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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

ELOISE TYRRELL

Grievor

and

TREASURY BOARD  
(Department of Foreign Affairs and International Trade)

Employer

**Before:** Marguerite-Marie Galipeau, Deputy Chairperson

**For the Grievor:** Chris Rootham, Counsel, Association of Public Service Financial  
Administrators

**For the Employer:** Richard Fader, Counsel

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Heard at Ottawa, Ontario  
November 27, 2002.



## DECISION

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[1] This decision follows a hearing into a grievance referred to adjudication by Eloise Tyrrell (AS-03, acting FI-01) employed at the Department of Foreign Affairs and International Trade (DFAIT), in the division of Corporate Services, Passport and Consular Affairs, in the Foreign Operations and International Banking section.

[2] The grievor requests that her "acting pay be properly recalculated on the basis of retroactive salary adjustments to her substantive level from the start of the acting period".

[3] Counsel for the grievor summarized the situation as follows. According to counsel, the grievor's substantive position is an AS-03. The grievor's acting assignment was a promotion according to the *Terms and Conditions of Employment Policy* (Exhibit A-4).

[4] At the time the grievor accepted this assignment to a position classified FI-01, that is July 3, 2001, the AS Collective Agreement (Agreement between the Treasury Board and the Public Service Alliance of Canada: Program and Administrative Services, (expiry date: June 20, 2000), had expired on June 20, 2000 (Exhibit A-2).

[5] The new AS Collective Agreement (Exhibit A-1), which was signed on November 19, 2001, contained a retroactive pay increase. The retroactivity started June 21, 2001.

[6] The grievor is seeking a recalculation of her rate of pay under the new collective agreement to July 3, 2001.

[7] According to counsel for the employer, the Federal Court of Appeal has pronounced itself authoritatively in *Canada (Attorney General) v. Lajoie* (F.C.A.), [1992] F.C.J. No. 1019:

...

*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.*

...

[8] According to counsel, the effect of this decision is that there is no retroactivity other than "in the revision of pay rates". Therefore, there is no obligation to recalculate the grievor's rate of pay on July 3, 2001. Counsel is of the view that the *Buchmann* decision, 2002 PSSRB 14 (166-34-30637) is in error.

[9] The provisions which follow are relevant in order to resolve this matter.

[10] From the Terms and Conditions of Employment Policy (Exhibit A-4), section 24 and more particularly 24(1)(a) and 24(2):

***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.*

...

(Rest of section 24 not reproduced.)

Section 46 and more particularly 46(C):

**Remuneration - Acting assignment**

**46. Pay**

**46.(A) General**

Where a deputy head requires an employee to perform duties of a higher classification level for at least the qualifying period specified in the relevant collective agreement or the terms and conditions of employment applicable to the employee's substantive level, the employee shall be paid acting pay calculated from the date the employee began to perform such duties.

**46.(B) Rate of pay**

Acting pay is the rate of pay that the employee would be paid on deployment or appointment to such higher classification level, as calculated pursuant to Sections 24 or 26 of these regulations.

**46.(C) Recalculation of pay**

(1) An employee in receipt of acting pay is entitled to a recalculation of the acting rate of pay pursuant to Sections 24 or 26 when increments within and revisions to the salary range for the substantive level occur. If following recalculation the rate of pay in the higher classification level is less than the rate of pay received immediately prior to the recalculation, the employee shall be paid at the rate of pay received immediately prior to the recalculation.

(2) An employee in receipt of acting pay is entitled to revisions to the salary range of the higher classification level.

**46.(D) Pay increments**

(1) Notwithstanding paragraph 46.(C)(1) above, an employee

(a) who is being paid at the maximum rate of pay for the substantive level at the time of the employee's assignment; or

(b) who receives an increment in the substantive level which does not result in a higher rate of pay in the higher classification level shall be eligible to receive pay increments in the higher classification level at the end of the increment period for the higher classification level, calculated from the date on which the acting assignment commenced.

(2) Notwithstanding paragraph 46.(C)(1) above, an employee

(a) who has received pay increments in the substantive level that have resulted in higher rates of pay in the higher classification level; and

*(b) has reached the maximum rate of pay for the substantive level shall be eligible for increments in the higher classification level at the end of the increment period for the higher classification level, calculated from the date of the last pay increment received in the substantive level.*

...

(Rest of section 46 not reproduced.)

[11] From the FI group collective agreement (Exhibit A-3), Article 55:

**Article 55**  
**PAY ADMINISTRATION**

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

**55.02** *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 he is appointed, if the classification coincides with that prescribed in his certificate of appointment;*

*or*

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

**55.03**

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

*(b) Paragraph (c) supersedes the Retroactive Remuneration Directives.*

*(c) 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 this bargaining unit 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 employee's representatives to receive payment in accordance with subparagraph (iii), the Employer shall notify, by registered mail, such individuals at their last known address that they have thirty (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 (c) for one dollar (\$1) or less.

[12] From the AS group collective agreement (Exhibits A-1 and A-2), Article 64:

**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.

**FACTS**

[13] The parties have produced the following Agreed Statement of Facts (Exhibit A-5):

AGREED STATEMENT OF FACTS

1. The parties to this grievance agree to the facts stated below. The parties are free to introduce any further or other evidence so long as such evidence is not inconsistent with the facts stated below.
2. The grievor, Eloise Tyrrell, was at all material times employed in the Department of Foreign Affairs and International Trade.
3. The grievor's **substantive position is an AS-03**, this position is in a bargaining unit represented by the Public Service Alliance of Canada ("PSAC").
4. On July 3, 2001 the grievor accepted an **acting position classified as FI-01**. This position is in a bargaining unit represented by the Association of Public Service Financial Administrators ("APSFA").
5. When the grievor accepted the acting position, the collective agreement for the AS-03 group had expired. That collective agreement had expired on June 20, 2000. The parties to the AS group collective agreement subsequently negotiated a collective agreement (Exhibit 1), which was signed on November 19, 2001.
6. The rates of pay under the new AS group collective agreement are set out in Appendix "A" of the agreement. The rates of pay under the old collective agreement are set out in the line beginning with the word "From". The collective agreement included a **retroactive pay revision** for all AS-03 employees. The pay level as of June 21, 2001 is set out in row "B" of the AS-03 pay grid in Appendix A of the collective agreement.
7. The grievor's rate of pay for her substantive AS-03 position prior to the revision was \$45,307. After applying the retroactive increase as of June 21, 2001, the salary was revised to \$49,421.
8. The collective agreement for the FI group (Exhibit 2) also sets out the rates of pay in Appendix "A". The grievor's FI-01 acting rate of pay placed her at the sixth step, \$47,807.
9. The employer calculated the grievor's pay rate pursuant to the method set out in section 24 of the Public Service Terms and Conditions of Employment Regulations (Exhibit 3). This employer policy is incorporated into both the AS and FI group collective agreements.



10. *The employer's calculation was arrived at by adding the lowest increment in the FI-01 classification level (\$1,793) to the employee's substantive salary (\$45,307). The employer then located the step on the FI-01 pay grid which is closest to, not less than the sum of those two figures. This was determined to be the sixth step: \$47,807.*
11. *Had the employer recalculated the grievor's acting FI salary when the substantive rate of pay was revised to \$49,421, then the grievor would have been placed at the eighth step in the FI grid: \$51,398.*
12. *On June 21, 2002, the employer adjusted the grievor's acting pay rate to take into account the June 21, 2002 rate of pay increase in her substantive AS-03 level, pursuant to section 46(c) of the Terms and Conditions of Employment Regulations. The grievor's acting salary was increased to \$53,400, or the ninth step.*
13. *An Arbitral Award was rendered on November 7, 2002 revising the FI rates of pay retroactive to November 2001. The grievor's acting salary will be revised in accordance with this Arbitral Award as follows:*

<i>Effective November 7, 2001</i>	<i>\$49,146</i>
<i>Effective June 21, 2002</i>	<i>\$54,895</i>
<i>Effective November 7, 2002</i>	<i>\$56,267</i>

[14] Following the production of this statement, the grievor testified and her testimony can be summarized as follows.

[15] The grievor has worked at DFAIT for 29 years. Her position is classified AS-03 and her bargaining agent is the Public Service Alliance of Canada. Currently, she occupies on an acting basis and since July 3, 2001, a position classified FI-01 which is included in a bargaining unit represented by the Association of the Public Service Financial Administrators (APSFA).

[16] On July 3, 2001, when she accepted an FI-01 position, her rate of pay was \$47,807, that is, the sixth step of the FI-01 salary scale (Exhibit A-3). As an AS-03, her salary was \$45,307 (Exhibit A-2). Had she stayed in the AS-03 position, as a result of the retroactive adjustment following the signing of the new AS Collective Agreement, her AS salary would have gone from \$45,307 to \$49,421 (Exhibit A-2) on June 21, 2001.

[17] On June 21, 2002, the grievor's acting salary (as an FI-01) became \$53,400 (Exhibit A-7). The grievor still occupies an FI-01 position and her salary rate is at the

ninth step of the FI salary scale. This amount of \$53,400 as an acting pay rate was arrived at following an adjustment to take into account the June 21, 2002 rate of pay increase in her substantive AS-03 pay rate. The grievor wants the recalculation made retroactive to July 3, 2001, which is the start of her acting period.

[18] The employer produced the witness Suzanne Marchand-Bigras. As a policy analyst within the pay administration section of the Labour Relations Division at Treasury Board, she is responsible for the interpretation of the *Terms and Conditions of Employment Policy* (Exhibit A-4) as well as that of the collective agreements.

[19] The FI collective agreement (Exhibit A-3) expiring November 6, 2001, resulted from the second round of collective bargaining following the salary freeze. The *Terms and Conditions of Employment Policy* (Exhibit A-4) is incorporated into both the AS and the FI collective agreements. According to the witness, (there is no disagreement between the parties on this point), the sections of this Policy (sections 22 to 26) are the same as those considered in the *Lajoie* decision (*supra*) except for the numbering.

[20] According to the witness, the effect of the *Lajoie* decision is that history is not recreated. Revisions are paid retroactively but the rate of pay upon promotion remains calculated as it was at the time of appointment and should not be recalculated. Since the last round of negotiations, this is the interpretation which the employer has implemented.

[21] According to the witness, the *Lajoie* decision (*supra*) only applies to the retroactive period (i.e. date of expiry of old collective agreement to date of signature of new collective agreement). In this case, the obligation to retroactively pay the revised salary flows from Article 55 of the FI group collective agreement (Exhibit A-3) and more precisely 55.03(c) (iii) which reads as follows:

**ARTICLE 55**  
**PAY ADMINISTRATION**

**55.03**

...

(c) 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:

...

(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;

...

[22] This is the language which was challenged in the *Lajoie* decision (supra), the effect of which, according to the witness, is that the revision of the salary of the grievor is a forward revision. Thus, the grievor's rate of pay is revised effective June 21, 2002.

[23] According to the witness, the effect of paragraph 46(c) of the Policy is that the grievor's acting pay (in an FI position) is recalculated to take into account the employee's substantive position. Thus, on June 21, 2002, the rate of pay of an AS-03 position is \$50,657. This was the starting point to recalculate the salary to which the grievor was entitled in the FI-01 position. It became \$53,400, that is, the maximum of the FI-01 position. The recalculation was "forward looking" and because of the *Lajoie* decision and paragraph 46(c) of the Treasury Board *Terms and Conditions of Employment Policy*, the revision did not apply to the retroactive period.

[24] June 21, 2002, was the first time there was a pay event for the employee's substantive position (AS-03) after the retroactive period. According to the witness, paragraph 46(c) of the Treasury Board *Terms and Conditions of Employment Policy* works prospectively and depends on the occurrence of an event in the substantive position (i.e. AS-03).

[25] The witness points out that had the grievor remained in her substantive position (AS-03), the maximum she could earn today would be \$50,657, whereas she is now earning \$56,267.

#### ARGUMENTS

[26] The representations made by counsel for the grievor can be summarized as follows.

[27] It defies logic that the grievor was promoted (FI position) and paid less than if she had stayed in her position (AS), yet, for a period of time, she was paid less. There is something wrong in promoting and paying less.

[28] Section 2 of the Policy (Exhibit A-4) defines "acting assignment". Section 24 specifies the method of calculating the rate of pay upon promotion. Section 46, and more precisely 46(c)(i), sets out how and when to recalculate upon revisions to the salary range.

[29] Clause 64.01 of the Program and Administrative Services (Exhibit A-1) collective agreement governs rates of pay. The effect of 64.03(b)(iii) is that the word "occur" in 46(c)(i) of the Policy (Exhibit A-4) must be interpreted and read to mean "the effective date of the revision in rates of pay". The dates set out in Appendix A of the AS collective agreement (Exhibit A-2) contain the date on which the revision occurs.

[30] The date of the recalculation is when the revision occurs. June 21, 2001, is the relevant date in this case because of 64.03(b)(iii) of the AS collective agreement.

[31] The facts in *Buchmann* (supra) were almost identical with the only difference that in one case, it was an appointment, in this one, an assignment.

[32] Therefore, on July 2, 2001, the grievor's salary was \$45,307 and then \$49,421 retroactively as a result of the new collective agreement.

[33] If one applies section 24 of the Policy, \$51,398 was obtained retroactively on July 3, 2001, and from then on it progresses to \$56,267 today.

[34] There is no issue as to what happened after June 21, 2002. The issue is the period between July 3, 2001, and June 21, 2002.

[35] The employer's policy not to do retroactive adjustments is based on its interpretation of the *Lajoie* decision (supra) which is erroneous. No retroactive revision of "all the consequences" does not mean "never". Furthermore, the present grievor's situation was not considered in *Lajoie*. In addition, in the *Lajoie* decision, the Court took a principled approach. An employee should not be harmed by a promotion. A promotion should be a promotion. Furthermore, in the *Lajoie* case, there had been a retroactive adjustment of the rates of pay of the new position. As a result, the employer retroactively adjusted downward (one level) the pay level. The fundamental principle of *Lajoie* is that when there is a retroactive increase in pay, the employee should not get less money; the principle is not that retroactive adjustments should never occur but rather that a retroactive adjustment on promotion should not take place to the detriment of the employee. The *Lajoie* decision can be distinguished from

the *Buchmann* decision (supra) as well as the present grievor's case. The *Penticton* case (*Re Penticton and District Retirement Service and Hospital Employee's Union, Local 180* (1977), 16 L.A.C. (2d) 97) stands for the proposition that retroactivity applies unless there occurs an impractical or unintended consequence. That is just what happened in the *Lajoie* case (supra): an unintended consequence, that is, a retroactive pay increase acting to the detriment of the employee.

[36] In the present case, the agreement as a whole is retroactive; the retroactive salary was \$49,421 on July 3, 2001, and a recalculation should occur as a result of this retroactive pay increase.

[37] The decision rendered by Deputy Chairperson, Evelyne Henry in the *Social Science Employees Association* case, 2002 PSSRB 101 (161-2-1208) supports the proposition that an employee is entitled to the benefit of the *Lajoie* decision or better, according to his or her own circumstances.

[38] The representations of the employer's counsel can be summarized as follows.

[39] The decision not to seek judicial review of the *Buchmann* decision was not Treasury Board's and Treasury Board should not be bound by it. Although consistency is a valid objective, a disagreement is also healthy. Treasury Board holds the *Buchmann* decision as wrong and is of the view that the *Lajoie* decision occupies the field. In the *Buchmann* decision, adjudicator Chad Smith found the language ambiguous. In the *Lajoie* case, neither the adjudicator nor the Federal Court made such a finding. The effect of the *Lajoie* decision is that the revision applies strictly to the setting of the new rates of pay. The promotion of the grievor (i.e. the acting assignment) occurred on July 3, 2001, and it is afterwards that the AS rates of pay were changed retroactively. The pay which the grievor accepted on promotion should not be undone and recalculated retroactively on the basis of the revised AS rates of pay. There is no presumption of retroactivity and there is no clause in the present collective agreement similar to the one which is found in the *Penticton* case (supra). It is a canon of interpretation that "unless specifically stated, provisions of a collective agreement should not be given retroactive effect". In fact, this principle is also found in the FI collective agreement (Exhibit A-3), clause 58.02 reads "Unless otherwise expressly stipulated, the provisions of this Agreement shall become effective on the date it is signed". The term used in both collective agreements is "rates of pay" and not "rates of pay and all other consequences and/or all salary related benefits".

[40] Counsel for the employer analysed the *Lajoie* and *Buchmann* decisions (supra) and invited me to apply *Lajoie*.

[41] Finally, counsel for the grievor replied by stating that *Lajoie* was distinguishable on the facts and that I should tread carefully before disregarding the *Buchmann* decision.

### REASONS

[42] This case is one of interpretation and application of collective agreements. Therefore, the burden of proof rests with the grievor.

[43] This is a step-by-step analysis of the employee's situation.

[44] Up until July 3, 2001, the grievor occupied an AS-03 position and her salary was \$45,307. This salary was the salary to which she was entitled as a result of the application of the relevant collective agreement to the AS group which had expired on June 20, 2000. This salary (\$45,307) was used to determine the salary to which she was entitled when on July 3, 2001, she left her AS-03 position and began an acting assignment in a FI-01 position.

[45] Was her salary in her AS-03 position, \$45,307? On the day she moved to the FI-01 position, it was and no one knew on that day what retroactive revision of that salary would occur in the future when and if the parties successfully negotiated a new collective agreement for the AS group. Therefore, the employer was right to use that salary (\$45,307) as a starting point to calculate the salary (\$47,807) to which she was entitled in the FI-01 position to which she was moving on July 3, 2001, and in so doing properly applied paragraph 24(1)(a) and subsection 24(2) of the *Terms and Conditions of Employment Policy* as well as paragraph 46(b) of that same Policy.

[46] Was her new salary (\$47,807) which was acting pay for an FI-01 position, set once and for all? No. Paragraph 46(c) of the same Policy clearly states that an employee is entitled to a recalculation of the acting rate of pay pursuant to section 24 when "revisions to the salary range for the substantive level occur".

[47] Did a revision to the salary range for her substantive level occur? It did. A new collective agreement signed on November 19, 2001, and applicable to the AS group revised retroactively the rates of pay for that group and the grievor's salary had she

remained in her substantive position (i.e. "the substantive level" as defined by section 2 of the Policy) became \$49,421 instead of \$45,307.

[48] Therefore, should the employer recalculate the grievor's acting pay as an FI-01 to reflect the fact that in the end, the grievor's salary in her AS-03 position was really \$49,421?

[49] Yes. The first sentence of 46(c) of the Policy clearly states that there exists an entitlement to a "recalculation" of the acting pay rate.

[50] I believe that a "recalculation" is different from a "calculation". A recalculation is retrospective. It implies going back in time over a calculation done in the past. It is inherently retroactive.

[51] If it had been intended that the acting pay be strictly prospective, the term "recalculation" would not have been used but rather terms such as "calculation of the new acting rate of pay".

[52] This Policy is applicable to the grievor as a result of the first clause of the pay administration article of both the AS group and the FI group collective agreements (clauses 55.01 and 64.01).

[53] The terms and conditions it contains govern the application of pay to employees covered by the collective agreements applicable to the AS group (clause 64.01) and the FI group (clause 55.01) and "except as provided" in clause 64.01 (AS group) or 55.01 (FI group), it is those terms which apply.

[54] Now, those terms set out in the Policy deal with the recalculation of acting pay, whereas the pay administration articles (articles 64 - AS group and 55 - FI group) of both the AS group and FI group collective agreements do not. Therefore, I must turn to the Policy to recalculate acting pay; I should add that the "acting pay" provisions of both collective agreements are also silent on the recalculation of acting pay (except for Article 56 of the FI group collective agreement which is unhelpful in this case).

[55] When I turn to the Policy, the conclusion is inexorable that, as I have already stated, there is an entitlement to the recalculation of acting pay.

[56] As I have said, a recalculation is retrospective. Therefore, a revision to the salary range of the grievor's substantive level having occurred, (effective June 21, 2001), as contemplated by 46(c)(1) of the Policy, she is entitled to a recalculation of her acting pay from the date of the beginning of her acting assignment (July 3, 2001).

[57] Finally, I note that neither the *Lajoie* decision nor the *Buchmann* decision (supra) considered the interpretation of subparagraph 46(c)(1) nor provided an interpretation of "recalculation of the acting pay rate" as required in the present case.

[58] In conclusion, the grievor's substantive revised rate of pay was \$49,421 (agreed statement of facts) and consequently, the grievor's acting pay rate should have been \$51,398 (agreed statement of facts) on July 3, 2001.

[59] For all these reasons, the grievance is allowed.

[60] Therefore, the employer is ordered to pay her the salary owed to her from July 3, 2001, to June 21, 2002.

**Marguerite-Marie Galipeau,  
Deputy Chairperson**

OTTAWA, February 10, 2003.