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Citation: 2002 PSSRB 48

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JANE MICHAEL

Grievor

and

TREASURY BOARD (Veterans Affairs)

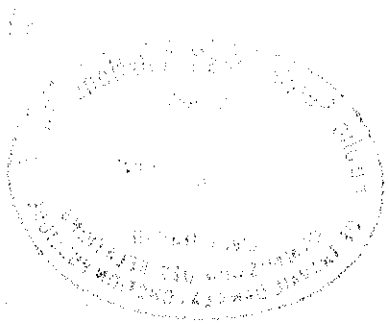
Employer

Before: Anne E. Bertrand, Board Member

For the Grievor: Yvette Michaud, Counsel

For the Employer: Harvey A. Newman, Counsel

Heard at Halifax, Nova Scotia,
July 11 and 12, 2001



[1] The facts of the present case were obtained in part and by agreement from the companion case of *Bisal*, 2002 PSSRB 43 (166-2-30176 to 30179). In that case, four lawyer employees of Veterans Affairs in Pensions Advocates positions filed same grievances alleging that they were not paid on the same pay scale as their colleagues, Area Advocates, although they had the same roles, responsibilities and classification levels. They wished to be paid at the top level of the rates of pay for LA-2 (Law Group, Level 2).

[2] In the present case, Jane Michael was an Area Advocate seconded at the LA-2(II) level. Until recently, she was always paid at this level while performing the duties of an Area Advocate, including her acting assignments as such. When grievances were filed in the companion case, Michael's employer advised that she would no longer receive that salary but rather be paid at the lower scale of an LA-2(I).

I — FACTS

[3] The facts received from the oral evidence of Roy Ridlington, Legal Advisor to National Operations Division of the Department of National Affairs, and Rick C. McLeod, Acting Chief Pensions Advocates, and Jane Michael, the grievor.

[4] Prior to 1990, there were two classification levels in the Law Group, LA-1 and LA-2. In 1990, a new collective agreement introduced two pay levels for LA-2, i.e., pay level LA-2(I) and pay level LA-2(II). Both parties agreed that LA-2(I) and LA-2(II) do not represent different classification levels but rather different pay scales. Jane Michael is classified at the LA-2 level.

[5] Explanatory pay notes were included in the 1990 collective agreement to administer these changes, and a dispute arose over their interpretation. The pay notes are reproduced below:

NOTES:

PAY INCREMENT ADMINISTRATION

(1) The pay increment period for employees paid in the ten dollar ($10) step part of the LA-1 scale is six (6) months. The minimum pay increment shall be three hundred dollars ($300) or such higher amount that the Employer may determine, or if there is no such step, to the maximum of the pay range.

(2) The pay increment period for employees paid in the LA-1 scale not designated by ten-dollar ($10) steps is six (6) months.

(3) The pay increment period is twelve (12) months for employees paid in the LA-2(I) and LA-2(II) scales. The pay increment shall be to the next higher rate in the scale of rates.

(4) Part-Time Employees

A part-time employee shall be entitled to receive a pay increment when the employee has worked a total of:

(a) nine hundred and seventy-five (975) straight-time hours for LA-1 employees; or

(b) nineteen hundred and fifty (1,950) straight-time hours for LA-2(I) and LA-2(II) employees;

during a period of employment, provided that the maximum rate for the employee's level is not exceeded.

PAY ADJUSTMENT ADMINISTRATION

(5) LA-1:

(a) An employee paid in the ten-dollar ($10) step part of the LA-1 scale shall be paid effective January 1, 1990 in the LA-1 "X" scale of rates of pay at a rate which is identical to the employee's rate of pay as of December 31, 1989.

(b) Effective January 1, 1990, an employee paid in the ten-dollar ($10) step part of the LA-1 "X" scale of rates shall be paid in the LA-1 "A" scale of rates at a rate which is 5.0% higher than the employee's rate of pay in the "X" scale of rates, rounded to the nearest ten dollars ($10)

provided that the last step in the ten-dollar ($10) step part of the scale is not exceeded.

(c) Effective January 1, 1990, an employee paid in the part of the LA-1 scale of rates not designated by ten-dollar ($10) steps, shall be paid in the LA-1 "X" scale of rates at a rate of pay which is identical to the employee's rate of pay as of December 31, 1989.

(d) Effective January 1, 1990, an employee paid in the part of the LA-1 "X" scale of rates not designated by ten-dollar ($10) steps, shall be paid in the LA-1 "A" scale of rates at the rate of pay which is immediately below the employee's rate in the LA-1 "X" scale of rates.

(e) Notwithstanding Notes 5(c) and 5(d), an employee whose position was classified at the LA-1 level on January 1, 1990, and who was paid on December 31, 1989 above the double barrier in the LA-1 scale of rates at a rate of pay of either $54,751 or $57,802, shall be paid, effective January 1, 1990 at a rate of pay which is 5.0% higher than the employee's former rate of pay (ie., $57,489 or $60,692). An employee who was paid at $57,489 on January 1, 1990, shall be considered for an annual increment (ie., to $60,692), subject to a "fully satisfactory" performance rating.

(6) LA-2(I):

An employee whose position was classified at the LA-2 level on or after January 1, 1990, and who was paid on or after December 31, 1989 at a rate of pay in the LA-1 scale of rates, shall be paid in the LA-2(I) "A" scale of rates, other than an employee who is appointed to a position to which the LA-2(II) scale of rates applies.

(7) LA-2(II):

Effective January 1, 1990, an employee paid in the LA-2 scale of rates on December 31, 1989 shall be paid in the LA-2(II) "A" scale of rates at the rate of pay which is immediately below the employee's rate of pay as of December 31, 1989.

(8) At the discretion of the Employer, the rate of an employee

> *(a) who is initially appointed, transferred or promoted during the retroactive period,*
>
> *and*
>
> *(b) who was paid a rate in the part of the LA-1 scale not designated by ten-dollar ($10) steps or a rate above the minimum of LA-2(I) and LA-2(II).*
>
> *and*
>
> *(c) who, after application of the terms and conditions governing the application of pay pursuant to 15.01 and 15.03 would be paid a rate less than that shown immediately below the rate he was receiving prior to revision,*
>
> *may be increased to any rate up to and including the rate shown immediately below the rate he was receiving. Such an increase does not change an employee's increment due date.*

[6] These same pay notes were not repeated in subsequent collective agreements.

[7] Prior to 1995, lawyers representing individuals who made claims under various legislation administered by the Department of Veterans' Affairs ("DVA"), somewhat likened to a legal aid service for pension and other claims to assist claimants in obtaining benefits, were hired as advocates in three separate agencies. These three agencies were the Bureau of Pension Advocates ("Bureau"), the Canada Pension Commission, and the Veterans' Appeal Board. The Bureau as a separate agency reported to the Minister of the DVA.

[8] Since 1995, the Bureau has become a Division of the DVA and the parties informed me that the Bureau gets its authority from the Department of Veterans Affairs Act instead of the Pension Act. Both the Canada Pension Commission and the Veterans' Appeal Board ceased to exist and a newly created Veterans' Review and Appeal Board hears both review and appeals.

[9] The lawyers hired by the Bureau still worked for the Bureau but their work changed. Pension Advocates were classified at LA-1 and these lawyers pursued the claims at the initial level and at review, while Area Advocates were classified at LA-2 and they represented the claimants at the appellate or final level of their claims.

[10] Another re-structuring of the Bureau took place in 1997 and Pension Advocates lost their work at the initial claim stage, but they maintained their role at the review level and were imposed the responsibility to represent claimants at the appellate level. In other words, Pension Advocates were now doing the same work as that of Area Advocates, yet they were not paid the same salary. Pension Advocates were paid at the LA-2(I) level while the Area Advocates were paid at LA-2(II) level.

[11] Roy Ridlington became an Area Advocate for the Bureau in 1985 and he is classified as an LA-2 and paid at the LA-2(II) level. He has been part of the bargaining team for PIPS for their contract negotiations in 1986, 1988, 1989, 1991, 1997, 1999 and he is currently involved in negotiations to replace the current collective agreement.

[12] Ridlington explained that the bargaining agent always sought parity with the Department of Justice lawyers' pay – although the latter had performance pay and bargaining unit lawyers had allotment – nevertheless the top levels of pay matched. During negotiations of 1988, the employer provided to the bargaining agent a copy of the Personnel Management Manual, Chapter on Performance Pay Plans - Overview for the Law Group of the Department of Justice and other legal officers in the public service excluded from collective bargaining. This explained how excluded lawyers were paid. These lawyers classified at the LA-2 level had two sub-levels of pay, A and B, while the bargaining unit lawyers LA-2 at that time did not have sub-levels of pay. Parity was difficult to achieve for this reason. The Performance Pay Plans - Overview Appendix B indicates how a legal officer enter the different levels:

> *LA-2, SUB-LEVEL A*
>
> *Legal officers in this salary range are at an experienced working level. Individuals are capable of performing a number of fields or sub-fields of law and undertake complex assignments. Work is performed under general direction but with considerable freedom of action.*
>
> *QUALIFICATIONS*
>
> *Normally a minimum of 4 years of legal experience related to duties to be performed are required for entry into the LA-2, sub-level A.*
>
> *LA-2, SUB -LEVEL B*
>
> *Legal officers in this salary range are at the first level of management in the Law Group, or the first level specialist.*

> *This level is intended to provide an introductory level for managers and to enable credit to be given to those who are required to accept minor managerial responsibilities in addition to practitioner duties. It is also intended to provide senior managers with greater flexibility for increasing the effectiveness of the unit.*
>
> *Also assigned to this salary range are the senior legal officers of legal services units in departments and agencies where the program size and legal complexity are moderate. Specialist positions allocated to this salary range encompass senior level advisory or operational roles in which the legal officer receives general direction from a senior legal officer. Specialists have a depth of legal knowledge and expertise in a particular field of legal specialization and are recognized within the legal community as experts in their field.*

[13] Then in 1990, parity was achieved according to Ridlington, as the new collective agreement provided for two sub-levels of pay for the LA-2 classification, LA-2(I) and LA-2(II). All lawyers in the Bureau who were at LA-1 were moved to LA-2(I), and all of those at the level of LA-2 were moved to LA-2(II). Ridlington explained that an agreement was reached that the Bureau advocates would be subject to the same policy in effect that the Justice Department in that after four years of employment, an employee in the Law Group classified in a position at level LA-1 should normally be promoted to level LA-2(I).

[14] Ridlington states he was moved from LA-2 to LA-2(II) in 1990 for two reasons: firstly, as a result of pay note 6 ((6) LA-2(I):An employee whose position was classified at the LA-2 level on or after January 1, 1990, and who was paid on or after December 31, 1989 at a rate of pay in the LA-1 scale of rates, shall be paid in the LA-2(I) "A" scale of rates, other than an employee who is appointed to a position to which the LA-2(II) scale of rates applies); and secondly, by reason of his duties at the appellate level for he was considered a first level specialist much like Justice lawyers at the LA-2(B) level.

[15] The grievor, Jane Michael, testified that her current substantive position is that of Portfolio Executive Position for Veterans Affairs. She has been seconded to the Bureau of Pensions Advocates ("Bureau") as an Area Advocate. She is presently being paid at the LA-2(I) rate, but has grieved same on the basis that she was paid at the higher LA-2(II) in the past for a series of acting appointments since 1995 (see Exhibits G-1 to G-5).

[16] Michael grieved this decision indicating she wished to be paid as other

colleagues LA-2 performing the same work and having the same responsibilities.

[17] In its final level reply, the employer states:

> *I understand your disagreement with management's decision to revise your salary to an LA-2(I) pay scale. As shared with you during the grievance hearing, this action was taken as a result of consultation with Treasury Board in regards to several issues related to the application of the LA-2(I) and (II) pay scales within the Bureau of Pensions Advocates. While I do recognize that you are performing the same duties as your colleagues classified at the LA-2 group and level in Head Office, their remuneration at the LA-2(II) pay rate is based on the fact that they were all members of the LA bargaining unit on December 31, 1989 and therefore benefited from the pay adjustments made following ratification of the 1990 LA agreement.*
>
> *The current collective agreement between the Professional Institute of the Public Service of Canada and the Treasury Board does not provide any guidance with respect to placing an employee on the LA-2(I) or the LA-2(II) pay scale. Under the circumstances and in light of Treasury Board's directive given in this matter, I have no other alternative but to deny your grievance and associated corrective action requested.*
>
> *Signed, Simon Coakeley,*
> *Assistant Deputy Minister*

[18] Her first acting appointment as Area Advocate was confirmed by letter and provided as follows:

> *December 14, 1995*
>
> *Dear Ms. Michael:*
>
> *RE: Acting Appointment*
> *Position No.: 700000-9010*
> *Position Title: Area Advocate*
> *Group and Level: LA-02(ii)*
> *Language: English Essential*
>
> *This will confirm management's request that you assume the duties of the above-noted position from September 18, 1995, until March 20, 1996.*
>
> *Your acting appointment will be at the LA-02(ii) group and level and your rate of pay will be determined in accordance with the Public Service Terms and Conditions of Employment Regulations and the Law Collective Agreement....*

[19] Michael's acting appointment was extended in 1996 as follows:

> *October 25, 1996*
>
> *Dear Ms. Michael:*
>
> *RE: Acting Appointment (Extension)*
> *Position No.: 700000-9010*
> *Position Title: Area Advocate*
> *Group and Level: LA-02(ii)*
> *Language: English Essential*
>
> *This will confirm management's request that you continue to assume the duties of the above-noted position up until March 28, 1997.*
>
> *As a result of this extension, the expiry date for your acting appointment will be amended and you will, therefore, continue to receive acting pay at the LA-02(ii) group and level for the extended period. This period may be extended further or reduced upon management's rights.....*

[20] Throughout that time, Michael remained at the LA-2(II) level and rate of pay. A further extension of her acting appointment came in 1997:

> *December 16, 1997*
>
> *Dear Ms. Michael:*
>
> *RE: Acting Appointment (Extension)*
> *Position No.: 700000-9010*
> *Position Title: Area Advocate*
> *Group and Level: LA-02(ii)*
> *Language: English*
>
> *This will confirm management's request that you continue to assume the duties of the above-noted position up until March 31, 1998.*
>
> *As a result of this extension, the expiry date for your acting appointment will be amended and you will, therefore, continue to receive acting pay at the LA-02(ii) group and level for the extended period. This period may be extended further or reduced upon management's rights.....*

[21] Michael returned to the Portfolio Executive Services, but she hoped to return to the Bureau and after extensive discussions with Rick McLeod, she returned in 2000 for another acting appointment:

> *February 15, 2000*

Dear Ms. Michael:

RE: Acting Appointment
Position No.: 3625
Position Title: Area Advocate
Group and Level: LA-02(ii)
Language: English Essential

This will confirm management's request that you assume the duties of the above-noted position from January 4, 2000 until June 30, 2000.

Your acting appointment will be at the LA-02(ii) group and level and your rate of pay will be determined in accordance with the Public Service Terms and Conditions of Employment Regulations....

[22] A secondment agreement was entered into at this time to cover the period of Michael's absence from her Home Organization. This type of agreement is signed by the employee and the host organization as well as the home organization to confirm the terms and conditions of the secondment. Importantly for Michael, such agreement indicated that Michael would receive acting pay at the LA-02(II) level for the duration of the secondment from January 4, 2000 to June 30, 2000 (see Exhibit G-5).

[23] During the winter of year 2000, McLeod approached Michael to inform her that actions by other employees in the Bureau could have an adverse effect on her job, i.e., that it could result in her being placed at the LA-2(I) scale but McLeod did not explain in such a way that she would be receiving a lesser salary. When word came that Michael's acting appointment would be extended, another secondment agreement (Exhibit G-7) was signed showing the revised duration of the secondment from January 4, 2000 to December 31, 2001. In this latest secondment agreement signed by all three parties that the period would be from January 4, 2000 to December 31, 2001. Again, in this agreement, the Bureau undertakes to pay Michael at the LA-02(II) level for the extended duration of the secondment period.

[24] Then later, just prior to June 30, 2000, McLeod informed Michael that her acting appointment would be extended but that she would be placed at the LA-2(I) level and her salary reduced accordingly. Michael was made this offer just prior to the extension of the acting appointment, and while she admitted to having accepted this news of the reduced salary, she wished to continue her commitment to the acting appointment. Michael, however, made it very clear upon accepting to continue that she was not happy with the reduction in pay and that she would do something about it. She later

filed a grievance.

[25] Michael received employer's letter confirming the extension of the acting appointment on July 10, 2000 (see Exhibit G-6), after having signed the secondment agreement (G-7):

> *July 10, 2000*
>
> *Dear Ms. Michael:*
>
> *RE: Acting Appointment (Extension)*
> *Position No.: 3625*
> *Position Title: Area Advocate*
> *Group and Level: LA-02(ii)*
> *Language: English Essential*
>
> *This will confirm management's request that you continue to assume the duties of the above-noted position from June 30, 2000, December 31, 2001.*
>
> *As a result of this extension, the expiry date for your acting appointment will be amended and you will, therefore, continue to receive acting pay at the LA-02(i) group and level for the extended period. This period may be extended further or reduced upon management's rights.....*

[26] After the issuance of this letter, another secondment agreement was forwarded to Michael for signature, and in this later agreement, the terms were modified to show that she would be paid at the lower LA-02(I) level of salary for the entire duration of the secondment period (see Exhibit G-8), i.e., from January 4, 2000 to December 31, 2001, the same period as the prior secondment agreement signed earlier (Exhibit G-7).

[27] The facts are not in dispute that the reduction in Michael's pay did not take place until after June 30, 2000, during the extended period of her secondment. Her duties did not change as a result of this change in pay. Michael stated she signed to continue in this position but that she did not agree with the reduction in pay.

[28] McLeod told Michael that the collective agreement had been re-interpreted and had to be applied in this manner, i.e., that Area Advocates were paid because they were in the bargaining unit at the time of the December 31, 1989 before the 1990 contract. The term "grandfathering" was used to explain but she had never heard this term used before.

[29] The employer's final level reply also spoke of a directive as the basis for the decision not to pay Michael at the LA-2(II) level. She therefore asked for a copy of this directive but there was none. According to Michael, she knows of other employees, such as McCabe and McArthur, who were hired in 1995 as Area Advocates and they too were paid at the LA-2(II) level.

[30] Rick C. McLeod is currently the Acting Chief of Pensions Advocate, and he has been the Associate Chief of Pensions Advocate since 1997. He first joined the Bureau of Pensions Advocates in Halifax in 1978, and held positions of District Pensions Advocate, Area Advocate and Senior Area Advocate, which last position was an excluded managerial position classified at LA-2(B).

[31] McLeod testified that Michael was very qualified to fill the acting appointments and to help with the backlog of work caused by the reforms in the legislation. He hired her as acting Area Advocate and paid her at the LA-2(II) level.

[32] In the winter of year 2000, he recalls having a conversation with Michael advising that he had just been made aware of grievances filed by Pensions Advocates in the Bureau and that it was not a classification matter as previously thought but rather a pay issue. After the filing of those grievances, the Assistant Deputy Minister Coakeley received extensive advice from Treasury Board - Compensation regarding that dispute and he was told it was a pay issue. McLeod is not certain whether he spoke of the salary change at that time with Michael but he did want to give her notice of such.

[33] McLeod explained that he felt obligated to pay Area Advocates at the LA-2(II) level because he believed it was a classification matter, knowing however that there were no differences in duties.

[34] McLeod did not see anything in writing concerning the change in salary and knows that there is no directive as mentioned in the employer's reply.

[35] The letter of extension of the acting appointment (Exh. G-6) does show Group and Level as LA-02(II) but McLeod reckoned that was just a typographical error as the body of the letter indicates that Michael will now be paid at the LA-02(I) level, which she was as of June 30, 2000.

[36] According to McLeod, the second secondment agreement (Exh. G-7) showing that Michael would be paid at the LA-02(II) level was signed prior to that letter and during between the winter months of 2000 and June of 2000, therefore, before McLeod told Michael the changes would definitely come into effect including a reduction in salary. Nevertheless, a third secondment agreement was signed prior to June 30, 2000 to show the change in Michael's level.

[37] McLeod states that under his supervision are six Area Advocates (LA-2(II) all in Charlottetown), and these have no support staff nor supervisory functions.

[38] In Canada, there are 17 District Offices which include 37 lawyer positions (2 vacancies at the moment). The single Associate Chief Pensions Advocate has five Regional Directors of District Pensions Advocates (LA-2(B)) reporting directly to him or her. For each region there is one Regional Director, and in total those Directors have 12 District Pensions Advocates (LA-2(II)) reporting. Pensions Advocates (LA-2(I)) report directly to the Regional Directors of Pensions Advocacy.

[39] From 1972 to 1995, the Bureau of Pensions Advocates was an independent agency where Area Advocates were only in Ottawa and District Pensions Advocates and Pensions Advocates were in the District offices of the various regions. Pensions Advocates prepared submissions for first and second levels of disability pensions applications and claims. Area Advocates were called upon to prepare and present appeals for claimants who were unsatisfied with the results obtained at the second level. This appeal level was the final level of process before the judicial review procedure in the Federal Court. District Pensions Advocates were excluded from bargaining unit because of their supervisory functions, and these were at the LA-2(A) level whereas others were at the LA-2(B) level.

[40] Prior to 1990, employees at the LA-1 position did not move to the LA-2 unless that position became available and the employee was the successful applicant. Therefore, Pensions Advocates could remain at the LA-1 level for years. Following the implementation of the 1990 collective agreement, all employees at LA-1 were moved to the new classification LA-2(I). Certain employees became LA-2(II) because they were Area Advocates who were LA-2 already. There were no Pensions Advocates paid at the LA-2(II) level. At that time, there were 7-8 Area Advocates, 20 Pensions Advocates and 17 District Pensions Advocates.

[41] In 1995, substantial changes were made in the processing of first level pension claims, and Pensions Advocates lost 20-30% of their work load. Appeals were added to their duties to relieve in the backlog of cases for Area Advocates. Eventually, by 1999, most District offices in Canada were conducting both first level reviews and appeals. Then that year, another type of review was added to Pensions Advocates, that of "re-consideration of decision" and for all intents and purposes, Pensions Advocates were doing essentially the same work as Area Advocates.

[42] Because of these changes, it is no longer considered that Area Advocates do "specialized" work. Everyone is a generalist, and consequently, the promotion of LA-1 is now academic says McLeod.

[43] There are no Pensions Advocates being paid at the LA-2(II) level, and McLeod states there is no policy regarding the movement from LA-2(I) to LA-2(II). Furthermore, he states that since 1990, some Area Advocates were hired and paid at the LA-2(II) level but because the employer was under a mistaken belief that secondment or acting positions of such were a classification issue, when in fact the Compensation specialist advised McLeod it was a pay issue. It was not until the filing of the grievances that the employer consulted Compensation and realized that the matter was not a classification issue. Therefore, up to and including the year 2000, when an Area Advocate was hired or placed into an acting position, he or she was paid at the LA-2(II) level.

[44] That is why McLeod explains that in Jane Michael's case, she was hired in the acting Area Advocate position but when the employer realized its mistake as having paid her at the LA-2(II) rate of pay, it dropped the "acting" position of Area Advocate and offered instead the Area Advocate position to Michael as LA-2(I). All Area Advocates being hired today are hired at the LA-2(I) rate of pay.

[45] The employer, however, will not be reverting the Area Advocates placed at LA-2(II) in 1990 back to the LA-2(I), and that is why the employer referred to the "grandfathering" aspect of this implementation. The employer realizes that those legal officers are doing the same work and not paid accordingly, but says that such is a result of the legislative changes.

[46] Ironically, the LA-2(B) salary is the same as the LA-2(II) and yet there are cases where a Regional Director is supervising an Area Advocate both of whom are at the same salary level. Only positions with management functions can obtain a salary at

the LA-2(B) or LA-2(II) level today, because the employer cannot justify that pay scale for Area Advocates nor for Pensions Advocates who are no longer considered specialists or who no longer have first level management functions.

[47] Since the filing of the grievances, the acting positions of Area Advocates have been revoked and replaced with simply Area Advocates positions and associated pay reduced to the LA-2(I) level.

[48] In its final level reply dated August 16, 2000 for those grievances, the employer writes:

> *Currently, the majority of the Area Advocates in Head Office are paid at the LA-2(II) pay rate. This difference in pay stems from the pay adjustments made following ratification of the 1990 LA collective agreement. This agreement provided pay adjustments to a newly introduced LA-2(II) pay rate for lawyers who were in the LA-2 group and level, essentially perform duties of the same nature, most Area Advocates currently still benefit from the "grandfathering" effect created by the 1990 pay adjustments. I have also informed your representative that when an Area Advocate position is vacated, the new incumbent is to be compensated at the LA-2(I) rate.*

II — POSITION OF THE GRIEVOR

[49] Jane Michael has received a number of acting appointments and extensions of same since the year 1995 as Area Advocates, all for which she was paid at the LA-2(II) rate of pay. It was only upon the filing of grievances in the companion cases of Bisal et al. that the employer modified its conduct and reduced the level of pay of Area Advocates to LA-2(I). Those placed at the LA-2(II) in 1990 will be "grandfathered" so as not to lose their salary level.

[50] It therefore means that Jane Michael is the only Area Advocate paid at the lower level of LA-2(I) yet with no change in her duties and responsibilities.

[51] This is an example of the employer revisiting the 1990 contract and re-interpreting same to suit its position when faced with grievances. There is no directive, no written policy or condition which can establish the actions of the employer. Simply put, the employer has unilaterally re-interpreted the 1990 contract to suit its purpose.

[52] The employer states that it cannot have District Advocates who occupy managerial functions and who are paid at the same LA-2(II) level as the Area Advocates. Further, to justify its new interpretation, the employer now says that the only reason Area Advocates were paid at the LA-2(II) are such because they happen to be at the LA-2 level at December 31, 1989 before the implementation of the 1990 collective agreement and pay notes.

[53] The employer has acted in the same manner since 1990, that of paying Area Advocates at the LA-2(II) level, and has done so for 10 years. It cannot suddenly change its conduct in a clear violation of the contract, and it must be estopped from doing so.

[54] The grievor argued that the employer cannot be allowed to interpret the pay notes in a different light today because Area Advocates are doing the same work as Pensions Advocates. Everyone agrees that there were changes over the years, but the employer cannot correct these changes in this fashion. The employer cannot suddenly state it was "mistaken". There is no justification to modify the interpretation of the pay notes after all these years.

[55] There is no dispute as to how the parties conducted themselves in the past. All Area Advocates were paid at the LA-2(II) level, and Jane Michael relied on this to get her acting appointment. Mid-way through her second secondment, the employer changed the terms of her contract by reducing her level of salary for the same work.

[56] Management's prerogative to organize the work force is not unfettered and cannot be done if it means interpreting the collective agreement differently than it has done so in the past. All LA-2 employees should be paid at the same level.

[57] Area Advocates were considered specialists in 1990 and placed at the LA-2(II) level for that purpose. After 1995 and 1997 legislative changes imposing new duties and new structure to the Bureau of Pensions Advocates, the District Pensions Advocates were de-excluded and were placed at the bargaining unit level of LA-2(II) due to their acquiring managerial functions. For Area Advocates, however, management no longer considered them specialists but rather generalists, and consequently felt that the Area Advocates were overpaid at the LA-2(II) level. To justify those already placed at that level, the employer stated they were "grandfathered" into that pay scale and would not be reduced to a lower level of pay. All of this new

"interpretation" took place after the filing of the grievances as remarked by the grievors. Reaching parity should allow for both specialists and first level managers to be paid at the LA-2(II) scale of rates. The employer today is reneging on its contract with the union, and is doing so by unilaterally changing the interpretation of the 1990 collective agreement.

[58] The grievor points out that it is interesting that the employer has not used the term "grandfathering" in her case, probably because she has been doing this work for the past six years. The bargaining unit referred to the decisions in *Levesque, Coughtry v. Treasury Board (Fisheries and Oceans)* (File No. 166-2-28869) and *Molbak and Treasury Board (Revenue Canada, Taxation)* (File No. 166-2-26472).

[59] Jane Michael seeks to be paid at the level of salary which she was receiving when she accepted the acting position, including during the extension of that acting position.

III — POSITION OF THE EMPLOYER

[60] The employer can appreciate the consternation of the grievor in not being paid at the level she was paid in the past. Notwithstanding her concerns, the fact remains that Jane Michael was put on notice in the Spring of year 2000 that she would no longer be paid at the LA-2(II) but rather at the LA-2(I) level. She could have accepted to continue at that level, or go back to her substantive position, or she could grieve.

[61] Michael is not a victim of circumstances. During a review of pay scales for Pension Advoctes and Area Advocates, management determined that it could no longer justify paying Area Advocates at the LA-2(II) level except those who had been placed at that level in 1990, those who management felt had acquired management rights. Those earlier Area Advocates were given special status by management and management has not sought to reduce their salary.

[62] The employer argues that when Michael was first appointed to acting positions which were existing at the time, they were not new positions, and that is why she could receive the LA-2(II) pay level. And with each appointment, the employer reserved the right to extend or reduce the period of acting employment. Consequently, when the extension was granted to Michael in June of 2000, this secondment was a new secondment and the employer changed the salary level. Michael was not induced into

believing she would be paid at the previous level, it was clear that the salary was reduced and she was free to leave that position if she so chose. Therefore, the principle of estoppel has no application in this case.

[63] Whether management has violated the contract remains the only issue, and the grievor has the burden of proof. The present collective agreement provides for two pay scales only. Pay notes utilized in 1990 stated clearly that Area Advocates would be paid at the LA-2(II) if management appointed the advocate to a position to which the LA-2(II) applied. In this case, management has decided to appoint Michael to a position to which LA-2(I) applies, and it has the right to do so.

[64] Because of the apparent inequalities between Pensions Advocates and Area Advocates, management had no choice but to revisit the payment plan and made a decision that later acting appointments to Area Advocate positions would no longer be at the LA-2(II) level.

[65] Therefore, this is a case of a new appointment where management has re-evaluated the pay scale of a position to which the LA-2(I) applies, not the LA-2(II).

IV — ISSUES

[66] Are the pay notes ambiguous? Did the employer violate the collective agreement when it modified the salary for the extension of the acting appointment occupied by the grievor?

V — DECISION

[67] This grievance is simple. For several years, Jane Michael was appointed to a series of acting appointments as Area Advocate to which the pay scale of LA-2(II) applied. She was paid at the LA-2(II) during all of these appointments, except from July 1, 2000 when the employer abruptly reduced her salary for the same position to LA-2(I).

[68] Michael's last appointment was for the period of January 4, 2000 to June 30, 2000. The letter of February 15, 2000 confirms this is a new appointment and a new position number. Clearly, both parties intended for Michael to be paid at the LA-2(II) level and she was. Then discussions during the winter months of year 2000 resulted in an extension of her appointment, confirmed by a secondment agreement showing the

full duration of the acting appointment to be from January 4, 2000 to December 31, 2001 (Exhibit G-7). The salary to be paid in this document is set at LA-2(II). This agreement was superceded later with a modified secondment agreement showing the reduced salary level, but such only came after the employer's letter of July 10, 2000 for the extension of the acting appointment at the reduced level.

[69] I find that this extension was not a new appointment, but rather an extension of the existing appointment of January 2000.

[70] The reduction in salary was brought about solely as a result of the employer having to respond to four grievances filed by Pensions Advocates who were performing the duties of Area Advocates yet paid at the LA-2(I) scale of rate (see *Bisal*, 2002 PSSRB 43 (166-2-30176 to 30179).

[71] In the *Bisal* case, the employer reviewed the matter and consulted Treasury Board, only to be told that the difference between Pensions Advocates and Area Advocates was not a classification issue but rather a pay issue, and notwithstanding this, the pay notes of 1990 were to be interpreted such that only those who were Area Advocates on December 31, 1989 were to be paid at the LA-2(II). The employer had mistakenly paid later Area Advocates at the LA-2(II) level.

[72] Consequently, the employer was advised that from then on, it would remunerate Area Advocates at the LA-2(I) only. McLeod informed Michael of this and imposed the reduction in salary. Michael, while not at all happy with this development, agreed to continue to do the work but filed a grievance to challenge the reduction in salary.

[73] I do not agree that by virtue of having continued the acting appointment at the reduced level, Michael could be said to have implicitly accepted the new salary. Her commitment to the position was foremost and she immediately grieved the imposition of the reduced salary. In addition, Michael was notified of this reduced salary just prior to the extension of the acting appointment.

[74] How do the pay notes figure in this case. The grievor argues that the pay notes must be ambiguous for the reason that the employer is now changing their interpretation and hence their application. Yet, for 10 years, both parties seemed to acknowledge that Area Advocates were paid at the LA-2(II) level without question.

[75] I disagree. The pay notes are not ambiguous. They can be read easily and applied to the facts which existed at the time. They are repeated below for this analysis:

> *(6)* *LA-2(I):*
>
> *An employee whose position was classified at the LA-2 level on or after January 1, 1990, and who was paid on or after December 31, 1989 at a rate of pay in the LA-1 scale of rates, shall be paid in the LA-2(I) "A" scale of rates, other than an employee who is appointed to a position to which the LA-2(II) scale of rates applies.*
>
> *(7)* *LA-2(II):*
>
> *Effective January 1, 1990, an employee paid in the LA-2 scale of rates on December 31, 1989 shall be paid in the LA-2(II) "A" scale of rates at the rate of pay which is immediately below the employee's rate of pay as of December 31, 1989.*

[76] The heading for these notes is "*Pay Adjustment ...*" , and the notes have been referred to by the parties as "*pay notes*" . The use of the verb "paid" is evident in all of the pay notes, all of these factors suggesting that these notes were to effect changes in pay for these advocates. Furthermore, the use of the words "*level*" and "*scale of rates*" does point again to the notes suggesting how the advocates of certain levels would be paid, i.e., level referring to classification level such as LA-2, and scale of rates referring to salary such as LA-2(I) and LA-2(II).

[77] Moreover, the formula in pay note 6 is simple to use: those advocates paid at the LA-1 scale of rates on December 31, 1989 and classified at the LA-2 level on or after January 1, 1990 were paid at the LA-2(I) scale of rates, except for those advocates who would be placed by the employer (*appointed*) to a position to which the LA-2(II) scale of rates applied. Clearly the employer retained its right to determine which position would attract a pay at the LA-2(II) scale of rates. I therefore conclude that the pay notes are not ambiguous.

[78] Having so found, I now turn to what I believe to be the central issue: whether the employer breached the collective agreement when it did chose to reduce the salary paid to the grievor from the LA-2(II) to the LA-2(I) scale of rates for the extension of her acting appointment as Area Advocate from June 30, 2000 to December 31, 2001.

[79] What is not in dispute is that the grievor was seconded to a position to which the LA-2(II) scale of rates applied until the employer gave notice to the bargaining agent that such position would no longer attract that level of remuneration. In the case of Jane Michael who had been occupying an acting appointment since January 4, 2000, the employer argues that the extension of her acting appointment was a new appointment, therefore attracting the employer's new salary level.

[80] In the *Bisal* grievances, the employer maintained that in order for an advocate in the Law Group to move from LA-2(I) to LA-2(II), that advocate was required to apply or be appointed to a position to which the higher salary was set, because a position at the LA-2(II) scale of rates was considered a new position. If that employee was appointed to a position to which the LA-2(II) rate applied, then that is the salary the employee would receive.

[81] We know that in the future, the employer intends to pay an Area Advocate at the lower salary level of LA-2(I), same as that of the Pensions Advocates, and it has given notice to the bargaining agent that it shall do so from now on. That is the prerogative of the employer. There is much jurisprudence on the right of an employer to organize its workforce at it sees fit as long as it does so without violating the provisions of the collective agreement (please refer to Brown & Beatty, *Canadian Labour Arbitration* (3rd Ed.) in Chapter 5: Organization and Direction of the Work Place, and in particular, paragraph 5:2000 Distribution of work within the bargaining unit).

[82] Having said so, however, in this case I do not share the employer's contention that it had the right to reduce the salary of the acting appointment for Jane Michael because the extension of her acting appointment was a "new" appointment and thereby attracted the reduced salary as per the employer's notice.

[83] I am of the view that the extension of Jane Michael's acting appointment was not a new appointment such that the terms for the acting appointment could be modified.

[84] The pattern of acting appointments and extensions is clearly established in this case. The first acting appointment was made on September 18, 1995 until March 20, 1996. Exhibit G-1 shows this to be an acting appointment for the position of Area Advocate, No. 700000-9010 at the Group and Level LA-2(II). Such appointment was extended to March 31, 1997 and Exhibit G-2 shows the extension as "*Acting*

Appointment (Extension)" for the same position number and group and level. Then, a similar extension was approved with same indications to the date of March 31, 1998 (see Exhibit G-3).

[85] Michael returned to her substantive position after March 31, 1998. On January 4, 2000, she was appointed to the acting position of Area Advocate, position No. 3625 at the Group and Level LA-2(II). That acting appointment was to end on June 30, 2000. An extension came later. This extension is the one which is at the centre of this grievance. The letter introduced as Exhibit G-6, describes the extension in the same manner as those for the previous acting appointment extensions, i.e., the employer writes "*Acting Appointment (Extension)*" for the same position number 3625 and Group and Level LA-2(II). By all accounts, this is an extension of the current acting appointment and not a new appointment.

[86] The employer gave evidence that the Group and Level in the top part of the letter G-6 was mistakenly typed as LA-2(II) while the body of the letter referred to the new rate of LA-2(I). I understand that the employer wanted to impose the reduced salary level to the extension of this acting appointment and chose to indicate this intention in the letter. That modification, however, was not permissible in my view. The acting appointment for position number 3625 was established on January 4, 2000 at the salary level of LA-2(II). The employer could not modify the terms of that acting appointment no more that it could for extensions of that acting appointment. Furthermore, the employee and the employer signed a secondment agreement to include the extended period of the acting appointment which again pointed to a clear intention to pay Michael at the same level (Exhibit G-6).

[87] In this regard, the employer breached a term of the acting appointment for Area Advocate position number 3625.

[88] While notice that future acting appointments to Area Advocate positions would command a reduced salary at the LA-2(I) rate, such notice was only clearly communicated to the grievor upon the extension of her current acting appointment. The grievor was already committed to the acting appointment contract and for her to refuse the extension due to the employer's reduction in her salary and leave her work so abruptly would not have made much sense for either the grievor, for her own professionalism, nor the employer, for its work obligations. Moreover, the grievor made it clear that she would continue her acting appointment but would challenge the

employer's decision to reduce the salary, and that she did when filing the present grievance.

[89] On the basis of the foregoing, I allow the grievance of Jane Michael and I order the employer to pay Jane Michael the difference in salary she ought to have received from July 1, 2000 to December 31, 2001 for the extension of the acting appointment as an Area Advocate, position number 3625 at the LA-2(II) salary.

ISSUED at Fredericton, New Brunswick, this 7th day of May, 2002.

ANNE E. BERTRAND
Member
PUBLIC SERVICE STAFF RELATIONS BOARD