

Date: 20020312

Files: 166-2-29758  
to 29778

Citation: 2002 PSSRB 29



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**Alice Anderson and Others**  
(see list attached)

Grievors

and

**TREASURY BOARD**  
(Indian and Northern Affairs Canada)

Employer



**Before:** Jean Charles Cloutier, Board Member

**For the Grievors:** Edith Bramwell, Public Service Alliance of Canada

**For the Employer:** Sean Gaudet, Counsel

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Heard at Hamilton, Ontario,  
July 16 and 17, 2001.  
(Written submissions filed September 27, October 26 and November 16, 2001.)



[1] This decision concerns grievances referred to adjudication, pursuant to section 92 of the *Public Service Staff Relations Act (PSSRA)*, by 19 employees of Indian and Northern Affairs Canada (INAC) in which they challenge the employer's decision to recover overpayments made in the form of annual pay increments to them as a result of the employer's incorrect application of subsections 5(1.) and 5(1.2) of the *Public Sector Compensation Act, 1991* (as amended by the *Government Expenditures Act, 1993* and the *Budget Implementation Act, 1994*) collectively referred to as the Act.

[2] Although each employee filed an individual grievance, the substance of each grievance is essentially the same. The details set out in the grievance filed on November 10, 1999 by Alice Anderson (Board file 166-2-29759) are illustrative of the language contained in the grievances. Ms. Anderson's grievance reads as follows:

*I grieve the employer's decision dated Sept. 14, 1999 to recover alleged overpayments on my salary.*

- 1. I request that first level hearing be waived and this grievance be heard at level 2 immediately.*
- 2. No overpayments be recovered until grievances are heard at every level of procedure including adjudication.*
- 3. Should it be ascertained that an overpayment was indeed made, that the return of such an overpayment be waived.*
- 4. Immediately provide to me a fully audited statement of salary entitlements and any Revenue Canada, C.P.P., and benefit package overpayments.*

[3] The hearing in this matter commenced on July 16, 2001 and continued the following day. During the two days of hearing, I heard evidence from three grievors: Michael Bolton, Lori Skye-Martin and Chester Gibson. Counsel for the employer filed 22 exhibits and the grievors' representative filed four.

[4] On July 18, 2001, the grievors' representative advised me that she would be calling no further evidence at this time in order to allow counsel for the employer to bring a motion seeking a decision from me in respect of two questions: (1) whether the grievances are referable to adjudication pursuant to section 92 of the *PSSRA*, and (2) whether, as a matter of law, estoppel can operate to preclude the employer from recovering the overpayments made to the grievors in this case.

[5] For the purposes of the motion, the parties agreed to the facts set out below. Each party submitted argument in writing, the full text of which has been placed on file.

#### AGREED STATEMENT OF FACTS

*For the purpose of the motion to be brought by the Employer, the parties agree to the following facts:*

- 1) *All of the Grievors (except the Grievor Katherine Gurman) commenced employment in the ED-EST-01 group and level of the Education Group of the Department of Indian and Northern Affairs ("INAC") following the commencement of the operation of the increment freeze imposed by the Public Sector Compensation Act, S.C. 1991, c. 30, as amended by the Budget Implementation Act, 1994, S.C. 1994, c. 18, i.e. June 15, 1994. The Grievor Gurman commenced employment in the ED-EST-01 group and level of the Education Group of INAC on May 2, 1994.*
- 2) *While certain Grievors received a salary increment in September, 1995, all of the Grievors received an annual salary increment in September, 1996, and all the Grievors continued to receive annual salary increments until September, 1999.*
- 3) *By letter dated September 14, 1999, all the Grievors were notified by INAC that the two year period during the salary increment freeze from June 15, 1994 to June 14, 1996 "...would never be taken into consideration to determine salary levels based on years of experience."*
- 4) *The September 14, 1999 letter addressed to each Grievor also stated, in part, as follows:*  
  
*"The Financial Administration Act stipulates that all salary overpayments must be recovered from any money payable to an employee. Consultations with our headquarters and Treasury Board authorities as to the course of action to be taken have confirmed that there is no other option but to recover the overpayments.*

*In addition, we wish to inform you that in order to prevent further overpayments, the September 1999 increments will not be paid in order to correct salary anomalies..."*

- 5) *INAC has commenced recovery of the overpayments by way of salary deductions.*

[6] The first issue raised by the employer relates to jurisdiction as it questions whether the grievances are referable to adjudication pursuant to section 92 of the *PSSRA*. The essence of the employer's position is that the forms (Form 14 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993*) by which each grievance was referred to adjudication were checked under the box for subparagraph 92(1)(b)(ii), which relates to the termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the *Financial Administration Act (FAA)*. The employer submits that the grievances obviously do not relate to those matters, but rather deal with the recovery of the overpayment of the annual increment, which according to the employer is not a matter that may be referred to adjudication under section 92 of the *PSSRA*.

[7] The grievors understandably take the opposite position. They submit that the grievances relate to the pay provisions of the collective agreement and that the check placed on the box for subparagraph 92(1)(b)(ii) is attributable to a clerical error.

[8] On this issue, I agree with the position of the grievors. While the form by which each grievance was referred to adjudication is checked in the box for subparagraph 92(1)(b)(ii), indicating termination of employment or demotion, the grievances themselves clearly relate to a pay issue with respect to the pay provisions of the collective agreement. I am satisfied that the check in the box for subparagraph 92(1)(b)(ii) was the result of a clerical error. Indeed, the fact that the grievances were accepted and dealt with as a pay issue by the employer is evidenced by its replies at the final level of the grievance process.

[9] Accordingly, the grievances may properly be referred to adjudication pursuant to subsection 92(1)(a) of the *PSSRA* and I accept them as such.

[10] The other issue raised by the employer is whether as a matter of law, estoppel can operate to preclude the employer from recovering the overpayment made to the grievors.

[11] The employer's position on this issue is "Assuming, without in any way conceding, that the factual elements of a plea of estoppel can be made out in this case, estoppel cannot operate as a matter of law to prevent the Employer from recovering overpayments that were made to the Grievors in violation of the legislation."

[12] The employer submits that the doctrine of estoppel cannot operate where it would prevent a public body such as the employer from exercising a clear statutory duty. The employer's view is that the Act imposes a clear positive duty on the employer to collect the overpayments which is incompatible with the common law doctrine of estoppel.

[13] The position of the grievors, of course, is that the employer should be estopped from recovering the overpayments made.

[14] Even assuming, without so finding, that the submission of the employer is correct in law, I do not believe it is applicable in the instant case. It is not disputed that the increments were paid contrary to the Act as a result of a mistake on the part of the employer. Once it was discovered that the increment payments had been made, the employer advised the grievors that it was commencing proceedings to recover the amounts of the overpayments. There was no suggestion of bad faith on the part of the employer in either making the overpayment or in its decision to commence recovery.

[15] The Act, itself, contains no provision for the recovery of an overpayment. The process to recover the amount of the increments paid to the grievors was commenced under section 155(3) of the *FAA*. The authority to recover an overpayment of salary and wages under that section is discretionary.

[16] In the circumstances, I am not prepared to find that the Act imposes a clear positive duty on the employer to recover the amount of the overpayment that would bar the application of the doctrine of estoppel.

[17] In the result, for all the above reasons, the answer to the first question in the employer's motion is "yes" and the answer to the second question is "no".

[18] The Assistant Secretary (Operations) will contact the parties to discuss dates for any further hearings that may be required.

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[19] To date, I have heard the testimony of three of the 19 grievors and have not heard argument on the merits on the issue of estoppel. While I realize that additional evidence may be forthcoming, I would indicate at this time that I am not persuaded on the basis of the evidence adduced so far that the doctrine of estoppel would apply in this case. Also, I would remind the parties that the Board's mediation services are always available on joint request.

**Jean Charles Cloutier,  
Board Member**

OTTAWA, March 12, 2002.

**BOARD FILE NUMBER:****GRIEVOR'S NAME:**

166-2-29758	ANDERSON, Alice
166-2-29759	ANDERSON, Alice
166-2-29760	BOLTON, Michael
166-2-29761	CLAUS, Tammy
166-2-29762	DOW, Wendy J.
166-2-29763	ESTEY, Sandra Ann
166-2-29764	GIBSON, Chester Kent
166-2-29765	GOWLAND, Betty Ann
166-2-29766	GOWLAND, Betty Ann
166-2-29767	GURMAN, Katheryn
166-2-29768	HILL, Louise
166-2-29769	JENNE, Tina Marie
166-2-29770	LAING, Paula
166-2-29771	MARACLE, Tracy
166-2-29772	McNAUGHTON, Judith A.
166-2-29773	PHILLIPS, Robin Louis
166-2-29774	PROCUNIER, Sherry Lee
166-2-29775	RATH, Sandra
166-2-29776	SANDY, Audrey
166-2-29777	SKYE-MARTIN, Lori
166-2-29778	THOMAS, David