Date: 20000821

File: 166-2-29525

Citation: 2000 PSSRB 74

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

BRIAN MURPHY

Grievor

and

TREASURY BOARD
(Fisheries and Oceans)

Employer

Before: Evelyne Henry, Deputy Chairperson

For the Grievor: J.P. Duclos, Canadian Association of Professional Radio Operators

For the Employer: Richard Fader, Counsel

Heard at Ottawa, Ontario,
June 8, 2000.

[1] At the beginning of the hearing, the parties advised that the grievance of Brian Murphy (Board file 166-2-29525), would be heard as a test case and the other references to adjudication on the same issue (Board files 166-2-29512 to 29524, 29526 and 29661), would be held in abeyance.

[2] Brian Murphy's grievance arose from the interpretation of the agreement between the Treasury Board and The Canadian Association of Professional Radio Operators (RO agreement), (Code 409/2000), which was entered as Exhibit P1.

[3] The parties filed an Agreed Statement of Facts (Exhibit P2) which reads as follows:

> *The parties agree to proceed on the reference to adjudication of Brian Murphy, Public Service Staff Relations Board (hereinafter the "PSSRB") file number: 166-2-29525. The parties agree to hold the other references to adjudication in abeyance pending the outcome of the within reference to adjudication, i.e., those listed in the May 29, 2000, Notice of Hearing: 166-2-29512 to 166-2-19524, 166-2-19526 and 166-2-29661.*
>
> *The parties agree that the relevant provision of the Radio Operator's Collective agreement, clause 16.02, is unambiguous and that this is not an appropriate case in which to call extrinsic evidence. In fact, the parties have agreed to proceed by way of argument and will not be calling any witnesses.*
>
> *THE PARTIES HERETO AGREE, for the purposes of this reference to adjudication:*
>
> *The facts set forth herein are admitted as proven, as if those facts had been established in evidence, subject to their weight being contested by the parties and determined by the Adjudicator.*
>
> 1. *The grievor, Mr. Brian Murphy (hereinafter referred to as the "grievor") served in the Canadian Armed Forces from 1973 to 1981.*
>
> 2. *The grievor was honourably released from the Armed Forces and received a return of his pension contribution.*
>
> 3. *The grievor made a valid election to contribute for his military service under the Public Service Superannuation Act.*

4. *The grievor received no severance package upon leaving the Canadian Armed Forces.*

5. *The grievor had a twelve-month break in service between his leaving the Canadian Armed Forces and his appointment to the Public Service, as he was appointed to the Public Service on May 3, 1982.*

6. *The grievor, at all material times, was a member of the Radio Operators (the "RO") Bargaining Unit and was a member of said unit covered by the RO Collective Agreement 409/2000 signed the 5th day of May 1999 by the Treasury Board and the Canadian Association of Professional Radio Operators.*

The following documents are entered into evidence, subject to their weight being contested by the parties and determined by the Adjudicator.

1. *Memorandum dated August 26, 1999, addressed to J.P. Duclos from Janet Leduc, Chief Staff Relations (Human Resources) for Fisheries and Oceans.*

2. *The previous two RO collective agreements: 1. 409/87 (expiry date: October 31, 1988) and 2. 409/90 (expiry date: April 30, 1992).*

3. *The* Terms and Conditions of Employment Regulations, *appendix "A" to the Terms and Conditions of Employment Policy.*

4. *The EN collective agreement (210/91) which was at issue in the* Lachance v. Treasury Board (National Defence) *decision (166-2-26603/26604).*

5. *An award issued to the grievor for long service.*

[4] For ease of reference, the memorandum dated August 26, 1999 from Janet Leduc to Canadian Association of Professional Radio Operators (CAPRO), Vice-President Duclos, was entered as Exhibit P3. The photocopy of the 25 years of service award was entered as Exhibit P4. Excerpts from the Engineering and Land Survey (EN) collective agreement were entered as Exhibit P5. The *Public Service Terms and Conditions of Employment Regulations* (T. & C. Regs.), were entered as Exhibit P6. The grievance of Brian Murphy became Exhibit P7 and the employer's reply to the grievance Exhibit P8.

[5] The employer entered as Exhibit E1, the RO collective agreement (Code 409/90) expiring April 30, 1992, and that expiring on October 31, 1988, (Code 409/87), as Exhibit E2.

Arguments for the Grievor

[6] The grievor argued that the basic source of jurisdiction for an arbitrator is to be found in the "body of the collective agreement". The arbitrator must construe words, phrases, and groups of sections within the collective agreement. It is a rule of statute and contract interpretation that effect must be given to each word and each phrase contained in a collective agreement.

[7] The issue between the parties is in the first two sentences of paragraph 16.02 (g) of the RO collective agreement Code 409/2000 which reads:

> *g) For the purpose of clause 16.02 only, all service within the Public Service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the Public Service, takes or has taken severance pay.* […]

[8] Distinct terms have to be defined: "all service" whether "continuous" or "discontinuous" and "within the Public Service". These terms are not directly defined in the collective agreement. What is defined is "continuous employment" under clause 2.01 (d) which reads:

> *"continuous employment" has the same meaning as specified in the Public Service Terms and Conditions of Employment Regulations.*

[9] Clause 2.02 also provides for a recourse in defining terms. It reads:

> *2.02 Except as otherwise provided in this Agreement, expressions used in this Agreement:*
>
> *(a) if defined in the* Public Service Staff Relations Act, *have the same meaning as given to them in the* Public Service Staff Relations Act,
>
> *and*
>
> *(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.

[10] There is no definition of "service" under the *Public Service Staff Relations Act* (P.S.S.R.A.), nor of "continuous service". The next step is to look at the *Interpretation Act*. A review of that Act reveals no definition of "service", nor of "continuous service".

[11] In Exhibit P3, which is a response to an enquiry made by C.A.P.R.O. to the employer, an interpretation of "continuous service" is given but it is more a question of policy of the Treasury Board. No definition can be found in legislation. Policies are subject to changes and do not form part of the collective agreement and as such cannot hold any weight in the present case.

[12] Referring to the T. & C. Regs. (Exhibit P6) at the section entitled "Continuous Employment" at paragraph 8853, one can find a definition of "continuous employment", section 3. For the purpose of these Regulations, the following periods count as "Continuous Employment";

> *(A) in respect of a person appointed to Part I Service as an indeterminate employee*:
>
> *(i) immediately prior service in Part I Service or the Public Service on an indeterminate basis, or on a specified term basis for six months or more;*
>
> *(ii) a combination of prior service in Part I Service and the Public Service on an indeterminate basis, or on a specified term basis for six months or more;*
>
> *(iii) immediately prior service in the Canadian Armed Forces or the Royal Canadian Mounted Police, provided that the person was honourably released and has made or makes a valid election to contribute for that service under the* Public Service Superannuation Act *(the effective date will be the date the election is completed)*
>
> *provided that these periods of service are not separated by more than three months;*
>
> […]

[13] It is not disputed that Mr. Murphy has made a valid election to contribute for his service in the Canadian Armed Forces under the *Public Service Superannuation Act*.

[14] With regard to the phrase "provided that these periods of service are not separated by more than three months", the term "discontinuous" in paragraph 16.02 (g) of the RO collective agreement overrides this qualifier. "Continuous service"

is not defined in the collective agreement, nor the P.S.S.R.A., nor the *Interpretation Act*; it is therefore necessary to look at the ordinary meaning of the term. The plain or ordinary meaning of words can be grammatical or dictionary meanings. The grievor referred to the Canadian Oxford Dictionary, Thumb Index Edition of 1998, for the definition of "service", more specifically to item 5:

> ***5*** ***a*** *the fact or status of being a servant.* ***b*** *employment or a position as a servant.*

The grievor maintains that the above definition indicates that "service" and "employment" are synonymous.

[15] The grievor also refers to Black's Law Dictionary, Sixth or Centennial Edition, 1990, for a definition of "service". Finally he quotes from the Canadian Law Dictionary by Dukelow and Nuse published by Carswell, 1991 Edition, a definition of "continuous" and of "continuous service":

> ***CONTINUOUS.*** adj. *1. Uninterrupted. 2. In relation to membership in a pension plan or to employment, means without regard to periods of temporary interruption of the membership or employment.* Pension Benefits Standards Act*, R.S.C. 1985 (2d Supp.), c. 32, s.2.*
>
> ***CONTINUOUS SERVICE.*** *Uninterrupted service of a person as an employee.*

[16] It is the grievor's contention that "service" and "employment" are synonymous, that they are intermingled and mean the same thing. This line of reasoning is strengthened by the decision in *Re: Air Canada and Canadian Airline Employee's Association*, 13 L.A.C. (2d) 225 from which the grievor quoted at pages 227, 228 and 229. There are similarities between that case and this one. The employer wanted to make a distinction between the two terms: "continuous employment" and "continuous service" and was relying on policy to distinguish between the two.

[17] The grievor referred to a second decision *Re: Regina General Hospital, on behalf of Hospital Laundry Services of Regina and Retail, Wholesale and Department Store Union, Local 568*, 21 L.A.C. (4th) 249. In that decision on page 252, the vacation article reads somewhat like clause 16.02 of the RO collective agreement. The finding in that case follows that in *Air Canada* (*supra*) which was cited by the arbitrator. The grievor cited the last paragraph on page 253, when the arbitrator concludes that the

expression "continuous service" simply means "continuous employment". The grievor also cited pages 254 and 256 of that decision.

[18] The grievor then referred to clause 15.05 of the RO collective agreement which reads:

> ***15.05*** *An employee who, on the day that this Agreement is signed, is entitled to receive furlough leave, that is to say, five (5) weeks' leave with pay upon completing twenty (20) years of continuous employment, retains his entitlement to furlough leave subject to the conditions respecting the granting of such leave that are in force on the day that this Agreement is signed.*

[19] The grievor argues that if Mr. Murphy had ten years of service in the Canadian Armed Forces and then another ten years in the Coast Guard, he would be entitled to furlough leave after ten years. However, pursuant to the employer's interpretation of paragraph 16.02 (g), his military service would not count under clause 16.02. This would be an absurd result.

[20] A further absurdity would be in the application of clause 16.03 which refers to "continuous employment". An employee with military service immediately prior to his employment would be entitled to an advance of credits because of military service but this would not count for the accumulation of those credits under clause 16.02.

[21] The grievor then referred to the decision in *Re Government of Province of Alberta and Alberta Union of Provincial Employees* (Gaudette) 40 L.A.C. (4th) 30, and more specifically to pages 34, 35 and 36 where an arbitrator had to interpret the meaning of "continuous service". The above case confirms that "continuous service" means "continuous employment". In the RO collective agreement where "continuous employment" means the same as in the *T. & C. Regs*, there is a direct relationship between the two terms and it contains a recognition of prior service in the Canadian Armed Forces, the R.C.M.P. as well as casual employees and term employees.

[22] The section on continuous employment in the *T. & C. Regs.* is sprinkled with references to "prior service". The words "service" and "employment" are used as synonyms. If the term "period of service" is different from the term "period of employment" for the purpose of the *T.& C. Regs.* and the RO collective agreement, why is prior Canadian Armed Forces service recognized and treated the same as service "in Part I Service"? It is interesting to note that it reads "Part I Service" and not "Part I

Employment". Another interesting fact is that the term "employee" under the *P.S.S.R.A.*, excludes "casual employee" yet under the *T. & C. Regs.* immediately prior service as a casual employee counts as continuous employment. Treasury Board administers the *T. & C. Regs.* and makes amendments. The *T. & C. Regs*, recognize continuous employment to include military service and at section 11 paragraph 8861, there is a specific section dealing with "Previous Military Service" it reads:

> *[¶8861] [Previous military service]*
>
> ***Sec. 11**. Where an employee's previous service in the Canadian Forces or the Royal Canadian Mounted Police counts for continuous employment pursuant to Sections 3 to 5 of these Regulations, the increase in continuous employment for vacation leave purposes shall be effective from the date of the valid election.*

[23] There is also section 15 at paragraph 8865 which deals with "sick leave earned in the Public Service". It provides:

> *[¶8865] [Sick leave earned in the Public Service]*
>
> ***Sec. 15**. Where a person who ceased to be employed in the Public Service becomes an employee subject to these Regulations, and his or her employment in the Public Service and employment subject to these Regulations constitutes continuous employment, he or she shall, on appointment, be deemed to have earned sick leave credits earned but not granted during his or her period of employment in the Public Service.*

[24] For the purpose of determining entitlement the *T. & C. Regs.*, recognize service in the Canadian Armed Forces to determine vacation or sick leave benefits. As "continuous service" and "continuous employment" are synonymous it follows that clause 16.02 of the RO collective agreement includes service in the Canadian Armed Forces to calculate the accumulation of leave credits.

[25] Turning to the interpretation of the term "Public Service" the grievor notes that in paragraph 16.02 (g) of the RO collective agreement, it does not state: "as defined in the P.S.S.R.A." If this was the intention, the parties would have used these words, as they have in clause 19.04 and in paragraph 19.09 (f) of the RO collective agreement. The parties did not do so under paragraph 16.02 (g), because taken in context, the two terms "continuous employment" and "continuous service" in the Public Service would be put in conflict. The grievor submitted that the two terms are not in conflict.

[26] The grievor turned to the jurisprudence of the P.S.S.R.B. and noted the consistent approach of the employer in relying on the decision in *Eric A. Bolling et al* (Board files 166-2-2410 to 2412).

[27] The grievor's book of reference contained the following decisions:

-*Bolling et al* v. *Public Service Staff Relation Board*, [1978] 1 F.C. 85 (F.C.A.)

-*Gingras* v. *The Queen in right of Canada* (1990), 69 D.L.R. (4th) 55 (F.C.T.D.)

-*Gingras* v. *The Queen in right of Canada* (1994), 113 D.L.R. (4th) 295 (F.C.A.)

-*McCormick* (Board file 166-2-14340)

-*Dansereau* (Board file 166-2-17887)

-*Deniger and Miller*, (Board files 166-2-21583 and 21584)

-*Hough* (Board file 166-2-25177)

-*Lachance* and *Palmer* (Board files 166-2-26603 and 26604)

[28] The grievor argued that the decision in the *Gingras* case (*supra*) was to the effect that the P.S.S.R.A. and the P.S.E.A. can not apply to the Canadian Armed Forces. He agreed with that principle but noted that in the present case the grievor does not seek to apply the P.S.S.R.A. to the Canadian Armed Forces. What he asks is that the adjudicator find that service in the Canadian Armed Forces counts as service as it does under the *T. & C. Regs*, for the accrual of vacation leave.

[29] In *McCormick* (*supra*), *Dansereau* (*supra*), *Deninger* and *Miller* (*supra*) and *Hough* (*supra*), continuous employment was not argued and/or was not included in the applicable collective agreement. None of the cases in the book of reference dealt with the definition of continuous employment except for *Lachance* (*supra*). The grievor relied on *Lachance* (*supra*) in particular on paragraph 39 where the adjudicator quoted from Collective Agreement Arbitration in Canada, Third Edition, wherein Messrs. Palmer and Palmer quote from the arbitral award in Massey-Harris as follows:

> […] [*W*]*e must ascertain the meaning of what is written into [a] clause and to give effect to the intention of the signatories to the Agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to*

> *apply its language in the apparent sense in which it is used notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or to add words to accomplish a different result. (Massey-Harris, 4 L.A.C. 1579, at 1580 (Gale, 1953).*

[30] The grievor also relied on paragraph 41 and cited paragraph 42 as the distinction made by the adjudicator between that case and earlier decisions:

> *[para 42] It appears that the definition of continuous employment contained in Article 2 of the predecessor to the collective agreement which I am now considering was not brought to the attention of Mr. Lowden in the Deniger and Miller case (supra). Therefore Mr. Lowden's decision in that case can be distinguished from the matter before me.*

[31] The grievor submitted that the same arguments apply to *Dansereau* (*supra*), *Hough* (*supra*), *Deninger* and *Miller* (*supra*), *Bolling* (*supra*) and *McCormick* (*supra*). The employer will prefer one definition over the other. The grievor took the opposite view and noted that had the parties wanted the definition of Public Service as defined in P.S.S.R.A., they would have used the same language as in clause 19.04 and paragraph 19.09 (f) of the RO collective agreement.

[32] Here as in *Lachance* (*supra*), the parties are dealing with "continuous employment"; they cannot ignore that it exists and meaning must be given to all the words of the agreement.

[33] The grievor referred to Exhibit P5 the excerpts from the EN collective agreement, which contains a definition at paragraph 2.01 (b) similar to that in the RO collective agreement; the only distinction is the added words "on July 15, 1986". As in *Lachance* (*supra*) clause 16.02 of the RO collective agreement is similar to their clause 21.01 and their clause 21.03 defines "service" somewhat in the same way as paragraph 16.02 (g) of the RO collective agreement.

[34] The grievor concluded that it is a well established principle of interpretation that all words and clauses must have a purpose and an application. In the absence of an expressed link between the terms "employment" and "service", the adjudicator must look at the arbitral jurisprudence and the decision in *Lachance* (*supra*) is a strong argument. I cannot substract or isolate words to give a different meaning. The article

must be taken as a whole. If the employer had wanted to give it a different meaning the term Public Service could have been isolated.

[35] The grievor urged that the adjudicator apply the *Lachance* (*supra*) rationale to allow the grievance in order to maintain an even standard of consistency in the Public Service.

Arguments for the Employer

[36] The employer stressed the importance of this case as the language used in the RO collective agreement is the same as that used in many other collective agreements with the Professional Institute of the Public Service of Canada (P.I.P.S.C.) and the Public Service Alliance of Canada (P.S.A.C.).

[37] The employer indicated that it was not the first time that prior service in the Canadian Armed Forces was the issue in grievance adjudication. As can be seen from the jurisprudence, the Canadian Armed Forces are not part of the Public Service. Under certain collective agreements, prior employment in the Canadian Armed Forces has been used towards the accumulation of vacation leave but every time it relied on the term "continuous employment". It is because the term used to include the *T.& C. Regs.*, that there is a link to the Canadian Armed Forces. It is that definition that causes that link to the Canadian Armed Forces. That link is "no mystery to anybody". Everyone at the negotiation table knew that the only link to the Canadian Armed Forces was in that term "continuous employment". They knew it when they negotiated the change to clause 16.02 of the RO collective agreement. The change was not a Treasury Board dictate; it was the result of negotiation, of a trade off. What was gained was the inclusion of "discontinuous" service in the Public Service, even if broken up by more than three months. This was a real gain for many employees. However, as happens in negotiation, there are gains but also losses. The loss was that the parties took out the link to the Canadian Armed Forces.

[38] The employer submitted that clear jurisprudence, a clear change in the collective agreement and a plain reading of the clause itself can only lead to the conclusion that time spent in the Canadian Armed Forces does not count for the accumulation of vacation leave and that the grievance should be denied.

[39] The employer referred to the text by Messrs. Brown and Beatty, *Canadian Labour Arbitration*, 3rd Edition on Interpretation of Collective Agreements. The employer referred to sections 4: 2100, 4: 2220, 4: 2300 in support of its interpretation of paragraph 16.02 (g) of the RO collective Agreement. The employer also referred to the decision in *Re Newfoundland (Department of Works, Services and Transportation) and N.A.P.E.* (1994), 40 L.A.C. (4th) 372 as illustrative of how the principles cited by Messrs. Brown and Beatty (*supra*) are applied.

[40] The employer relied on the adjudicator's decision in *Bolling* (*supra*) at page 2, where clause 18.02 was at issue:

> *18.02 For the purpose of this Article, "service" means all periods of employment in the Public Service, whether continuous or discontinuous, except where a person who on leaving the Public Service, takes or has taken severance pay.*

It is language similar to that of the present case. The argument made then was that the employment in the Canadian Armed Forces was the same issue as in the Department of National Defence. The conclusion was that the Canadian Armed Forces was not part of the Public Service. The employer cited the adjudicator's decision at page 15:

> *In the result, and either on a reading of the National Defence Act standing alone, or when taken together with the interpretation of the "Public Service" as that term has been defined and applied in various legislative contexts, I must conclude that service in the Canadian Forces cannot reasonably be regarded as employment in or under the Department of National Defence. Accordingly and given the definition of "Public Service" that the parties have, by articles 2.02 and 18.02, seen fit to adopt, it necessarily follows that such service cannot reasonably be characterized as employment in the Public Service.*

An application by the grievors for judicial review of this decision was dismissed by the Federal Court of Appeal: *Bolling et al.* v. *Public Service Staff Relations Board* (*supra*).

[41] In *Dansereau* (*supra*) the case is in on all fours with the present case. In that case the clause was a mirror of paragraph 19.02(g) of the RO collective agreement. The employer referred to page 3 where are found the arguments of the grievor and those of the employer. In that case, the employer made the same arguments that it is making today. It is the same issue and the employer urged me to reach the same conclusion as

adjudicator Wexler did. The decision in *Dansereau* (*supra*) was the context in which the RO collective agreement was negotiated.

[42] The employer conceded that in *McCormick* (*supra*) the clause contained the term "continuous employment" that created the link to the Canadian Armed Forces but in the present case the term is not used and there is no link.

[43] The employer distinguished *Lachance* (*supra*) from the present case. The employer quoted clause 21.03 of the relevant collective agreement at paragraph 27, and an important part of paragraph 41. The grievance in *Lachance* (*supra*) was allowed because of the wording of clause 21.03. That wording was removed from the present agreement. In this context, on the basis of reasonable interpretation and knowing that "continuous employment" was the only link to the Canadian Armed Forces, one must conclude that the parties did not want to include service in the Canadian Armed Forces when it made the change.

[44] The employer read through clause 16.02, under the old RO collective agreement Exhibit E1. It is obvious that the bridge to the Canadian Armed Forces was taken out and replaced with "service". To define the scope of the word service, one must look at paragraph 16.02 (g) of the applicable RO collective agreement Code 409/2000. This change shows that parties must have reasonably known that they were removing the link to the Canadian Armed Forces by the removal of the term "continuous employment". It is not within the bounds of reason, given the clear jurisprudence of the P.S.S.R.B. and the clear meaning of this clause to deny that the parties no longer intended to count the time spent in the Canadian Armed Forces in the accumulation of vacation leave.

[45] Referring to the *T. & C. Regs.* the employer listed all the obvious benefits to the employees in the bargaining unit by the inclusion of the term discontinuous service in the Public Service. This the employer claims was the trade off for dropping the reference to "continuous employment".

[46] The jurisprudential history must be appreciated in the context of paragraph 16.02 (g) itself. For that purpose, one must do, as adjudicator Wexler did in *Dansereau* (*supra*), and look at the expression: "All service within the Public Service". What is the meaning of Public Service with a capital "P" and a capital "S"? Its definition is at clause 2.02. It is defined in that clause and it does not include the Canadian Armed Forces.

In the collective agreement, at clause 27.02 under severance pay, reference is also made to Public Service.

[47] What the grievor is asking, is to remove *Public Service*, use only the term service and define it as *continuous service* having the meaning of *continuous employment.* That is what was done in the *Regina General* (*supra*) case at page 252. The grievor is inviting the adjudicator to rewrite the language of the collective agreement. He wants to refer to "*continuous service*" without a reference to "*Public Service*". The adjudicator should not do this, but rather should go with a plain reading of the clause "all service within the Public Service". The adjudicator should not read into the clause a term that was specifically removed from a prior collective agreement. For the grievance to succeed, the adjudicator must refer to "continuous employment" but "continuous employment" should not be read into the clause and thus no link to the Canadian Armed Forces can exist and on that basis alone, the grievance should be denied.

[48] With regard to paragraph 19.09 (f), the parties went further and limited the term "Public Service" to Part I. The P.S.S.R.A. contains two parts, Part I and Part II. In 19.04, the parties did not have to include the specific words in view of the clause 2.02 definition. It is a repetition of clause 2.02; it is there and does not override clause 2.02.

[49] In clause 15.05, the expression "continuous employment" is used; in clause 16.02 it was removed. Again in clause 16.03, there is a link to "continuous employment" but for the purpose of clause 16.02 only, that link was removed.

[50] The employer summarized its position in stating the importance of the term "continuous employment" in the jurisprudence. That importance is also manifest in the language of the collective agreement. It is a defined term that refers to the *T. & C. Regs.* and is the only bridge or nexus to the Canadian Armed Forces. This language was removed and what was added was discontinuous service.

[51] Finally in the alternative, the employer argued that, according to item 5 of the Agreed Statement of Facts, the grievor had over a twelve-month break in service. He would not have qualified under the *T.& C. Regs.* for continuous employment.

[52] The burden is on the grievor to show on the balance of probabilities that the employer has violated the collective agreement. In view of the change to the wording

of clause 16.02, and in that context and a plain reading of the clause the grievance should be denied.

Rebuttal

[53] The grievor indicated that the argument made by the employer, that the parties at the bargaining table knew and intended for the jurisprudence defining Public Service to apply is contradicted by clause 19.04 and paragraph 19.09 (f) of the RO collective agreement.

[54] The change to clause 16.02, where the expression "continuous employment" was removed, was necessitated by the addition of the term "discontinuous". The change was made necessary to avoid a contradiction but there remains that the expression "continuous service" means the same as "continuous employment".

[55] Under clause 16.03, the term "continuous employment" was there and continues to be there. In paragraph 16.02 (g) of the RO collective agreement, which applies only to that clause, the term "discontinuous" service only applies to vacation leave.

[56] In the collective agreement applicable in *Dansereau* (*supra*), there was no definition of "continuous employment" to be found. The grievor submitted that the "regulations" referred to under the P.I.P.S.C. Master Agreement are not the same as the *T. & C. Regs.*

[57] In *Bolling* (*supra*), there was no definition of Public Service and nothing turned on the definition of Public Service or "continuous employment". There is no evidence here as in that case of notifying the bargaining agent as had been done in clause 19.04 or 19.09.

[58] In *Lachance* (*supra*), the situation was the same as the present one. The parties could have intended a result similar to that of the *Lachance* case (*supra*) not just the *Dansereau* case (*supra*).

[59] In pursuit of consistency in the interpretation of the terms "employment" and "service", these terms must be given the same meaning as in the *Lachance* (*supra*) case and the grievance should be allowed.

Reasons for Decision

[60] The arguments made for the grievor were very eloquent. Unfortunately, for him, the RO collective agreement (Exhibit P1) was negotiated and changed within the background of the existing jurisprudence, after the decisions in *Dansereau* (supra) and *Lachance* (supra). The RO agreement provides at article 16.02:

> ***16.02*** *An employee shall earn vacation leave credits at the following rate for each calendar month during which he receives pay for at least ten (10) days:*
>
> *(a) six decimal two five (6.25) hours for an employee who has completed up to one (1) year of service;*
>
> *(b) nine decimal three seven five (9.375) hours for an employee who has completed more than one (1) year of service;*
>
> *(c) twelve decimal five (12.5) hours commencing with the month in which the employee's eighth (8th) anniversary of service occurs;*
>
> *(d) fifteen decimal six two five (15.625) hours commencing with the month in which the employee's eighteenth (18th) anniversary of service occurs;*
>
> *(e) eighteen decimal seven five (18.75) hours commencing with the month in which the employee's twenty-ninth (29th) anniversary of service occurs;*
>
> *(f) however, an employee who is entitled to or who has received furlough leave shall have the vacation leave credits, earned under this article, reduced by three decimal one two five (3.125) hours per month from the beginning of the month in which the employee completes his or her twentieth (20th) year of service until the beginning of the month in which the employee completes his twenty-fifth (25th) year of service.*
>
> *(g) For the purpose of clause 16.02 only, all service within the Public Service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the Public Service, takes or has taken severance pay. However, the above exception shall not apply to an employee who receives severance pay on lay-off and is reappointed to the Public Service within one (1) year following the date of lay-off.*

[61] There are subtle differences in the language of the collective agreements that were in issue in *Dansereau* (supra) and *Lachance* (supra). The parties knew or ought to have known what the consequences were of using one language as opposed to the other.

[62] In *Lachance* (supra) the EN collective agreement reads:

> *ARTICLE 21*
>
> *VACATION LEAVE*
>
> *21.01 Accumulation of Vacation Leave*
>
> *An employee who has earned at least ten (10) days' pay for each calendar month of a fiscal year shall earn vacation leave at the following rates:*
>
> *(a) one and one-quarter (1 ¼) days per month until the month in which the anniversary of his eighth (8th) year of service occurs;*
>
> *(b) one and two-thirds (1 2/3) days per month commencing with the month in which his eighth (8th) anniversary of service occurs;*
>
> *(c) two and one-twelfth (2 1/12) days per month commencing with the month in which his nineteenth (19th) anniversary of service occurs;*
>
> ****
>
> *(d) two and one-half (2 ½) days per month commencing with the month in which his thirtieth (30th) anniversary of service occurs.*
>
> *21.02 Notwithstanding the provisions of clause 21.01(b) and (c), an employee who is entitled to or who has received furlough leave shall have his vacation leave credits earned under this Article, reduced by five-twelfths (5/12ths) of a day per month from the beginning of the month in which he completes his twentieth (20th) year of continuous employment until the beginning of the month in which he completes his twenty-fifth (25th) year of continuous employment.*
>
> *21.03 For the purpose of this Article, "service" means all periods of employment in the Public Service, whether continuous or discontinuous, except where a person who on leaving the Public Service, takes or has taken severance pay, retiring leave or a cash gratuity in lieu thereof. However, the above exception shall not apply to an employee who receives*

severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.

[63] In *Dansereau* (supra), the PIPSC Master Agreement was in issue and the clause reads:

15.02 Accumulation of Vacation Leave Credits

An employee shall earn vacation leave credits for each calendar month during which he receives pay for at least ten (10) days at the following rate:

(a) Applies to the following AC, AG, BI, CH, FO, HR, MA, PS, SG, SE-RES levels 1 and 2 and SE-REM level 1, SW Groups:

(i) One and one-quarter (1¼) days until the month in which his ninth (9th) anniversary of service occurs. Effective June 1, 1987 eight (8) shall replace nine (9).

(ii) One and two-thirds (1 2/3) days commencing with the month in which his ninth (9th) anniversary of service occurs. Effective June 1, 1987 eight (8) shall replace nine (9).

(b) Applies to the following DE, HE, NU, OP, PH Groups:

(i) One and one-quarter (1¼) days until the month in which his second (2nd) anniversary of service occurs. Effective June 1, 1987 one (1) shall replace two (2).

(ii) One and two-thirds (1 2/3) days commencing with the month in which his second (2nd) anniversary of service occurs. Effective June 1, 1987 one (1) shall replace two (2).

(c) Applies to the following SE-RES levels 3 and 4 and SE-REM level 2, DS levels 5, 6 and 7 Groups:

(i) one and two-thirds (1 2/3) days until the month in which is twentieth (20th) anniversary occurs.

(d) Applies to the following DS levels 1, 2, 3 and 4.

(i) One and one-quarter (1 ¼) days until the month in which his eighth (8th) anniversary of service occurs.

> *(ii) One and two-thirds (1 2/3) days commencing with the month in which his eighth (8th) anniversary of service occurs.*
>
> *(e) This clause applies to all seventeen (17) Groups:*
>
> *(i) two and one-twelfth (2 1/12) days commencing with the month in which his twentieth (20th) anniversary of service occurs.*
>
> *(f) However, an employee who is entitled to or who has received furlough leave shall have the vacation leave credits earned under this Article, reduced by five-twelfths (5/12ths) of a day per month from the beginning of the month in which the employee completes his twentieth (20th) year of continuous employment until the beginning of the month in which the employee completes his twenty-fifth (25th) year of continuous employment.*
>
> *15.03 For the purpose of clause 15.02 only, all service within the Public Service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the Public Service, takes or has taken severance pay. However, the above exception shall not apply to an employee who receives severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.*

[64] I find that in the Public Service, the words "employment" and "service" are not always synonymous This is made clear by the jurisprudence cited by both parties. One must look at the context in which the words "employment" and "service" are used.

[65] In interpreting the provisions of the RO collective agreement, I must look at the context in which the change was made to determine the intention of the parties. The expression "continuous employment" is defined at clause 2.01(d). The parties removed all references to this definition from clause 16.02. They used instead a related expression "service within the Public Service". They did this for the purpose of clause 16.02 only. The change was made in the knowledge of both the *Dansereau* (*supra*) and *Lachance* (*supra*) cases. I must take it that the parties intended the words to have the same meaning as in *Dansereau* (*supra*) since they used the exact same words.

[66] Both parties have argued the virtue of consistency in the application of jurisprudence in labour relations. I support that principle. I find the reasons given by adjudicator Wexler in *Dansereau* (*supra*) highly persuasive in the present case.

Mr. Murphy's service in the Canadian Armed Forces cannot be counted as "service within the Public Service" for the purpose of clause 16.02 and his grievance is therefore dismissed.

Evelyne Henry,
Deputy Chairperson.

OTTAWA, August 21, 2000.