to acting assignments. There are no clauses that provide for pay increments in the case of several periods of acting assignments broken by periods of service in an employee's substantive position. Clearly each acting assignment must be seen in its particular context.

[64] The Pay Notes cannot be construed as providing the calculation of acting pay. They are general clauses. They clarify that the pay increment period is one year or 52 weeks for full-time employees. They also specify what the pay increment periods are for part-time employees. They are silent with regard to acting assignments. It is necessary to look at clause 27.07 and the Terms and Conditions of Employment Policy to determine what the entitlements are in case of an acting assignment.

[65] Ms. Kreuger worked during three periods of acting appointments:

February 21, 1994 to April 15, 1994	*8 weeks*
August 30, 1994 to March 31, 1995	*31 weeks*
May 6, 1996 to November 1, 1996	*26 weeks*

Her acting pay was calculated as if she had commenced to act on the first day of each period. This calculation is in keeping with clause 27.07 of the collective agreement. The jurisprudence she submitted is irrelevant to the case at hand.

[66] With regard to the timeliness issue Ms. Kreuger knew, more than twenty-five days prior to her grievance, that the employer took the position that she was not entitled to an increment. Ms. Kreuger did not accept the "advice" of the payroll clerks because she did not recognize them as representatives of management. Even if I were to accept this position, on June 17, 1997 an e-mail (Exhibit E7) from Caroline Bradfield made it abundantly clear that the employer would not pay Ms. Kreuger the increment and the reason why. Ms. Kreuger claims that the last paragraph of that e-mail (Exhibit E7) meant she had to go through her manager for a decision. This paragraph reads:

> *For your information, enquiries of this nature should correctly be referred through your manager, whom I am certain would be able to provide you with the necessary guidance in these matters. While Human Resources is pleased to provide assistance to staff at the request of their managers, I am sure you can appreciate that with over 4,000 employees in the Pacific Region, it is not possible to provide individual advice in response to independent enquiries.*

[67] I cannot accept that Ms. Kreuger did not understand the meaning of Ms. Bradfield's message. Again, even if I were to accept her interpretation of it, and her reasons for not grieving at that time, it is quite clear that her manager, whom she recognizes as representing management, did not share her views. A memorandum dated August 21, 1997 from Mr. Farres to Rosemary Lindal in Human Resources (Exhibit U4(O)) reads:

> *I enclose a copy of a memo dated Aug. 14th regarding Thea's claim for the increment she feels is she is entitled to receive for her time as an acting AU04. You will see from the memo that Thea still maintains that she should have received the increment.* ***I do not read the contract etc. as she does*** *but you are the experts and accordingly I would appreciate it if*

> *you would consider it one more time and advise Thea of your decision in view of her points raised in the attached memo.*
> ...
>
> [emphasis added]

[68] Ms. Kreuger knew as early as February 1997 that, not only had she not received an increment, but she was not going to get one. I do not think she was justified in disregarding the advice of a payroll clerk in the absence of a contrary opinion from her manager. Had Mr. Farres supported Ms. Kreuger's position I would agree that she was justified in pursuing the debate. Even if I were to accept that she was not given all the information in February and May 1997, I cannot accept that the protracted debate that Ms. Kreuger engaged in with the Human Resources personnel meets the criteria of paragraph 4 of Exhibit U1 which she quoted in her testimony.

[69] No evidence was submitted by Ms. Kreuger to the effect that she had discussed the issue of her increment with her immediate supervisor prior to July 1997. The evidence reveals that she grieved when she finally realized that her arguments, repeated to various people, had failed to convince the employer to accept her interpretation of the increment entitlement. This course of action could have precluded Ms. Kreuger from obtaining a remedy, had I accepted her interpretation of the increment period. Ms. Kreuger might have been entitled to redress only for the twenty-five working days prior to filing her grievance or from then on, but not for the period from August to November 1996.

[70] Mr. Phillips mentioned the fact that the employer did not raise the issue of timeliness throughout the grievance procedure. It is a strong argument to grant an enlargement of time limits, when an application for such is made, but this is not the case here. The doctrine of waiver of procedural irregularities was considered and accepted in the following adjudication decisions: *Kettle* (Board file 166-2-21941); *Coles* (Board file 166-2-22905) and *Sauvé* (Board file 166-2-26974) but was rejected in *Ouellette* (supra).

[71] In the present case, it is not necessary for me to decide which of these two approaches I would follow, as I have decided that the grievance should be dismissed on the merits.

[72] Ms. Kreuger's grievance is accordingly dismissed.

Evelyne Henry,
Deputy Chairperson

OTTAWA, January 6, 2000.