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Citation: 2002 PSSRB 88

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DONNA BONIA

Grievor

and

TREASURY BOARD
(Royal Canadian Mounted Police)

Employer

Before: Anne E. Bertrand, Board Member

For the Grievor: Michael Tynes, Grievance and Adjudication Officer

For the Employer: Harvey Newman, Counsel

Heard at St. John's, Newfoundland,
October 25, 2000 and September 11, 12 and 13, 2001.

I — PRELIMINARY OBJECTION

[1] At the outset of this matter, the employer presented a preliminary objection as to my jurisdiction to hear this grievance. The employer argues that the grievance filed by Donna Bonia alleges a violation of her rights provided by the Workforce Adjustment ("W.F.A.") policy found in Appendix "E" of the collective agreement between Treasury Board and the Public Service Alliance of Canada covering all employees in the Program and Administration Services Group, Code :300/98 (filed as Exhibit G-1). As an "affected" employee, and not a "surplus" employee as indicated in the grievance, Ms. Bonia was entitled to a guarantee of a reasonable job offer by the employer in the face of the loss of her position, and Ms. Bonia was offered such a position and has accepted same. Counsel for the employer consequently argues that Ms. Bonia's rights under the W.F.A. policy have been respected and the employee has no right to grieve under Appendix "E". Further, the employer states that Ms. Bonia is alleging that she lost some benefits because the duties she once performed were collapsed into another position, and that issue is a staffing issue and not one appropriate for adjudication before this tribunal. In the alternative, the employer suggests that the grievance in its present format is vague and alleges only a broad violation of the W.F.A. policy in Appendix "E" and thus prevents the employer from properly responding thereto. The employer requests that the grievor be directed to specify exactly which provisions of Appendix "E" she believes have been violated.

[2] The grievor replied to the preliminary objection by first indicating that an error had been made in the grievance form to show that she was a "surplus" employee when in reality she had been made an "affected" employee by the employer, but that notwithstanding this error, the fact remained that Ms. Bonia as an affected employee came under the provisions of the W.F.A. policy found in Appendix "E" of the collective agreement, and as such, she has the right to grieve an alleged violation of same. As for the matter of giving particulars of the alleged violation, the grievor will argue that the employer failed to treat her equitably contrary to Part I, clause 1.1.1 of the W.F.A policy in Appendix "E", and she will also argue that the employer failed to minimize the impact of the workforce adjustment upon her, contrary to clause 1.1.2.

[3] The employer then stated that even as an affected employee, all the rights Ms. Bonia acquired under the W.F.A. policy were upheld. For instance, clause 1.1.1 states that for employees who are affected by workforce adjustment, it is the

responsibility of the departments to ensure that such employees are treated equitably and whenever possible, given every reasonable opportunity to continue their careers as public service employees. In this case, Ms. Bonia was offered a job and accepted it and therefore she was not treated inequitably in being offered a reasonable job offer as this took place. While the grievor may be saying she did not obtain the new position B201 created with duties from her previous position B26, that is not a matter for this adjudication. She was entitled to a reasonable job offer and that is what she received. The new position B201 was later abolished. As for the allegation that the employer failed to minimize the impact upon her during the workforce adjustment, during the workforce adjustment, the employer will raise the decision of the Federal Court in **Burchill v. Attorney General of Canada [1987] 1 F.C.109** to counter the move by the grievor to modify her grievance which the court in that case determined was not permissible.

[4] I did agree with the employer's counsel that the wording of the grievance could be more precise and more focussed on the real issue to be brought before me. The bargaining agent sought an adjournment to allow this to take place and to re-align its case to deal with the jurisdictional issue. Both parties agreed that insufficient time had been set aside to deal with both the objection and the case on the merits and the matter was adjourned to a later date by consent.

[5] The hearing resumed on September 11, 2001, at which time evidence on both the jurisdictional issue and the case on the merits was presented. The grievor confirmed that she is alleging inequitable treatment by and a failed duty on the part of the employer to minimize the impact upon her during the work force adjustment period as provided by clauses 1.1.1 and 1.1.2. of the W.F.A. policy in Appendix "E". The remedial action which she seeks, however, after such a long period of time since this matter began, is no longer to have her status as an affected employee rescinded to claim rights to position B201 but rather if she is successful in this grievance, that I issue a declaration that the employer failed to comply with Appendix "E" W.F.A. in her case and that I further direct the employer to comply with the workforce adjustment principles contained in the said policy in future similar situations.

[6] The employer maintains its jurisdictional objection that Ms. Bonia has no basis upon which to bring this grievance as none of her rights under the W.F.A policy were violated. The position B201 was never established as a new position; it was never

staffed; and it was ultimately deleted from the organization. Simply put according to the employer, Ms. Bonia complains that duties from her position were rolled into another position for which she felt she should have been able to compete but which was filled by another employee. This is a staffing issue and not proper for this adjudicator.

[7] My decision on the jurisdictional issue was reserved until all the evidence was heard after which time both decisions shall be rendered together.

II — FACTS

[8] I heard evidence from two witnesses: the grievor herself, Donna Bonia, and for the employer, Keith Walsh, from the RCMP "B" Division, in St. John's, Newfoundland. These two witnesses paint a somewhat different picture of the events of the past three years which led to the filing of the present grievance. I have summarized the evidence by carefully taking into account both versions. Keith Walsh was at the material time in 1997, the Public Service Personnel Administrator and a re-organization of all of the RCMP provincial headquarters across Canada was undertaken. It was formally referred to as the "regionalisation" wherein functions of public service departments within all RCMP Detachments were concentrated into "regions". For the Atlantic provinces, various departments were split among the four, for instance, one province's headquarters would be responsible for the department of finance, another for administration, and so on. The headquarters in St. John's, Newfoundland "B" Division became responsible for the administration of personnel, i.e., for all human resources of public service employees in RCMP detachments throughout the Atlantic provinces.

[9] Before launching into the reorganization of the region's personnel, the Atlantic Regionalisation Committee (with members of USGE/PSPA) reviewed Appendix "E" of the collective agreement which provided objectives on how best to address workforce adjustments:

> *It is the policy of the Employer to maximise employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.*

> *To this end, every indeterminate employee whose services will no longer be required because of a work force adjustment situation and for whom the deputy head knows or can predict employment availability will receive a guarantee of a reasonable job offer within the public service. Those employees for whom the deputy head cannot provide the guarantee will have access to transitional employment arrangements (as per Part VI and VII).*

[10] This policy also specified the roles and responsibilities of those involved in this process, such as the necessity to act equitably and to minimize the impact on personnel during the reorganization. The Committee recognized this and set up guidelines including recommendations to assist in this process. Some of these recommendations are reproduced below (Exhibit G-2, Appendix A):

> *#7 Staffing within each of the divisions must be consistent. Employees will be given RCMP staffing priority consideration. Incumbents of relocated positions will be given first consideration. Secondly, affected employees will be placed within their own division. Finally, remaining vacancies will be staffed by affected employees within the region.*
>
> *#8 Rights of incumbents be protected as follows:*
>
> - *competitions be held;*
> - *when competitions are being run for a position, only those in the affected positions will be given the opportunity to compete for the position ie: three positions being collapsed into one, the competition be restricted to only those three incumbents;*
> - *where it is not clear that a like job function exists, the USGE/PSPA Committee will review the two work descriptions to determine incumbent rights.*
>
> *# 9 A competition will be held to fill all vacant positions where there is more than one affected employee vying for that position at that level.*
>
> *#10 Affected personnel who lose a specific job function during regionalization be allowed to return to the job function (successor rights) should the job function be reinstated, provided that it does not create another affected*

> *situation. (This recommendation would remain in effect for a three year period.)*

[11] According to Mr. Walsh, who was also a member of the Regionalisation Committee, the members of the Committee regularly consulted the objectives of Appendix "E" and the Committee's own recommendations when going about the adjustments to the workforce.

[12] Donna Bonia, the grievor, has been an employee with the RCMP "B" Division since 1987. She began her work as a secretary and through the years with promotions, acting and secondment assignments, Ms. Bonia attained the classification level of a SCY-02. After the regionalisation period of 1997-1998, Ms. Bonia became a dispatch operator, a position outside of the bargaining unit.

[13] Ms. Bonia filed the present grievance in 1999 to raise the issue of how a new position in her former department was filled during the regionalisation process, and how that action on the part of the employer was brought about contrary to what Ms. Bonia was told and led to believe would take place, particularly in regard to the application of "incumbent rights".

[14] Before the process of regionalisation, Ms. Bonia and another employee by the name of Shirley Kavanaugh, held separate and distinct positions with "B" Division in St. John's, Newfoundland. Ms. Bonia held the position of Secretary to the OIC Staffing & Personnel, position number B26, and which was classified at the SCY-02 level. Shirley Kavanaugh held the position of Personnel Services, position number B140 and she was classified at the AS-01 level. Ms. Bonia worked under Commanding Officer Ambler while Ms. Kavanaugh was the assistant to Keith Walsh.

[15] During its review and process to streamline operations, the Regionalisation Committee made a decision to eliminate two public service positions, those of Ms. Bonia and Ms. Kavanaugh. Mr. Walsh was told by management to create a new position by incorporating duties from both the B26 and the B140 positions, and to allow both Ms. Bonia and Ms. Kavanaugh to compete for same. Ms. Bonia was told that management and the bargaining agent would review the new position B201 against both B26 and B140 position to determine who could claim incumbent rights (also stated as "incumbency rights"). Ms. Bonia had never heard of incumbency rights before this time.

[16] As Ms. Bonia was classified as a SCY-02, and the bulk of the remaining positions after regionalisation would be in the CR group, Ms. Bonia was encouraged by Commander Ambler to have her current position reviewed to determine whether it fell in the CR classification. If so, Ms. Bonia could compete more readily as a CR than as a SCY. Ms. Bonia therefore approached Mr. Walsh and asked that her current job description be submitted for review of classification. He refused on the basis that her position would be eliminated in any event.

[17] As a result of that, Ms. Bonia spoke to Commander Ambler, and he helped Ms. Bonia write up her job description for submission to classification officials. During this time, it appeared to Ms. Bonia that discussions between Commander Ambler and Mr. Walsh concerning the new position were split, Commander Ambler favouring Ms. Bonia getting the new position while Mr. Walsh putting in a case for Ms. Kavanaugh; however, Ms. Bonia testified that she was not aware of any promise made to her by Commander Ambler that she receive the new position. Mr. Walsh testified that Ms. Bonia had been promised the job.

[18] In February of 1998, Staff Sergeant Alex McInnis who replaced Ambler advised Ms. Bonia that there was no such thing as incumbency rights. The matter of incumbency rights was taken to Superintendent Button who, along with Mr. Walsh, the Union President and Sharon Drodge decided that once the new position was classified, there would be a review of all three positions (those of Ms. Bonia, Ms. Kavanaugh, and the new position) by the Regionalisation Committee. They also agreed that if the two positions B26 and B140 were collapsed into one, there would be a competition restricted to those two employees, Ms. Bonia and Ms. Kavanaugh, and Mr. Walsh confirmed this during his testimony.

[19] In April of 1998, Ms. Bonia felt there had been a change in the process as Ms. Kavanaugh did not seem really upset about having to compete for the new position which surprised Ms. Bonia as all “affected employees” were concerned for their jobs during that time. Ms. Bonia spoke with S/Sgt.McInnis and asked him whether there had been further discussions by the Regionalisation Committee on the question of incumbency rights for the new position. McInnis had Mr. Walsh and Ms. Kavanaugh brought into this discussion and informed Ms. Bonia that incumbency rights would be considered against the new position but that Ms. Bonia could not compete for the new

position as she was classified in the SCY category and the new position would be classified as a CR-04.

[20] Ms. Bonia could not understand what was happening as she had always been told she could compete for the new position. Ms. Bonia therefore contacted Mabel Musgrave-Comeau, USGE RVP Atlantic who got in touch with Sharon Drodge to clear up the matter of incumbency rights: i.e., whether combining two job descriptions into one position was creating a new position, or whether including key duties from one job and adding it to the description of another, the employee in the latter could claim incumbency rights, etc.

[21] Meanwhile, Mr. Walsh had drafted a list of duties for the new position which would be entitled Human Resource Assistant, and a new position number was given: B201. The position B201 was approved by management and sent to the Public Service Commission for classification, which came back in June of 1998 as a position at the CR-04 level.

[22] In July of 1998, Superintendent Button held a meeting for all affected employees, and for the case of Ms. Bonia and Ms. Kavanaugh, Supt. Button and Mr. Walsh both stated that their respective positions were being eliminated and the new job description as written included duties from both positions which would be at the CR-04 level. Given that Ms. Bonia was a SCY-02 and Ms. Kavanaugh was an AS-01, however, neither of them could compete for the new position.

[23] Ms. Bonia sought once again to have her current position B26 reviewed given the circumstances, to determine whether it could be classified in the CR group. With this, Ms. Bonia felt she could really compete for the new position B201 classified at the CR-04 level. She went to Mr. Walsh and again he refused to submit it for review for reason that her job was being eliminated. Ms. Bonia felt this was unfair as she was aware that another employee had been able to have her job description reviewed during the regionalisation process.

[24] Nevertheless, Ms. Bonia sent a memo to Mr. Walsh requesting a complete description of her current position and she received two job descriptions with a note that both made up her complete description. Ms. Bonia believed, however, that the descriptions were still not current and asked Mr. Walsh once again for a review of her

current position. Again Mr. Walsh stated that he would not as Superintendent Button would not sign such a request.

[25] Ms. Bonia communicated directly with Button without satisfaction and she lodged a grievance to obtain a current and up to date job description. That grievance form was somehow lost for a while but finally, Mr. Walsh submitted a reply in September of 1998 that a current job description would be prepared and sent for classification review. Ms. Bonia did not really want to grieve and allowed Mr. Walsh to get the description matter resolved. No answer was forthcoming, so Ms. Bonia got in contact with Mr. Walsh who advised her that her job description was being discussed but it had not been sent for review. Later Mr. Walsh told Ms. Bonia that there was a moratorium on review of classifications due to the regionalisation process and hers was put on hold. Ms. Bonia was deeply concerned because she felt she was running out of time, regionalisation was taking place, and she would not be able to compete without a successful review of her current classification. Ms. Bonia persevered nevertheless.

[26] Finally, in November of 1998, Mr. Walsh wrote to Ms. Bonia to advise that a tentative question on classification of her B26 position would be classified a CR-03, instead of the CR-04 group and level which Ms. Bonia had been told would be recommended. Her job description, however, was not sent for review and the matter of her grievance was still unanswered.

[27] Again worried about running out of time, Ms. Bonia requested she see the file regarding her position and whether it had been sent to Ottawa for review. This was in January of 1999. Mr. Walsh was on leave at the time and it was Ms. Kavanaugh who looked after this matter. Ms. Kavanaugh did not show Ms. Bonia the file but informed her that the description had been sent for review.

[28] According to Mr. Walsh, Ms. Kavanaugh reviewed the job description for position B201 in February of 1999 and claimed that those duties were very similar to her current position B140, and she formally claimed incumbency rights for that new position to her boss (see Exhibits E-3 and E-4). Ms. Kavanaugh also suggested to Mr. Walsh that the new position B201 be deleted and that her current position B140 be re-written to include the new duties and allow her to remain in that B140 position.

[29] During all this time, Mr. Walsh was facing two employees who were claiming incumbency rights to the new position B201, so he sought further advice. Mr. Walsh proceeded to get answers from Annette Aris; she indicated that the "essence" of the work in B201 had come from B140 and that B140 should probably be re-written in that regard. In fact, Ms. Aris told Mr. Walsh that most of the duties of B201 came from B140 and the best course of action would be to delete B201 and resubmit the job description under B140. Ms. Kavanaugh was an AS-01 but she would be salary protected if she remained in B140 which was classified at the CR-04 group and level (see Exhibits E-5 and E-6).

[30] Having Ms. Kavanaugh claim rights to her position and by her remaining in the B140 position, as re-written, however, would effectively deny Ms. Bonia the ability to compete for the "new" position contrary to what she believed and had been told, and Mr. Walsh recognized this would be a problem. Moreover, Ms. Kavanaugh was Mr. Walsh's assistant. This problem was compounded by the fact that the then current Commander had made a promise to Ms. Bonia that there would be a new position and that it would become hers, according to Mr. Walsh. Commander Ambler was also a member of the Regionalisation Committee.

[31] Ms. Bonia's job description was evaluated at the CR-03 level in March 1999 (see Exhibit G-2, Appendix W). She contacted Mr. Walsh regarding a possibility that it be upgraded to CR-04 to compete for the new position and enquired again about incumbency rights. Mr. Walsh advised her there were no incumbency rights, and told her she could not upgrade her position to CR-04. SCY-02 is a higher classification than CR-03 but lower than a CR-04.

[32] Ms. Bonia decided to grieve the classification of CR-03 and when preparing for same, Mr. Walsh wrote to Ms. Bonia requesting that another copy of her job description be sent to Ottawa as her file had been lost. Ms. Bonia could not make sense of this as a classification had been sent from Ottawa, but how so if the file was lost? Months had gone by and it was now March. The decision about the new position would be made in April. Ms. Bonia wrote another job description and had it approved by S/Sgt. McInnis and the same was re-submitted. Meanwhile, Mr. Walsh informed her he had found her file which had been lost behind his desk for the past three months and would be sent urgently. Ms. Bonia was now totally confused and wondered which description had been used for the review in the first place. In fact when asked, Mr. Walsh could not

state which description had been sent to Ottawa for review. Further, Mr. Walsh told Ms. Bonia that the new position had not yet been classified.

[33] A classification decision of Ms. Bonia's position B26 was rendered on March 29, 1999 at the CR-03 level. Ms. Bonia grieved this decision. To make matters worse, Ms. Bonia found out that the review of her job was conducted under the old format and not the new format, the Universal Classification System.

[34] Then, on April 14, 1999, a meeting of the Local executives took place and a list of affected employees was provided. Position B201 and B140 and Ms. Kavanaugh's name were clearly missing from the list and no one could answer as to why. Ms. Bonia therefore requested from Button that the decision regarding staffing of the new position be held in abeyance until the matter of the review of her current position could be concluded. This request went unanswered. Meanwhile, Sharon Drodge asked Mr. Walsh whether Ms. Kavanaugh had claimed incumbency rights to the new CR-04 position and he had replied in the affirmative. Ms. Bonia could not understand how Ms. Kavanaugh could have claimed rights given it had been agreed prior thereto that neither Ms. Kavanaugh nor Ms. Bonia could claim incumbency rights to this new position.

[35] Musgrave-Comeau sent a letter to Supt. Button regarding what she described to be an appalling situation regarding the treatment of Ms. Bonia, and offered three options to resolve the problem (see Exhibit G-2, Appendix "AI"). In his reply with the assistance of Mr. Walsh, Supt. Button wrote that the Human Resources Assistant position was not a new position but rather an evolution of the existing position which gave rights to the incumbent in that position (i.e., Ms. Kavanaugh). Moreover, Supt. Button stated that Ms. Bonia had received preferential treatment during this process and described Ms. Bonia as a constant complainer. Ms. Bonia testified at this hearing to being "disgusted" when she learnt of this reply. She wrote a long letter in response to Musgrave-Comeau explaining the events which had taken place for the last year and a half.

[36] Ms. Bonia was confused and frustrated. Ms. Bonia had been told and was of the impression, like S/Sgt. McInnis, that none of her current duties had been eliminated and in fact were all collapsed into the new position, yet according to Supt. Button, 75% of the new position's duties were from Ms. Kavanaugh's current job. When this question was put to Supt. Button at the end of April after Ms. Bonia had received her

"affected employee" letter, Supt. Button stated that the new position had nothing to do with percentages but rather that the new job was more like that of Ms. Kavanaugh as it was more "labour intensive". Ms. Bonia did not know what this meant.

[37] Then on May 5, 1999, a new Notification of classification decision regarding Ms. Bonia's B26 position was rendered and it showed that it was a CR-04, effective October 10, 1997.

[38] By then, Mr. Walsh received advice from a Senior classification officer and that advice was to re-write position B140 and delete the newly created B201, and so he testified he did. Ms. Kavanaugh remained in her position B140. No one could tell Ms. Bonia, however, what exactly were incumbency rights and how they applied, nor how Ms. Kavanaugh could claim such rights over those of Ms. Bonia when most of Ms. Kavanaugh's job, i.e, pay duties, had been eliminated and not collapsed into the new position. Furthermore, Ms. Bonia thought Ms. Kavanaugh had been deployed to the new position only to be told later that the new position was deleted and Ms. Kavanaugh carried on in her current position. Because there was no deployment, there was no appeal for Ms. Bonia, hence, she could not complain.

[39] Ms. Bonia brought the present grievance to get answers. She recognizes that the whole regionalisation process was difficult for a lot of people and it seems that her situation was made worse. She wonders why management did not act when concerns were raised, why the discussions became off limits, and how was the decision on incumbency rights made.

[40] Ms. Bonia also recognizes that an affected employee has no right to a job, but in this case, there was the matter of incumbency rights to the new position based on the fact that Ms. Bonia's duties were collapsed into it, and that is how Ms. Kavanaugh received the position in the end, even though the Workforce Adjustment policy does not speak of incumbency rights.

[41] When asked how she could bring the present grievance, Ms. Bonia replied that it is based on the fact that her duties were rolled into the new position B201, that her duties were not abolished, that she was made an affected employee, and that there were incumbency rights to the new position given that Ms. Kavanaugh and the employer both agreed that is how Ms. Kavanaugh obtained this job, even though there seems to be no indication anywhere that incumbency rights exist.

[42] According to Mr. Walsh, the overriding recommendation of the Regionalisation Committee was to protect the rights of incumbents during the workforce adjustments, as per the Committee's recommendations number 7 and 8. The Public Service Commission, however, informed the Committee that it could not restrict the competition for any position by reason of "incumbency rights", i.e, could not close the competition to only two people as in the case of Ms. Bonia and Ms. Kavanaugh, also contrary to Recommendation 9. Mr. Walsh was of the view as he had been told in the past, by whom it is not known, that incumbency rights applied to the job itself not to the individual and those rights were to be applied on a "case by case" basis, yet the Policy Centre, Staffing Branch never provided a clear definition of "incumbency rights". As a consequence, Mr. Walsh did not know how incumbency rights had been applied elsewhere during the reorganization.

[43] Ironically, Ms. Kavanaugh was successful in obtaining the re-written B140 position through her claim of incumbency rights (see Exhibit E-13).

[44] As for Recommendation 10, Mr. Walsh said it did not apply either to Ms. Bonia's case as that Recommendation provided the employee could return to job functions but that meant the "whole" job, and Ms. Bonia's secretarial position had been eliminated and a few of her duties rolled into B201, such that her "whole" job B26 no longer existed.

[45] In the end, the position B26 classified as CR-04 was supposedly deleted, the position B140 was not deleted but rather re-written and Ms. Kavanaugh was allowed to remain in position B140, while Ms. Bonia was not allowed to compete for same. The effective date of Ms. Kavanaugh receiving this re-written position is April 23, 1999. The new position B201 was not deleted at the time, and Mr. Walsh stated that it was eventually deleted, even though documents brought forth dated as late as November of 1999 did not show B201 as having been deleted or processed (see Exhibit E-14).

[46] Because this became a staffing issue, Ms. Bonia could not appeal the decision to allow Ms. Kavanaugh to obtain the re-written B140 position. Ms. Bonia had been led to believe the job would be hers, or at least she would be allowed to compete for same, neither of which took place.

[47] In the end, the employer made a reasonable job offer to Ms. Bonia which she did accept, but she never accepted the employer's decision not to allow her to claim

incumbency rights to the new position B201. She therefore filed the present grievance in November of 1999. Mr. Walsh took sick leave thereafter for a few months, and Mr. Walsh testified that Ms. Kavanaugh, as his Assistant, may have been involved in the drafting of management's reply to Ms. Bonia's grievance in his absence.

III — SUMMATION -GRIEVOR'S POSITION

[48] The grievance is a result of the failure on the part of the employer to apply Appendix E in an equitable manner regarding the case of employee Donna Ms. Bonia. Further, the grievor contends that the employer failed to provide effective resource planning regarding the workforce adjustment in the workplace, especially for Ms. Bonia.

[49] The grievor submits that Ms. Bonia was not treated equitably during the regionalisation process nor was she treated fairly during application of the W.F.A. policy, and as such, Part1.1.1 of the Appendix "E" of the collective agreement was not complied with. As for the responsibilities of the employer under Part 1.1.2, that departments shall carry out effective human resource planning to minimize impact, this obligation also was not complied with in Ms. Bonia's case as effective planning failed to be carried out and the employer especially failed to minimize the impact of such a lack of planning upon this employee. How? By providing Ms. Bonia with erroneous information regarding the application of incumbent rights, which rights the Regionalisation Committee sought to secure as per its Recommendations #7 and #8.

[50] The term incumbent rights was used by human resources, by the employer, and Ms. Bonia was convinced they existed. Union Local Representatives and USGE representatives were also sold on the existence of these rights. Ms. Bonia was led in this direction and was led to believe that she possessed these incumbent rights and that such rights provided her with some legal rights under some regulation in the public service. This was definitely not the case as she was told in the end that such rights did not exist, nor did they apply to workforce adjustment cases.

[51] Furthermore, Mr. Walsh was a key management advisor during the personnel adjustment and his words and actions were important, including when he dealt with the creation of new positions and the deletion of others. Yet, when questioned on the rights, the employer representative Mr. Walsh could not state exactly what they were nor was he able to obtain a definition from the Public Service Commission on

incumbency rights. Rights are important issues for affected employees because those employees face the real possibility of having to accept a lower level job while being salary protected, nevertheless, a lower level job. Thus, it is reasonable to comprehend that incumbent rights would be important to an affected employee such as Ms. Bonia.

[52] The grievor still does not know why Ms. Kavanaugh was not declared an affected employee given the facts of this case. Both Ms. Bonia and Ms. Kavanaugh were told their jobs were to be eliminated and that both could compete for the new position. Additionally, Ms. Bonia informed Mr. Walsh that she was claiming incumbent rights to the new position, and even in light of this, the employer did not declare Ms. Kavanaugh, Mr. Walsh's assistant, an affected employee as was done to Ms. Bonia. This in the face of Ms. Bonia being given and she relying upon erroneous information during this entire process. Even in the instance that Ms. Bonia was unsuccessful in claiming incumbent rights, she knew to rely upon the fact that she could at least compete for the new position in a restricted competition between herself and Ms. Kavanaugh, as she had been told and led to believe would take place.

[53] Further aggravation and stress for Ms. Bonia came as a result of her attempts to have her current position B26 at SCY-02 group and level reviewed to determine whether she would be classified in the CR group, and if so, she could compete for the new position B201 at CR-04 group and level. This information came from the employer and she was led to believe the process was so. That review process was plagued with problems and delays, including the fact that the first job description was sent for review but was reviewed under the old format, and then Ms. Bonia was told that her file had been lost behind a desk for months, therefore, she was unable to determine which description had been reviewed and which came back at the CR-03 level, and then more delays to correct these problems all the while time was running out for Ms. Bonia as a decision on the new position had to be made.

[54] It is clear from the facts, argues the grievor, that Ms. Kavanaugh received preferential treatment in comparison to Ms. Bonia. As Mr. Walsh's assistant and working directly with Mr. Walsh throughout this process, Ms. Kavanaugh had access to much information, including that regarding the new position. To make matters worse, Ms. Kavanaugh also acted in Mr. Walsh's place during his absence and even dealt with the Ms. Bonia matter directly.

[55] Questions are raised as to why Ms. Bonia received a letter notifying her that her position was being abolished and that she was then an affected employee much later on in the process, in April of 1999, while Ms. Kavanaugh never received such a letter. Therefore, the grievor argues, it must have been the intention of the employer from the beginning to give the new position to Ms. Kavanaugh and that is the reason why Ms. Kavanaugh was never placed on the affected employee list. In further support of this theory, the grievor states that it makes sense the employer was encouraging her to have her job status reviewed to a higher classification CR04 because with such, Ms. Bonia could take on another position in "B" Division and there would be no competition, and the matter would go away. The employer's plan did not work, however, since Ms. Bonia grieved when things started to go wrong, and the matter is still in dispute today. The forms filed during this hearing also point to things being mishandled and not in a normal manner, i.e., the position B201 never established as having been deleted, the position B140 not being deleted but changed, and so on.

[56] All this to state that Donna Bonia went through a difficult time; while she recognizes she was not laid off, not demoted, she nevertheless tried to get answers to questions which kept growing in numbers as the process went on. Ms. Bonia is not asking to be placed in the new position or for compensation. She is requesting a declaration that the employer failed to comply with the principles laid down in Appendix "E" of the collective agreement in her case, and that the employer be directed to comply with those principles in the future so that employees in similar circumstances will not go through such a terrible ordeal in reorganizations which may take place in the future in the public service.

IV — SUMMATION - EMPLOYER'S POSITION

[57] The employer states that an adjudicator is not empowered to tell the employer what to do in the future, and the employer does not require direction from this adjudicator on how to apply the provisions of the collective agreement in the future, as the employer understands its responsibilities under the collective agreement. This adjudicator can state whether an employer has or has not violated the agreement in this case.

[58] According to the employer, this matter is not a matter which comes under the jurisdiction of the adjudicator for the reason that it is not a genuine collective

agreement case as it must use the Appendix "E" to draw itself under the collective agreement. Section 92 of the *PSSRAct* states that the jurisdiction of an adjudicator is limited to the interpretation of the collective agreement.

[59] The employer submits that the grievor's case is not in any sense a violation of the collective agreement and if Ms. Bonia believes that it is, she is too late. The **Burchill** case (*supra*) stands for the principle that once the grievance is launched, it cannot be changed later on in order for the adjudicator to assume jurisdiction.

[60] In this case, Ms. Bonia alleged violation of the Appendix "E" of the collective agreement, that is the Workforce Adjustment policy (*nota bene*: in its submission, the employer referred to Appendix "E" as a Directive as opposed to a policy, but I have used policy throughout for clarity) which states that the employer must provide protection to employees who are in danger of losing their job. Section 29 of the *Public Service Employment Act* provides that employees are afforded little protection from lay offs and contracting out, etc. Therefore, Treasury Board developed a policy for workforce adjustment in the 1980's to provide a safety net for employees about to lose their job, to be declared surplus. There was a National Joint Council made up of both parties and the Workforce Adjustment policy was incorporated by reference into collective agreements.

[61] The first step in the process is to be declared "affected" then "surplus". Affected is not a known term in the Public Service legislation, and the Workforce Adjustment policy states that such employees are provided limited employment protection. If that cannot be done, there are priorities regarding compensation and re-training. The concept of the "reasonable job offer" evolved from this over the years and lastly, the "guarantee of a reasonable job offer" was incorporated into Appendix "E" such as in this case.

[62] The objectives of Appendix "E" are set out the scheme of the Workforce Adjustment policy:

> *It is the policy of the Employer to maximise employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.*

> *To this end, every indeterminate employee whose services will no longer be required because of a work force adjustment situation and for whom the deputy head knows or can predict employment availability will receive a guarantee of a reasonable job offer within the public service. Those employees for whom the deputy head cannot provide the guarantee will have access to transitional employment arrangements (as per Part VI and VII).*

[63] The term "affected employee" is defined and the term "indeterminate employee" means an employee who is not a term employee. An employee must be declared an affected employee in order to fall within the application of this policy. Then states the employer, *when it is possible*, the first primary goal is to give alternative employment opportunities, and the policy goes on to state that "*this shall not be construed as the continuation of a specific position or job"* which means the employee has no right to his or her existing position.

[64] The employer states that Ms. Bonia was immediately declared an affected employee and therefore she had no right to any job and she recognized this during the hearing. If she is today arguing that she ought not to have been declared affected -- which is not what is contained in her grievance -- she cannot grieve for having become an affected employee.

[65] According to the employer, Ms. Bonia got the ultimate protection under Appendix "E", but that is not her grievance. The grievor is not grieving a violation of the collective agreement by way of Appendix "E" but rather she is really grieving the fact that she did not get Ms. Kavanaugh's job which she thought should be hers. She can only grieve a violation of the rights granted to her as an affected employee under the W.F.A. policy. Again, that is the only instance in which the adjudicator can assume proper jurisdiction in this case.

[66] All of the evidence regarding the re-classification of Ms. Bonia's B26 position is irrelevant, according to the employer as it is collateral to her case and does not bear on the real issue. Understandably, errors were made and these caused delays, but the situation was stressful and frustrating not only for Ms. Bonia but for Mr. Walsh too who was trying to deal with this matter in a considerate fashion. The situation was painful but that is bureaucracy, states the employer.

[67] While to be treated equitably is an obligation of the employer, the ultimate obligation is to provide alternative employment and that is the crux of this case. Ms. Bonia did receive and accept alternative employment. No more was the human resource planning less than effective as this planning went on for years and the grievor cannot state that the planning was not effective because she does not like the result.

[68] Parts 1.1.3., 1.1.15, and 1.1.16 set out clearly the goal of this process: to set up committees to manage the situations and to cooperate, re-deploy, re-train, in other words to keep employees employed or barring that, to give them options, compensation. Employees have no right to a particular job under the W.F. A. policy.

[69] In this case, Ms. Bonia could not have received more under the policy than she did. There may have been an intention that Ms. Kavanaugh would also lose her job in the initial planning, but that decision was later changed and she was not declared an affected employee and she did not lose her job. Ms. Bonia's tenacity is to be respected and it is to her credit that she was re-classified at CR04 in order to get a job at that level; however, those are staffing issues, and are not subject to adjudication.

[70] The employer went on to state the provisions of the *Financial Administration Act* (sections 7, 11(2)) which empowers the employer to manage its personnel, and the *Public Service Staff Relations Act* which dictates that nothing restricts the employer's ability to assign duties and to classify new positions. The new position B201 was an evolution of B140 and the employer had a right to do so.

[71] To assume jurisdiction in this case, the grievor must show that she grieves a right under the collective agreement, not under Appendix "E", and if we look at Appendix "E", management fulfilled its obligation by giving Ms. Bonia a reasonable job offer.

REPLY

[72] The grievor states that the Appendix "E" was incorporated into the collective agreement and all matters contained in the collective agreement are subject to resolution by an adjudicator appointed under the *PSSRAct*. This matter is grievable, and in support of this contention, Clause 7.01 of the collective agreement provides that such agreements will form part of this collective agreement. In **Roberts v.**

Treasury Board (Board File 166-2-22963), an adjudicator appointed under the *PSSRAct* assumed jurisdiction under a workforce adjustment situation much like this one.

[73] The **Burchill** case can be distinguished to the present one. In **Burchill,** the grievor modified his grievance from alleging a lay off to a dismissal, which shifted the burden of proof onto the employer. In the Ms. Bonia grievance, the main issue still remains the Appendix "E" violation.

[74] It is not uncommon when an adjudicator finds fault with the employer to order the employer to comply with provisions of the collective agreement in the future.

[75] The W.F.A. policy is indeed to offer reasonable alternative employment, but it is also much more than that and that is why it encompasses so much, including how to treat employees in the process. Ms. Bonia does not argue entitlement to any job but rather the information she was given which was false and which she was told to believe and to rely upon. That is what is wrong in this case. Further, the employer told Ms. Bonia she would compete with Ms. Kavanaugh for the new position; therefore, the employer too must have believed as did the grievor that she had rights in order to compete for that new position.

V — DECISION

Jurisdictional question

[76] I can appreciate the employer's submission in regard to my assuming jurisdiction in this matter only if the law so dictates. The applicable legislation which governs my jurisdiction is section 92 of the *PSSRAct*, and that legislative provision allows me, among other things, to interpret provisions of a collective agreement. In the matter before me, the grievor alleges a violation of the provisions found in Appendix "E" of the collective agreement. Can I assume jurisdiction in this context?

[77] The material portions of the very lengthy Workforce Adjustment policy found in Appendix "E" of the parties' collective agreement are reproduced:

General

Application

This appendix applies to all employees. Unless explicitly specified, the provisions contained in Parts I to VI do not apply to alternative delivery initiatives.

Collective agreement

With the exception of those provisions for which the Public Service Commission (PSC) is responsible, this Appendix is part of this Agreement.

Notwithstanding the Job Security Article, in the event of conflict between the present Work Force Adjustment Appendix and that article, the present Work Force Adjustment appendix will take precedence.

Objectives

It is the policy of the Employer to maximise employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.

To this end, every indeterminate employee whose services will no longer be required because of a work force adjustment situation and for whom the deputy head knows or can predict employment availability will receive a guarantee of a reasonable job offer within the public service. Those employees for whom the deputy head cannot provide the guarantee will have access to transitional employment arrangements (as per Part VI and VII).

Definitions

Accelerated lay-off *(*mise en disponibilité accélérée*) - occurs when a surplus employee makes a request to the deputy head, in writing, to be laid off at an earlier date than that originally scheduled, and the deputy head concurs. Lay-off entitlements begin on the actual date of lay-off.*

Affected employee *(*employé-e touché*) - is an indeterminate employee who has been informed in writing that his or her services may no longer be required because of a work force adjustment situation.*

(. . .)

Guarantee of a reasonable job offer *(*garantie d'une offre d'emploi raisonnable*) - is a guarantee of an offer of indeterminate employment within the public service provided by the deputy head to an indeterminate employee who is affected by work force adjustment. Deputy heads will be expected to provide a guarantee of a reasonable job offer to those affected employees for whom they know or can predict employment availability in the public service. Surplus employees in receipt of this guarantee will not have access to the Options available in Part VI of this appendix.*

(. . .)

Reasonable job offer *(*offre d'emploi raisonnable*) - is an offer of indeterminate employment within the public service, normally at an equivalent level but could include lower levels. Surplus employees must be both trainable and mobile. Where practicable, a reasonable job offer shall be within the employee's headquarters as defined in the Travel Directive. In Alternative Delivery situations, a reasonable offer is one that meets the criteria set out in Type 1 and Type 2 of Part VII of this appendix.*

(. . .)

Retraining *(*recyclage*) - is on-the-job training or other training intended to enable affected employees, surplus employees and laid-off persons to qualify for known or anticipated vacancies within the public service.*

Surplus employee *(*employé-e excédentaire*) - is an indeterminate employee who has been formally declared surplus, in writing, by his or her deputy head.*

(. . .)

Work force adjustment *(*réaménagement des effectifs*) - is a situation that occurs when a deputy head decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work, the discontinuance of a function, a relocation in which the employee does not wish to relocate or an alternative delivery initiative.*

Authorities

The PSC has endorsed those portions of this appendix for which it has responsibility.

(. . .)

Part I
Roles and responsibilities

1.1 Departments

1.1.1 *Since indeterminate employees who are affected by work force adjustment situations are not themselves responsible for such situations, it is the responsibility of departments to ensure that they are treated equitably and, whenever possible, given every reasonable opportunity to continue their careers as public service employees.*

1.1.2 *Departments shall carry out effective human resource planning to minimise the impact of work force adjustment situations on indeterminate employees, on the department, and on the public service.*

1.1.3 *Departments shall establish work force adjustment committees, where appropriate, to manage work force adjustment situations within the department.*

1.1.4 *Departments shall, as the home department, cooperate with the PSC and appointing departments in joint efforts to redeploy or retain for redeployment to appointing departments departmental surplus employees and laid-off persons.*

1.1.5 *Departments shall establish systems to facilitate redeployment or retraining of the department's affected employees, surplus employees, and laid-off persons.*

1.1.6 *When a deputy head determines that the services of an employee are no longer required beyond a specific date due to lack of work or discontinuance of a function, the deputy head shall advise the employee, in writing, that his or her services will no longer be required.*

Such a communication shall also indicate if the employee:

- is being provided a guarantee of a reasonable job offer from the deputy head and that the employee will be in surplus status from that date on,

or

- is an opting employee and has access to the Options of Section 6.3 of this appendix because the employee is not in receipt of a guarantee of a reasonable job offer from the deputy head.

Where applicable, the communication should also provide the information relative to the employee's possible lay-off date.

> ***1.1.7*** *Deputy heads will be expected to provide a guarantee of a reasonable job offer for those employees subject to work force adjustment for whom they know or can predict employment availability in the public service.*
>
> *(. . .)*

[78] The opening words of Appendix "E" clearly show an intention on the part of the parties that the appendix "applies to all employees", and in particular, that Appendix is "part of this Agreement" and " in the event of conflict..... the present Work Force Adjustment appendix will take precedence". The grievor referred me to Clause 7.01 of the collective agreement which provides that agreements concluded by the National Joint Council of the Public Service which the parties have endorsed will form part of their collective agreement, and included in those, are various "directives", such as the Dangerous substances Directive, Sanitation Directive, Travel Directive and so on. The Workforce Adjustment policy is not listed among these as a "directive", nor are these directives listed in appendices to the collective agreement. A directive the W.F.A. policy is not. What is it then?

[79] If I follow the logic of the several appendices attached to the collective agreement, I believe that they provide additional provisions of the parties' bargain and which give set details of operation for the collective agreement as a whole. For instance, Appendix "A" lists the actual rates of pay for various employee group, Appendix "B" gives terms on sessional leave for translation bureau employees, Appendix "C" depicts the hours of work for teachers' aides, and so on. Clearly these appendices are applicable to the employees who come under its application, and clearly the appendices including Appendix "E" were intended to be a part of the collective agreement. Accordingly, pursuant to paragraph 92(1)(a) of the *PSSRAct*, I have the necessary jurisdiction to hear and determine this grievance.

Case on the Merits

[80] Having met and heard both the grievor Donna Bonia and the Human Resource official Keith Walsh, who was at the centre of the workforce adjustment in "B" Division during 1997 to 1999, I can comprehend how difficult, stressful and frustrating this process must have been for all concerned. I commend the grievor for her frankness in stating that at this stage, the matter of the new position B201 is no longer a matter of

dispute, and that she was offered a position which she accepted. She still grieves, however, the adjustment process she faced and during which she tried desperately to hang on to her rights, whatever those were.

[81] The grievor is in reality looking for answers to why things happened the way they did. She could not appeal and yet she needed a forum to raise those concerns, and to vent her frustrations, and for someone to hear what she went through. I believe and hope that the hearing provided in part some gratification for her. Now she needs explanations.

[82] The grievor was unable to prove that the employer had violated the collective agreement in this case. Having said this, however, I find that the grievor could have been treated more equitably.

[83] The employer stated that the primary goal of the Workforce Adjustment policy was to find alternative employment for employees declared affected, those employees who were facing loss of employment through no fault of their own. I agree with that statement; however, there is much more to the policy in my view.

[84] Part I of the policy goes on to specify how the primary objective is to be achieved. The employer must find such employment opportunities by carrying out effective human resource planning, and in doing so, reduce as much as possible the impact of the adjustment upon those affected employees, and all the while by ensuring that the affected employees are treated equitably and that they be given every opportunity to continue their career in the public service. To find alternative employment without the qualifiers or conditions precedent stated here would achieve nothing, and that is why those conditions precedent are so important and they make sense in labour relation matters.

[85] Adjustments in any workplace are trying for both employer and employee. The employer is saddled with the efforts of reorganization because the old formula does not work, while the employee is troubled by the insecurity of the reorganization itself, the apprehension of having to take on unknown duties, and the ever looming possibility of the loss of one's job. Adjustments hit both parties at the core of their being and it is a most difficult process to endure. That is the reason why the Workforce Adjustment policy was designed in such a way as to recognize both the exigencies of the reorganization and the difficulties of living through the process itself

by establishing conditions to "minimize its impact". Those conditions include carrying out additional efforts, planning carefully, treating employees fairly and allowing them to pursue their career in the public service.

[86] I conclude from this that the employer cannot be said to have fulfilled its obligation under the Workforce Adjustment policy on the basis of finding alternative employment alone, but rather the obligation extends to those conditions precedent as stated in the policy and if those conditions have not been followed, the employer cannot be said to have fulfilled its obligations under the policy.

[87] In the matter before me, it is quite evident that some human resource planning did take place but not totally in an effective manner. The initial planning of having the two positions eliminated and a new one created to accomplish the duties of both seemed consistent with the needs to reorganize that department, and to have the incumbents of those two positions notified of such and by advising them of the employer's intent to have them both compete for the new position also presented a fair treatment to both Ms. Bonia and Ms. Kavanaugh. The employer's failure to carry out a verification of whether management had the ability to create such a new position and restrict competition to only those two employees, however, was not prudent. Moreover, to employees, the employer is seen as having all the answers – even if the employer does not – and when the employer professes to grant certain "rights" or privileges to employees without ensuring that it can do so, it had better make sure that it will be in a position to uphold its promises.

[88] Were the problems which took place thereafter foreseeable at the initial planning stage? Could they have been prevented? I believe they were and they could have. Management could have obtained an opinion on whether the "new position" was indeed a new position or an "evolution" of an existing position, as was the case according to senior staffing officers when they were asked much later on. That opinion could have been sought before the employer embarked on any discussion with the grievor and Ms. Kavanaugh about the new position. Furthermore, the members of the Committee, who were both management and union, had already envisaged that employees could have incumbent rights to jobs and that factor ought to have raised a flag that if two positions were collapsed into one, there would be a good chance both incumbents would lay claim to the new position. The facts of this case point to the Committee having had some discussions about this because the Committee was

prepared to grant a closed competition to both these employees. Moreover, the employer in that case should have gone further by verifying without delay with the Public Service Commission as to whether the competition could be restricted as the Committee intended to proceed. Those two inquiries made ahead of time would have prevented a lot of the problems which occurred in Ms. Bonia's case.

[89] The casual use of the expression "incumbency rights" also contributed to a lot of headaches, especially when both management and the bargaining agent did not have a clear idea of exactly what those rights were and whether they had any application in work force adjustment situations. Again, prevention would have proven more effective planning in this case.

[90] There is a well known principle in law that to appear to act fairly is as important as acting fairly. In this regard, I point out that the evidence presented gave an impression of lack of fairness in the treatment of Ms. Bonia's case. First of all, Mr. Walsh was the key person in the implementation of the work force adjustment including the elimination of two positions, one of which was that of the grievor and the other, that of Mr. Walsh's assistant Ms. Kavanaugh. Therefore, for Ms. Kavanaugh to have been even remotely involved in the process of the creation of the new position, such as having been involved in the actual writing of the new position description of duties, and the discussions regarding Ms. Bonia's claim of incumbency rights thereto showed lack of judgment and a perception that Mr. Walsh might not render fair treatment towards Ms. Bonia. Further, the fact that Ms. Kavanaugh would fill in for Mr. Walsh in his absence and as a result deal directly with the Ms. Bonia case presented a conflict of interest situation.

[91] Then, there were the problems of getting Ms. Bonia's current job description reviewed, and which Mr. Walsh refused on two occasions to submit. In light of all that was happening, and to show equitable treatment to employee Ms. Bonia, Mr. Walsh ought to have allowed the review to take place, and ensured that the process was done properly so as to show that the employment of Ms. Bonia was as important as any other employee. The fact that Ms. Bonia's job description file was lost behind a desk for months made it appear to Ms. Bonia that she was not important, that her requests were not relevant, and would have given her the appearance that her claim to the "new position" was not relevant.

[92] The actions of the employer in Ms. Bonia's case seemed inconsistent with their own Recommendations:

> *#7 Staffing within each of the divisions must be consistent. Employees will be given RCMP staffing priority consideration. Incumbents of relocated positions will be given first consideration. Secondly, affected employees will be placed within their own division. Finally, remaining vacancies will be staffed by affected employees within the region.*
>
> *#8 Rights of incumbents be protected as follows:*
>
> - *competitions be held;*
> - *when competitions are being run for a position, only those in the affected positions will be given the opportunity to compete for the position ie: three positions being collapsed into one, the competition be restricted to only those three incumbents;*
> - *where it is not clear that a like job function exists, the USGE/PSPA Committee will review the two work descriptions to determine incumbent rights.*
>
> *# 9 A competition will be held to fill all vacant positions where there is more than one affected employee vying for that position at that level.*
>
> *#10 Affected personnel who lose a specific job function during regionalisation be allowed to return to the job function (successor rights) should the job function be reinstated, provided that it does not create another affected situation. (This recommendation would remain in effect for a three year period.)*

[93] I believe that in that regard, there was an appearance that Ms. Bonia was not treated fairly nor equitably in the overall circumstances of this case.

[94] Having found that the grievor could not establish that the collective agreement had been violated, however, I must deny her grievance.

Anne E. Bertrand
Board Member

FREDERICTON, September 30, 2002.