Date: 20020131

File: 166-34-30637

Citation: 2002 PSSRB 14

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

MICHAEL BUCHMANN

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

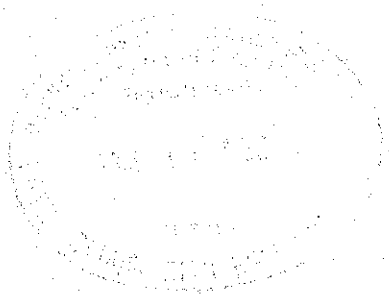
Employer

Before: Francine Chad Smith, Q.C.

For the Grievor: Robert Fredericks, Counsel, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader and Francois Auger, Counsel

Heard at Calgary, Alberta
October 3, 2001



Introduction

[1] This grievance involves the interpretation of the calculation of pay rates language of the collective agreement, between Treasury Board and the Professional Institute of the Public Service of Canada covering all the employees in the Auditing Group, Code: 204/2000, in relation to an employee promoted from another bargaining unit during the retroactive period of that bargaining unit's new agreement. The grievor was promoted from a PM-02 position to an AU-01 position during the retroactivity period of the collective agreement covering the PM positions. More specifically, the grievance involves consideration of the decision of the adjudicator in *Lajoie* (Board files 166-2-20731 and 20732) and of the decision of the Federal Court of Appeal dismissing an application for judicial review of the adjudicator's decision: *Lajoie and Treasury Board*, [1992] F.C.J. No 1019, 149 N.R. 223.

[2] The parties advised this specific issue currently affects approximately 40 other employees who have similar grievances outstanding against the employer.

[3] At the beginning of the hearing, an Agreed Statement of Facts, together with appendices, was filed. Counsel for the employer took the position that the language of the collective agreement was not ambiguous and, accordingly, extrinsic evidence should not be presented. Counsel on behalf of the grievor maintained the language was ambiguous and/or it has become ambiguous in light of the *Lajoie* decision. He expressed his wish to present evidence from the grievor and from Mr. Larry Menard, the Director of Compensation for the Canada Customs and Revenue Agency. The purpose of the evidence was to set the framework within which the grievor accepted the promotional appointment during the retroactive period, to establish the employer's historical approach to the interpretation of the specific provisions of the Terms and Conditions of Employment Policy (sometimes referred to as the Public Service Terms and Conditions of Employment Regulations) (Exhibit A1, Appendix B), which policy has been incorporated by reference into the collective agreement between the parties, and to explain how the decision of the Federal Court of Appeal in *Lajoie* has affected the employer's treatment of the operative language of the collective agreement.

[4] Having found there to be an ambiguity, I ruled that I would allow counsel for the grievor to present the evidence and that, upon completion thereof, I would allow counsel for the employer an opportunity to reconsider his position with respect to

whether or not he wished to call evidence and, if deemed appropriate, that I would allow him an adjournment in order to do so.

FACTS

[5] The Agreed Statement of Facts, marked as Exhibit A1, provided:

> *The Parties agree to the following:*
>
> *1. At all material times, Mr. Buchmann (the "grievor") was employed by the Canada Customs and Revenue Agency (the "Agency") at the Calgary Tax Services Office. Prior to November 1, 1999, the grievor was employed by the Treasury Board of Canada (the "Treasury Board").*
>
> *2. Immediately before October 4, 1999, the grievor occupied a PM-02 position. The grievor's rate of pay was at the third and last increment for said group and level.*
>
> *3. On December 29, 1998, a collective agreement was signed between the Treasury Board and the Public Service Alliance of Canada (the "Alliance") covering the Programs and Administrative Services group. The agreement set the following rates of pay for employees in the PM-02 group and level, effective April 1, 1999: 38809 40381 41949*
>
> *4. In a letter dated September 9, 1999 (attached as Appendix "A"), the grievor was offered an appointment to an AU-01 position as a Tax Auditor, effective October 4, 1999. The grievor accepted said appointment on the same day.*
>
> *5. The above-mentioned letter also stated that the grievor's salary range for the appointed position would be $37,437 to $49,280, and that the rate of pay on appointment would be determined in accordance with the Public Service Terms and Conditions of Employment Regulations (attached as Appendix "B").*
>
> *6. On May 5, 1999, a collective agreement was signed between the Treasury Board and the Institute regarding the Audit group (attached as Appendix "C"). The agreement set the following rates of pay for employees in the AU-01 group and level, effective May 5,1999: 37437 39132 40827 42510 44202 45893 47587 49280*
>
> *7. The grievor's rate of pay on appointment was set at $44,202. This was based on the rate of pay the grievor was receiving at the time of his appointment on October 4, 1999, i.e., $41,949.*
>
> *8. On May 16, 2000, a collective agreement was signed between the Treasury Board the Alliance regarding the*

> *Programs and Administrative Services group (attached as Appendix "D"). The agreement set the following rates of pay for employees in the PM-02 group and level, effective June 21, 1999: 39585 41189 42788*
>
> *9. It is based on this retroactive pay raise that the grievor now alleges the Agency should recalculate his promotion using the $42,788 figure.*
>
> *10. It is common ground between the parties that applying the $42,788 figure to a retroactive recalculation would result in the grievor being placed at the sixth increment of the AU agreement, i.e., $45,893.*
>
> *The parties reserve the right to call additional evidence at the hearing of the above noted reference to adjudication.*

[6] The exhibits referred to in the Agreed Statement of Facts were marked and included in Exhibit A1.

[7] Neither the evidence of the grievor, Mr. Michael Buchmann, nor the evidence of Mr. Larry Menard, the Director of Compensation for the Canada Customs and Revenue Agency, was contentious.

[8] The evidence of Mr. Buchmann fleshed out the facts contained in the Agreed Statement of Facts and provided additional background information. Mr. Buchmann had been employed with the Department of National Revenue since July, 1984. When he began his employment he had a professional designation as a certified general accountant. At the material time, prior to October 4, 1999, he had been employed as a PM-02. The rates of pay established under the collective agreement had expired as of June 20, 1999. On October 4, 1999, before the then current collective agreement had been concluded, the grievor received an appointment to the position of tax auditor, AU-01. A letter dated September 9, 1999 from his employer set out the terms of the appointment (Exhibit A1, Appendix A). That letter reads, in part, as follows:

> *Dear Michael:*
>
> *Re: Competition #: 98-NAR-CC-PRA-CGY-416*
> *Position Title: AU-01- Tax Auditor*
> *Position No: 3O0J3S09*
> *Position Location: Calgary, Alberta*
>
> *On behalf of Revenue Canada I am pleased to offer you an appointment as an AU-01, Tax Auditor, position number 30013509, in Calgary, Alberta, effective October 4, 1999.*

> *The salary range for this position is $37,437 - $49,280 per annum. Your salary rate on appointment will be determined in accordance with the Public Service Terms and Conditions Employment Regulations. You will be entitled to consideration for annual pay increments until the maximum level of the pay scale is reached.*

[9] The grievor moved into the appointed position and his salary changed from $41,949 to $44,202. He had been a union steward for the bargaining unit for the PM classification for a number of years and he knew that a promoted employee was to receive the smallest increment level as an addition to his salary. In the past he had dealt with issues similar to the one he had found himself in as a union steward and his advice to his co-workers was that once the new collective bargaining agreement was reached, people in positions similar to his would have their levels adjusted upward. As a steward, he also had access to the employer's manuals, particularly the Terms and Conditions of Employment Policy (Exhibit A1, Appendix B).

[10] Following the conclusion of negotiations for the new contract in May, 2000, the grievor received the retroactive pay he was entitled to in his position as PM-02 up to the date of his new appointment; however, his salary in his new audit position was not revised upward based upon the retroactive raise in pay for the PM positions, as the grievor had expected.

[11] He understood his grievance was denied because the employer was applying the principles contained in the decision of the Federal Court of Appeal in *Lajoie* to his situation. In August 2000 he received a copy of a memorandum dated July 27, 1999, directed to compensation managers and chiefs of staff relations, regarding the implementation of revised rates of pay (Exhibit U3) advising that in light of the Federal Court ruling in *Lajoie*, the salary for employees who were promoted, transferred or deployed during the retroactive period, such as the grievor was, was not to be recalculated.

[12] The grievor acknowledged that the July 27, 1999 memorandum regarding implementation of revised rates of pay (Exhibit U3) could have, in fact, been posted on the Treasury Board Secretariat website well before it was delivered to him in August, 2000; however, he stated he had no reason to check the website for such a revised policy and, in fact, he had no definite knowledge of when it was actually posted.

[13] Following the completion of the four steps of the grievance process, the grievor had two outstanding queries in relation to the rationale for applying the *Lajoie* decision in situations similar to his and he addressed them to Ms. Gobeil, the Assistant Commissioner, Human Resources Branch of the Canada Customs and Revenue Agency. She responded on April 27, 2001 in a letter (Exhibit U4) stating that she accepted the Treasury Board's position with respect to the application of the *Lajoie* decision to all employees because the language of the collective agreement under the *Lajoie* grievance was common to all collective agreements. The letter went on to note:

> [...] *the Court confirmed that the Employer had to simply apply the 'straight down' rule. Treasury Board believes it would not be appropriate to interpret this common collective agreement language in a manner different from the Federal Court.*

[14] At this juncture of the grievor's evidence, counsel sought to introduce two Treasury Board Secretariat policies dated November 8, 2000 and January 31, 2001. Following objection to the introduction of these documents by counsel for the employer, I ruled these were not relevant at this point of the hearing and therefore not admissible through this witness.

[15] Mr. Larry Menard testified that one of his duties as Director of Compensation for the Canada Customs and Revenue Agency is to interpret issues pertaining to the Agency's legal obligations regarding compensation and to communicate appropriate instructions to staff. He testified that as of May 30, 1999 the Department of National Revenue, or Revenue Canada, was subject to all Treasury Board policies. When the department became an agency on November 1, 1999, the Agency adopted all Treasury Board policies that existed at that time. Accordingly, the July 27, 1999 policy regarding *Lajoie* would have continued and it remains operative. The Treasury Board policies were posted on the employer's website.

[16] Prior to the Canada Customs and Revenue Agency being created, Revenue Canada had a policy memorandum regarding pay calculations during the retroactive period. This memorandum was marked as Exhibit U5. A compensation bulletin regarding practice dated September 1, 2000 was also in place and it was marked as Exhibit U6. Mr. Menard testified he was aware of Treasury Board policies developed subsequent to the Agency obtaining its status that contained policies that did not apply the *Lajoie* decision [apparently as the decision was interpreted in the July 27

memorandum]. However, he testified those new policies did not apply to the Agency, as the employer, because they had not been specifically adopted by its board of management. He testified that his compensation staff was continually fielding questions about the application of new Treasury Board policies; however, the inquiries were never responded to in writing.

ISSUE

[17] Does a retroactive revision to the rate of pay for the initial classification require a recalculation of the rate of pay for the current position where the appointment to the current position constituted a promotion made during the retroactive period?

ARGUMENT ON BEHALF OF THE GRIEVOR

[18] Counsel on behalf of the grievor maintained the employer is required to first recalculate the employee's pay for the initial position and then recalculate the employee's rate of pay for the new position using the revised rate of pay from his previous position.

[19] Counsel indicated that, prior to any recalculation of pay pursuant to the retroactive provisions, the grievor's appointment to the AU position was a promotion resulting in a pay differential of $2,253. Following the grievor's retroactive pay increase in his former PM position, and the employer's failure to recalculate his rate of pay in the new position based on the PM retroactive rate, the pay differential between the PM retroactive rate and his AU rate was reduced to $1,114. As a result of that reduction in the pay differential, the new appointment could no longer be regarded as a promotion because the pay differential fell below that required by the definition of promotion in section 24 of the Terms and Conditions of Employment Policy. Consequently, the promotion that the new appointment appeared to give to the grievor was transformed into a transfer.

[20] With respect to the employer's own policy manual, sometimes referred to as the Treasury Board of Canada Secretariat Policy, (Exhibit U2), which contains directions for pay rate calculations, counsel acknowledged that it does not override applicable legislation, regulations, provisions in the collective agreement, or judicial interpretations pertaining to those matters. He relied upon it nevertheless because it clearly set out the past method of recalculation of rates of pay pertaining to a promotion made during the retroactive period. Counsel relied upon the fact that there

had been no consequential change in the legislation, the regulations, or terms of the collective agreement; nevertheless, the employer changed its approach to the issue solely as a result of the *Lajoie* adjudication and judicial review decisions.

[21] Counsel for the grievor argued that while the *Lajoie* case requires appropriate deference, nevertheless it must be applied in the appropriate and proper perspective, and as it was intended.

[22] Counsel relied upon the wording of the Policy (Exhibit A1, Appendix B), specifically the use of the word "entitled" in subsection 20(1) and noted how this differed from the use of the word "received" in paragraph 2 of the employer's own policy manual (Exhibit U2), which discusses pay rate change on promotion. He argued the retroactive application of the pay raise to the grievor's former position applies to his current position. In this regard, he relied upon paragraph 5.6 of the employer's policy manual. Although, paragraph 5.6 applies to employees in acting positions, counsel argued it was demonstrative of what should occur in a factual situation such as the one before the adjudicator. More germane to the issue at hand is the procedure for calculation of raises for promotion as discussed under paragraph 2.1 of the employer's policy manual. He also relied on paragraph 3.1 regarding the procedure for transfer, paragraph 3.2 regarding transfer during a probationary period, and paragraph 10 regarding revisions specifically during the retroactive period, including paragraph 10.2.2 which reads as follows:

> ***10.2.2 Promotion, Transfer or Demotion***
>
> *Employees promoted, demoted or transferred during the retroactive period shall have their rate of pay calculated using the revised rates of pay.*

[23] Using this particular policy statement from the employer's manual, together with the example cited thereunder, and applying it to the facts at hand, he submitted the correct calculation would be in the grievor's favour. With respect to this particular point, counsel for the employer agreed that the use of the example and calculation as maintained by counsel for the grievor was correct - subject to general issues of whether the employer's policy manual was binding and valid as forming any part of the contract of employment between the parties.

[24] Counsel for the grievor then outlined the law as it relates to the conditions of employment for the employer, the Canada Customs and Revenue Agency. Pursuant to

section 51 of the *Canada Customs and Revenue Act*, the board of the Agency is empowered to establish terms and conditions of employment. The board incorporated the Public Service Terms and Conditions of Employment Policy (Exhibit A1, Appendix B) into its collective agreement with its employees, by reference, as those policies (or 'policy regulations'), existed when the Agency came into being. Those 'policy regulations' as then in existence may of course vary with the Public Service Terms and Conditions of Employment Policy as it currently exists and applies to Treasury Board employees.

[25] Pursuant to the state of the Terms and Conditions of Employment Policy applicable to the Canada Customs and Revenue Agency, specifically subsection 20(1) and section 23, the grievor is a public servant pursuant to Part II of Schedule 1 of the *Public Service Staff Relations Act*. His counsel maintained that section 24 of the Policy, insofar as it provides a scheme for employees moving from one position to another, provides for a demotion, a transfer, or a promotion (see also sections 25 and 26 regarding transfer). Subsection 24(1) addressing the rate of pay uses the key phrase, "the maximum rate of pay applicable", which is clearly distinguishable from the employer's position that utilizes for purposes of the current salary the "maximum pay received". Furthermore, the scheme of appointments must be taken into account. That is, a promotion must meet a minimum pay increase; otherwise it is not a promotion but merely a transfer under the collective bargaining scheme as reflected in the Terms and Conditions of Employment Policy effective upon the creation of the Agency.

[26] Initially, the grievor's appointment was a promotion and his rate of pay was calculated as such. The effect of the employer's position would be that his current rate of pay is not to be recalculated and, accordingly, then if one compares his current rate of pay with the rate of pay he was "entitled to" as a result of the retroactive pay, his current position is no longer a promotion but rather becomes retroactively a transfer. While the employer relies upon the Federal Court of Appeal decision in *Lajoie*, the decision did not address the distinction between the employer's interpretation focusing on salary "received" and the word "entitlement" used in the Terms and Conditions of Employment Policy incorporated into the collective agreement.

[27] Counsel for the grievor also relied upon the agreement between the Treasury Board and the Public Service Alliance of Canada signed on May 16, 2000 (Exhibit A1, Appendix D). Sub paragraph 64.03(b)(iii) provides:

> *Rates of pay shall be paid in an amount equal to what would have been paid had this Agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay;* [...]

[28] The effective date of the agreement is contained in Appendix A and is noted as June 21, 1999. That appendix also utilizes the words "from" a specified salary for a PM-02 and "to" a specified salary thereby denoting the salary rate prior to the effective date and the salary rate as of the effective date. According to counsel for the grievor, this specific contractual language reinforces the position of the grievor's entitlement.

[29] Counsel for the grievor then discussed some examples of anomalies that would result if the employer's interpretation of the effect of a retroactive pay increase to a former position was applied. The first one is the unjustifiable pay difference between a PM-02 promoted one day before the end of the retroactive period ($44,202) and a PM-02 promoted one day after the expiration of the retroactive period ($45,893). The second example illustrated how the employer's interpretation could be open to abuse. The promotion of a more favoured employee could be held back until after the retroactive period, while that of a less favoured employee could be made during the retroactive period, hence resulting in a similar significant pay differential.

[30] Counsel for the grievor then distinguished the *Lajoie* decision. Firstly, turning to the decision of the adjudicator, he pointed out the factual situation was different from the one at hand because there the rates for the PM classification had not expired and the retroactivity related only to the AU level. Secondly, the revision to the AU rates of pay was so dramatic that in recalculating the rate of pay during the retroactive period for the grievor in that case, the employer first moved that grievor to a lower pay level, within the AU classification, which still resulted in a technical promotion from the PM level, and then gave him a retroactive pay increase, which resulted in an overall lower rate of pay than had that grievor been left at his then classification level and given the retroactive increase. The fact the adjudicator rejected the employer's approach drew counsel for the grievor to conclude that the result of the adjudicator's decision in *Lajoie* was to give Mr. Lajoie the maximum benefit in light of the retroactive pay increase.

[31] Counsel then turned to the decision of the Federal Court of Appeal. The Court of Appeal approached the issue by interpreting the applicable terms and conditions of employment, including the reference to the applicable Terms and Conditions of Employment Policy, and, in effect, ended up agreeing with the result of the adjudicator's decision. Ultimately, the *Lajoie* case calculated the final rates of pay based only upon the grievor's actual base rate of pay in the initial position. The utilization of the base rate of pay as the starting point for these calculations is the logical way and the prescribed way of addressing them. In the *Lajoie* case, this calculation utilizing the base rate of pay as the starting point to determine the appropriate pay level was done once; therefore the calculation should not be made a second time, and the retroactive pay increase was then calculated upon that pay level. In the instant case, although an initial calculation was done once taking into account the grievor's base rate, the justification for redoing that calculation is that at the time the grievor's base rate was not his true or actual rate. (In *Lajoie*, there was no retroactive change to the PM rates; only the AU rates were revised.) The grievor's true or actual PM-02 rate here was that rate which would ultimately be negotiated and applied retroactively as if the "agreement has been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay". (See Exhibit A1, Appendix D: Agreement between the Treasury Board and Public Service Alliance of Canada, paragraph 64.03). According to counsel for the grievor, this recalculation must be done because fairness demands employees receive the promotion they think they are going to receive in light of ongoing contractual negotiations. If section 27 of Policy did not exist, employees such as the grievor, having been promoted during the retroactive period, would lose the benefit of the increment. If there was no section 46(c) for acting pay, similarly there would be no benefit for employees to assume greater duties because they would then be penalized with respect to the increment if they had been in an acting position during the retroactive period.

[32] Lastly, counsel for the grievor urged the adjudicator to make a purposeful interpretation of the relevant provisions and look at all the pay provisions in the context of the whole scheme. The rationale of the pay and promotion scheme includes fair compensation, elimination of inequities, elimination of different treatment, and the elimination of the possibility of abuse. The Policy incorporated into the collective agreement clearly differentiates between a transfer and a promotion in terms of the size of the pay increments. To disregard this scheme and change a promotion into a

transfer because the promotion occurred during a retroactive period is to defeat the purpose of the collective bargaining scheme's pay provisions. The clear rationale of section 46(F)(2) of the policy is to ensure fairness, to give protection to pay rates, and to ensure no deterioration in pay occurs for an employee.

[33] Counsel relied generally on the rules of interpretation pertaining to statutes and collective agreements being designed to avoid absurd results and more specifically upon a number of cases addressing the issue of retroactivity in pay in general and supporting his arguments. The cases relied upon were: *Lajoie and Treasury Board (Revenue Canada-Taxation)* (1991), Board files 166-2-20731 and 20732; *Canada (Attorney General) v. Lajoie* [1992] F.C.J. No. 1019, 149 N.R. 223; *Re Penticton and District Retirement Service and Hospital Employees' Union, Local 180* (1977), 16 L.A.C. (2d) 97; *Re Durham Memorial Hospital and London & District Service Workers' Union, Local 220* (1991), 19 L.A.C. (4th) 320; *Ontario Power Generation and Society of Ontario Hydro Professional and Administrative Employees (Kirkham Grievance)*, [1999] O.L.A.A. No. 496; *St.-Cyr and Treasury Board (Employment and Immigration)* (1984), Board file 166-2-13769 ; *Antonopoulos and Treasury Board (Veterans Affairs Canada)* (1990), Board file 166-2-20363; and *Bethell and Treasury Board (National Defence)* (1993), Board file 166-2-22225.

ARGUMENT ON BEHALF OF THE EMPLOYER

[34] Counsel for the employer began by noting this was a reference to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*. Accordingly, we are addressing a grievance alleging a violation of the collective agreement and the grievor bears the burden of proof to establish, on a balance of probability, that a provision of the collective agreement has been violated. He maintained that the burden of proof had not been met to demonstrate either that a violation occurred or what particular provision of the collective agreement had been violated.

[35] To support his contention, he relied upon the letter of appointment, Appendix A to Exhibit A1. He argued the appointment was clearly made effective October 4, 1999 and pursuant to section 51 of the *Public Service Staff Relations Act*, the grievor's then rate of pay, as set out in the relevant collective agreement, had been extended and accordingly, the grievor's then rate of pay was a legal rate of pay. The letter provided the salary rate on his appointment would be in accordance with the Policy and contained no mention of any contingency or recalculation of rate even though

everyone knew of the ongoing negotiations. The terms of the offer were clear and it was accepted without qualifications. Therefore, there was a meeting of the minds and the grievor's rights were vested at that time. Counsel noted this letter was sufficiently similar to that contained in the *Lajoie* case insofar as the terms of the appointment were certain and unconditional.

[36] He relied upon the *Lajoie* decision as full support for the employer's position throughout. In that case, the applicable language was the same as that in the instant case and in both cases, the appointment was a promotion at the time it was made. Subsection 24(2) is the operative clause and there is no indication that the employer violated it. It specifies the grievor was entitled to what he received. The use of the words "was entitled to" is past tense. Section 51 of the *Public Service Staff Relations Act* provides for a legal rate of pay once a collective bargaining agreement has expired and accordingly that was what the grievor here was entitled to.

[37] The heart of the employer's case is contained in the Federal Court of Appeal's decision in *Lajoie* at paragraphs 14, 17 and 18:

> *[14] First, I find it hard to read ss. 65 and 66 of the Regulations [now sections 23 and 24] as allowing retroactive revision of all, the consequences of an appointment every time a collective agreement gives employees retroactive salary increases. In my opinion, s. 65 [s. 23] should be read as enabling both employer and employees to know at once whether a new appointment is a promotion (s. 65(1)), a demotion (s. 65(2)) or simply a transfer (s. 65(3)). It seems to me that any other conclusion would lead to utter confusion: [...]*
>
> [. . .]
>
> *[17] Further, there is nothing in the applicable legislation which imposes the result sought by the government. On the contrary, clause 27.03(c)(iii) of the agreement indicates that the retroactive revision of pay is a contractual fiction which requires that certain amounts be paid as salary as if the agreement had been signed at an earlier date. According to the text itself, this fiction applies only to payments, not to the other aspects of relations between the employer and its employees. In other words, the agreement speaks of an action which the employer undertakes to perform in the future; it does not change what has already happened in the past. The appointment to a position and a level is not altered by a payment that the employer undertakes to make on the*

> *basis of an assumption which he recognizes is contrary to the reality.*
>
> *[18]* [...] *The starting-point of any salary review is the present salary level; in the case of a new appointment that level is necessarily fixed at the time the appointment is offered by the employer and accepted by the employee.*

[38] The language in the collective agreement focuses on the time of the appointment. Section 27 of the Policy is required because of section 24 to show the impact of section 24 is too limited and therefore creates a specific need to address increments in specific instances.

[39] There is no evidence of a violation of the terms of the letter of appointment; there is no evidence of a violation of subsection 24(2) of the Policy, nor can there be a violation of the new contract entered into between the parties because section 64.03 contains exactly the same wording as did the similar document in the *Lajoie* decision. (See paragraph [18] of *Lajoie*). The Federal Court of Appeal, at paragraph [14] of *Lajoie,* has answered the question by its reference to the absurdity of re-opening the promotion calculation.

[40] The effect of *Lajoie* is that an employer cannot recalculate a formula of pay pursuant to a promotion in order to claw back pay. If that is so, then the employer should not be required to recalculate in order to pay more money to an employee.

REASONS FOR DECISION:

[41] Is the employer required to recalculate the rate of pay in the grievor's current position where that position was a promotion made during the retroactive period of the former position?

[42] When addressing a contentious interpretation issue, it is useful to review the accepted principles of interpretation. These principles have been accepted as providing general direction only. There is no doubt that ultimately the words of the collective agreement, and/or applicable legislation will determine the issue. The principles of interpretation are addressed in *Collective Agreement Arbitration in Canada,* (third edition), Palmer and Palmer, at pages 121 to 128. The learned authors refer to the principles as rules of construction, which they list and discuss under twelve headings, the material ones being: A. Words are to be given ordinary meaning; B. The collective agreement to be read as a whole; C. Where two possible meanings

open, efficacy a consideration; and K. Unless specifically stated, provisions of a collective agreement should not be given retroactive effect.

[43] The second step in approaching the issue then would be to consider the words in issue and the overall scheme of which they are a part. Then reference should be made to arbitral and judicial authority that has addressed the specific issue or a similar or related issue. In this particular case, counsel for the employer relies upon the *Lajoie* decision of the Federal Court of Appeal that he argues has addressed the issue, specifically the issue of the interpretation to be placed upon the Terms and Conditions of Employment Policy incorporated by reference into the collective agreement. Such a pronouncement would be binding upon this adjudicator. Although the grievor in this case is no longer under the same legislative employment regime as a Treasury Board employee because of the recent Agency status of his employer; nevertheless, for a quasi-judicial body to place an interpretation different from that of the Federal Court of Appeal, upon identical language in an identical factual situation, would be patently unreasonable.

[44] Lastly, as counsel for the employer noted, the onus in this case lies with the grievor. The case submitted on behalf of the grievor must establish, on a balance of probability, that the interpretation he asserts is the appropriate one. If after reviewing the issue the adjudicator has not been so persuaded, the grievance must be dismissed.

[45] The language that is in dispute arises from the newly negotiated collective agreement and the specific Terms and Conditions of Employment Policy incorporated by reference into the collective agreement between the parties.

[46] The relevant articles of the new collective agreement are articles 66 and 64, which provide:

> *ARTICLE 66*
>
> *DURATION*
>
> *66.01 This Agreement shall expire on June 20, 2000.*
>
> *66.02 Unless otherwise expressly stipulated, the provisions of this Agreement shall become effective on the date it is signed.*

ARTICLE 64

PAY ADMINISTRATION

64.01 Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.

64.02 An employee is entitled to be paid for services rendered at:

(a) the pay specified in Appendix "A", for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment;

or

(b) the pay specified in Appendix "A", for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.

64.03

(a) The rates of pay set forth in Appendix "A" shall become effective on the dates specified.

(b) Where the rates of pay set forth in Appendix "A" have an effective date prior to the date of signing of this Agreement, the following shall apply:

(i) "retroactive period" for the purpose of subparagraphs (ii) to (v) means the period commencing on the effective date of the retroactive upward revision in rates of pay and ending on the day this Agreement is signed or when an arbitral award is rendered therefore;

(ii) a retroactive upward revision in rates of pay shall apply to employees, former employees or in the case of death, the estates of former employees who were employees in the groups identified in Article 9 of this Agreement during the retroactive period;

(iii) rates of pay shall be paid in an amount equal to what would have been paid had this Agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay;

(iv) in order for former employees or, in the case of death, for the former employees' representatives to receive payment in accordance with subparagraphs (b)(iii), the Employer shall notify, by registered mail, such individuals

at their last known address that they have 30 days from the date of receipt of the registered letter to request in writing such payment, after which time any obligation upon the Employer to provide payment ceases;

(v) no payment or no notification shall be made pursuant to paragraph 64.03(b) for one dollar or less.

64.04 Where a pay increment and a pay revision are effected on the same date, the pay increment shall be applied first and the resulting rate shall be revised in accordance with the pay revision.

64.05 This Article is subject to the Memorandum of Understanding signed by the Employer and the Alliance dated February 9, 1982 in respect of red-circled employees.

64.06 If, during the term of this Agreement, a new classification standard for a group is established and implemented by the Employer, the Employer shall, before applying rates of pay to new levels resulting from the application of the standard, negotiate with the Alliance the rates of pay and the rules affecting the pay of employees on their movement to the new levels.

64.07

****

(a) When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least three (3) consecutive working days or shifts, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.

(b) When a day designated as a paid holiday occurs during the qualifying period, the holiday shall be considered as a day worked for purposes of the qualifying period.

64.08 When the regular pay day for an employee falls on his or her day of rest, every effort shall be made to issue his or her cheque on his or her last working day, provided it is available at his or her regular place of work.

[47] The relevant sections of the applicable Terms and Conditions of Employment Policy are:

> *Entitlement to remuneration*
>
> *20. (1) Subject to these regulations and any other enactment of the Treasury Board, an employee is entitled to be paid, for services rendered, the appropriate rate of pay in the*
>
> *relevant collective agreement or the rate approved by the Treasury Board for the group and level of the employee's classification.*
>
> *20. (2) Unless modified by these regulations, the rates of pay and allowances and any other compensation established by the Treasury Board in effect immediately before the coming into force of these regulations and the conditions respecting their payment shall continue in effect.*
>
> *Dual remuneration*
>
> *21. Unless authorized by or under an Act of Parliament, no payment additional to the remuneration applicable to an employee's position (hereinafter referred to as "his or her regular position") shall be made out of the Consolidated Revenue Fund to an employee in respect of any service rendered by the employee unless the deputy head of the organization in which the employee occupies his or her regular position certifies that, in his or her opinion, the performance of the additional service does not impair the employee's effectiveness in his or her regular position.*
>
> *Rate of pay on appointment or deployment*
>
> *22. Subject to these regulations and any other enactment of the Treasury Board, the rate of pay of a person on appointment to Part I Service shall be the minimum rate applicable to the position to which the employee is appointed.*
>
> *23. The rate of pay on appointment or deployment of an employee, a person in the Public Service, a member of the Royal Canadian Mounted Police or of the Canadian Armed Forces to a position to which these regulations apply, shall be established in accordance with the promotion, deployment and transfer by appointment or demotion rules as applicable.*
>
> *Rate of pay on promotion*
>
> *24. (1) The appointment of an employee described in Section 23 constitutes a promotion where the maximum rate of pay applicable to the position to which that person is appointed*

exceeds the maximum rate of pay applicable to the employee's substantive level immediately before that appointment by:

(a) an amount equal to at least the lowest pay increment for the position to which he or she is appointed, where that position has more than one rate of pay; or

(b) an amount equal to at least four per cent of the maximum rate of pay for the position held by the employee immediately prior to that appointment, where the position to which he or she is appointed has only one rate of pay.

24. (2) Subject to Sections 27 and 28, on promotion, the rate of pay shall be the rate of pay nearest that to which the employee was entitled in his or her substantive level immediately before the appointment that gives the employee an increase in pay as specified in subsection (1) above; or an amount equal to at least four per cent of the maximum rate of pay for the position to which he or she is appointed, where the salary for the position to which the appointment is made is governed by performance pay.

Rate of pay on demotion

25. (1) A person is demoted where pursuant to Section 50(A), he or she is appointed to a position to which these regulations apply that has a lower maximum rate of pay than the maximum rate applicable to the employee's former substantive level.

25. (2) Subject to Sections 27 and 28, where a person described in Section 23 is demoted, he or she shall be paid the rate of pay that is nearest to but not more than the rate of pay the employee was entitled to in his or her substantive level immediately before the appointment.

Rate of pay on deployment or transfer by appointment

26. (1) A person described in Section 23 is deployed or transferred by appointment where the deployment or appointment to a position to which these regulations apply does not constitute a promotion or demotion.

26. (2) Subject to Sections 27 and 28, where the appointment constitutes a deployment or transfer by appointment, the employee shall be paid the rate of pay that is nearest to but not less than the rate of pay the employee was entitled to in his or her substantive level immediately before the deployment or appointment, or if there is no such rate, at the maximum rate of pay for the position to which he or she is deployed or appointed.

> *26. (3) Where a person employed in Part I Service is deployed or transferred by appointment during the probationary period to a position to which these regulations apply, the employee shall be paid in the new position at the rate he or she would be receiving in that position if deployed or appointed to it on the date of deployment or appointment to his or her former substantive level position.*
>
> *Appointment or deployment on pay increment date*
>
> *27. Where an employee is promoted, deployed or transferred by appointment on the day on which a pay increment would otherwise have become due, the employee's rate of pay in that position on the day immediately before the appointment or deployment shall be deemed to have been the rate of pay that he or she would have received if the pay increment had become due on that date.*
>
> *Rate of pay on appointment following declaration of surplus or lay-off.*
>
> *28. (1) On appointment to a position with a lower maximum rate of pay, as a result of being declared surplus or being laid off, an employee shall be paid in accordance with the salary protection provision of the Work Force Adjustment Policy.*
>
> *28. (2) No section of these regulations shall limit in any way the application of this salary protection provision. However, where the normal pay rules confer the greater pay benefit, the salary protection provisions do not apply.*
>
> *28. (3) Except as otherwise provided, where a laid-off person is reappointed to a position within one year from the date of lay-off, the employee shall be paid as if, at the time of his or her appointment, he or she held a position of the same group and level as the position held when laid-off, and his or her rate of pay in that position was the rate of pay for that position at the time of the reappointment.*

[48] Counsel on behalf of the grievor argues that sections 24 to 27 are relevant to the interpretation of the retroactivity articles of the collective agreement because they explain the scheme of which section 20 is only one part. Also of significance is the parties' stated intention with respect to the retroactivity of the salary increases for the positions of the grievor during the relevant period of time. That statement is contained in article 64.03 of the collective agreement as noted above.

[49] I do not agree that the Federal Court of Appeal's decision in *Lajoie* supports the position counsel for the employer contends that it does. Counsel for the employer

first relied upon paragraph [11] of the decision, which noted the employer's position in the case was "that once the new collective agreement had been signed the whole matter had to be reopened, first to determine whether the respondent's appointment dated July 29, 1987 was still a promotion, and second to recalculate the increments to which he was entitled at the time of the appointment and at the time of his transfer a year later". Secondly, counsel relied upon paragraphs [14] and [17] wherein Mr. Justice Hugessen rejected the employer's position, stating:

> *[14] First, I find it hard to read ss. 65 and 66 of the Regulations [now sections 23 and 24] as allowing retroactive revision of all, the consequences of an appointment every time a collective agreement gives employees retroactive salary increases. In my opinion, s. 65 [s. 23] should be read as enabling both employer and employees to know at once whether a new appointment is a promotion (s. 65(1)), a demotion (s. 65(2)) or simply a transfer (s. 65(3)). It seems to me that any other conclusion would lead to utter confusion:*
> . . .
>
> . . .
>
> *[17] Further, there is nothing in the applicable legislation which imposes the result sought by the government. On the contrary, clause 27.03(c)(iii) of the agreement indicates that the retroactive revision of pay is a contractual fiction which requires that certain amounts be paid as salary as if the agreement had been signed at an earlier date. According to the text itself, this fiction applies only to payments, not to the other aspects of relations between the employer and its employees. In other words, the agreement speaks of an action which the employer undertakes to perform in the future; it does not change what has already happened in the past. The appointment to a position and a level is not altered by a payment that the employer undertakes to make on the basis of an assumption which he recognizes is contrary to the reality.*

[50] The flaw in counsel's approach is twofold. Firstly, counsel for the employer has selected isolated portions of the decision that do not capture the complete rationale of the decision. Secondly, the facts are markedly different from the instant case.

[51] The entire portion of the rationale employed by the Court, which begins at paragraph [14], is as follows:

> *[14] First, I find it hard to read ss. 65 and 66 of the Regulations [now sections 23 and 24] as allowing retroactive revision of all the consequences of an appointment every*

time a collective agreement gives employees retroactive salary increases. In my opinion, s. 65 [s. 23] should be read as enabling both employer and employees to know at once whether a new appointment is a promotion (s. 65(1)), a demotion (s. 65(2)) or simply a transfer (s. 65(3)). It seems to me that any other conclusion would lead to utter confusion: an employer who believed he had disciplined an employee for incompetence by demoting him would realize two years later that as the result of retroactive pay he had actually given the employee a transfer or even a promotion; on the other hand, an employee who enthusiastically accepted what seemed to him to be a promotion would two years later, to his great disappointment, find it was actually a demotion.

[15] For example, in the facts of the case at bar we do not even know what pay the respondent would have received if he had continued in the PM group, which of course is another bargaining unit represented by another bargaining agent. What would happen if the PMs negotiated a retroactive increase which placed them at a level higher than that of the AUs?

[16] The interpretation suggested by the employer does not take into account line one of the grid and the word "from", which clearly indicates that that is where the starting-point of the calculation must be found. Further, this interpretation is capable of producing harmful and unfair results. It was not in dispute that ss. 65 and 66 apply only to transfers made within the Public Service and not to persons hired from outside, that is, persons not already members of the Public Service. There is no question that if the respondent had come from the private sector when he was appointed to the second AU-02 level on July 29, 1987, the retroactivity mentioned in the new collective agreement would have given him a salary increase from $38,377 to $39,893 effective at the time of his appointment. Why should his fate be different simply because he was already working in the Public Service? - and how is one to explain the fact that two employees appointed at the same time to the same level of the same position would receive different pay solely because one had the misfortune to agree to work in the public sector before the other did?

[17] Further, there is nothing in the applicable legislation which imposes the result sought by the government. On the contrary, clause 27.03(c)(iii) of the agreement indicates that the retroactive revision of pay is a contractual fiction which requires that certain amounts be paid as salary as if the agreement had been signed at an earlier date. According to the text itself, this fiction applies only to payments, not to the other aspects of relations between the employer and its employees. In other words, the agreement speaks of an action which the employer undertakes to perform in the

> *future; it does not change what has already happened in the past. The appointment to a position and a level is not altered by a payment that the employer undertakes to make on the basis of an assumption which he recognizes is contrary to the reality.*
>
> *[18] Finally, clause 27.04 appears to enshrine the principle that account must first be taken of any possible alteration of the level before passing on to the revision of pay. The same rule is also reflected in s. 66(3) of the Regulations. The starting-point of any salary review is the present salary level; in the case of a new appointment that level is necessarily fixed at the time the appointment is offered by the employer and accepted by the employee.*
>
> *[19] In short, for the respondent the salary review took place on July 29, 1987, the date of his appointment to the AU-02 position. To calculate that review it must be determined what salary he was in fact receiving on that date. For him, as for all the other members of his bargaining unit, it clearly was the salary established under the old collective agreement. For him, as for all the others, the agreement continued to be in effect. Under that agreement, the respondent was receiving on July 29, 1987 an annual salary of $38,377, and his new rates of pay must be calculated on the basis of that figure.*

[52] The differences in the factual bases are significant. In *Lajoie* the "retroactive changes" to salary related only to the new AU position and not the initial PM position; the collective agreement salary provisions relating to the PM position had not expired when Mr. Lajoie received his promotion to a higher AU position. Perhaps more important was the fact the newly negotiated salary provisions for the AU position amounted to a significant revision of the pay step levels, which if applied retroactively, in keeping with the employer's position, would have resulted in Mr. Lajoie being placed at lower pay level in the AU position which, although still an increase in pay amounting to a promotion, would nevertheless be a lower rate of pay than the new rate established for the AU level he had originally been placed in. The result of that form of retroactivity would still have given Mr. Lajoie an increase in his move to the AU position but it would have moved him back one pay level. However, if Mr. Lajoie would have retained the pay level he was initially placed at in the AU position, his pay would have been adjusted simply by applying the 'to and from' provisions of the new collective agreement as illustrated in paragraphs [9] and [16] of the Federal Court of Appeal's decision. These same 'to and from' provisions are contained in the new collective agreement between the parties before me in Exhibit A1, Appendix D.

[53] The difficulty in the employer's approach to the *Lajoie* case is that in attempting to minimize pay costs, the practical effect of the theory it was relying on, while giving Mr. Lajoie an increase in his actual pay, nevertheless moved him to a lower level in the pay scale. That approach is contrary to the foundation of contract law that contracts speak prospectively, and the more specific qualification in labour law that usually retroactivity only relates to pay even where the language appears to say the whole agreement is retroactive, because retroactive pay can be easily calculated. See generally *Collective Agreement Arbitration in Canada*, Palmer and Palmer (third edition) at paragraph 3.27. In the *Penticton* case, Weiler noted that, where the parties expressly provide, "all provisions must be given retroactive affect unless that would lead to absurd, impractical or unintended results". The Federal Court of Appeal in the *Lajoie* decision also appears to contemplate this point in the following paragraph previously included in the lengthy excerpt above:

> *[17] Further, there is nothing in the applicable legislation which imposes the result sought by the government. On the contrary, clause 27.03(c)(iii) of the agreement indicates that the retroactive revision of pay is a contractual fiction which requires that certain amounts be paid as salary as if the agreement had been signed at an earlier date. According to the text itself, this fiction applies only to payments, not to the other aspects of relations between the employer and its employees. In other words, the agreement speaks of an action which the employer undertakes to perform in the future; it does not change what has already happened in the past. The appointment to a position and a level is not altered by a payment that the employer undertakes to make on the basis of an assumption which he recognizes is contrary to the reality.*

[54] The direction of the Federal Court of Appeal in the *Lajoie* case is contained in the following paragraphs:

> *[18] [...] The starting-point of any salary review is the present salary level; in the case of a new appointment that level is necessarily fixed at the time the appointment is offered by the employer and accepted by the employee.*
>
> *[19] In short, for the respondent the salary review took place on July 29, 1987, the date of his appointment to the AU-02 position. To calculate that review it must be determined what salary he was in fact receiving on that date. For him, as with all others members of his bargaining unit, it clearly was the salary established under the old collective agreement. For him, as for all others, the agreement continued to be in*

> *effect. Under that agreement, the respondent was receiving on July 29, 1987 an annual salary of $38,377, and his new rates of pay must be calculated on the basis of that figure.*

[55] Accordingly, the starting point for the grievor's salary review was his present salary level at the time his new appointment was offered and accepted. On September 9, 1999 the grievor was a PM-02 at the third salary level. The retroactive effect of the new collective agreement increased his pay from $41,949 to $42,788 in that position. He was offered a promotion to the AU position. Therefore the calculation of his salary level in that new position must be based upon his PM salary of $42,788 as a result of the retroactive adjustment pursuant to the new collective agreement. It is from that salary that his salary for the promotion to the AU position is to be calculated. In other words, where an employee is promoted during the retroactive period of a collective agreement covering the position the employee is moving from, the employee's salary in the new position must be recalculated based upon the retroactive salary.

[56] The argument made by counsel for the employer that somehow the grievor is bound by the terms of the September 9, 1999 letter of appointment requires comment. Although the letter of appointment may contain specific terms of employment, including whether the appointment is a promotion, transfer or demotion, care must be taken in assessing its import. When it comes to issues of pay, generally speaking the provisions of the collective agreement will apply. That being so, where the letter does not address the issue of the nature of the appointment, the nature of the appointment can be inferred from the employer's adherence to a pay scheme pursuant to the collective agreement. The utilization of a specific pay level will demonstrate whether the appointment was a promotion, a transfer or a demotion. It is not then open to the employer at a subsequent point in time to diminish, or otherwise reduce, a benefit previously conferred upon an employee. Clearly a level of pay (as distinguished from actual pay) and a right to a retroactive pay increase are benefits contemplated by the operative collective agreement(s) before me.

[57] In so concluding, this decision is consistent with the 1993 decision of then Vice-Chairperson Tenace in *Bethell and Treasury Board (National Defence)*, which cited and relied upon the same passage of Hugessen, J.A. in the *Lajoie* decision that I have quoted above.

[58] The grievor has satisfied the burden of proof in establishing his case. Accordingly, the grievance is allowed. The grievor is to be compensated for all wages and benefits as though his salary upon promotion to the AU-1 position was established at $45,893 as of October 4, 1999, being the effective date of the promotion.

Francine Chad Smith, Q.C.
Board Member

Regina, January 31, 2002.