

Date: 20041210

File: 166-34-32035

Citation: 2004 PSSRB 172



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board



BETWEEN

DONALD W. KREWAY

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Debra Seaboyer, Public Service Alliance of Canada

For the Employer: Rosalie Armstrong, Counsel

Heard at Regina, Saskatchewan, January 28 and 29, 2004
(Written submissions October 20, November 5 and November 12, 2004).



DECISION

[1] This decision follows an earlier preliminary decision I wrote between these parties (*Kreway v. Canada Customs and Revenue Agency*, 2004 PSSRB 33). This story began when Donald Kreway filed a grievance in May 2002, alleging that the employer contravened Appendix "E" of his collective agreement. Appendix "E" is a reference to the Work Force Adjustment (WFA) provision contained in the collective agreement applicable to the grievor (Exhibit G-8).

[2] In the grievance, Mr. Kreway requested:

That I be declared surplus retroactive to November 1, 2001, and that I be appointed as a surplus employee with priority rights to the PM4 Collections Team Leader position effective November 1, 2001. Any other remedies that are reasonable under the circumstances.

[3] The matter was set down, and heard in January 2004. In my preliminary decision (*supra*), I wrote at paragraph 3:

*Following the completion of the evidence from three witnesses, including Mr. Kreway, it became apparent that Mr. Kreway wanted to be appointed to a position that he did not occupy, and which was encumbered by another individual. No one had informed this other individual of his right to attend and be represented at the hearing (see *Bradley v. Ottawa Professional Firefighters Association (Re)* (1967), 63 D.L.R. (2d) 376, [1967] 2 O.R. 311 (C.A.)).*

[4] Accordingly, the parties were asked to make submissions on this and I wrote, at paragraph 31 of my decision (*supra*):

Therefore, in the instant case, I find that:

- a) I have jurisdiction to hear the reference to adjudication, and*
- b) If the bargaining agent is going to argue that the grievor is entitled to be placed in a position currently encumbered by someone else, that person should receive notice and a hearing de novo would ensue.*

[5] On May 5, 2004, Ms. Seaboyer wrote to the Public Service Staff Relations Board (the Board) and stated "...that the Union wishes to proceed with adjudication in this matter ...". In addition, Ms. Seaboyer wrote that she was "...requesting contact information for any potentially affected employees. Once that information is received

from the Employer, the Union will contact those individuals and advise them of their right to attend and make representations at the hearing."

[6] The Board then scheduled the matter to continue on September 28-30, 2004.

[7] On July 27, 2004, the employer wrote to the Board, seeking clarification as to who should be notified about the September hearing. I dealt with that matter via a telephone conversation with Ms. Seaboyer (with the concurrence of the employer) in August 2004 and confirmed the discussion in a letter dated August 26, 2004, addressed to Ms. Seaboyer and copied to the employer.

[8] A letter dated September 20, 2004, was received at the Board from the bargaining agent, confirming that Mr. Kreway was no longer asking "...for the displacement of any person as the corrective action in this grievance". The letter also stated that the parties were attempting to resolve the matter short of a written decision, but if they were not successful, written submissions would be made.

[9] The Board was then advised on September 27, 2004, that the parties were unable to reach a settlement. Accordingly, on October 1, the Board wrote to the parties and requested written submissions. This decision relates to the substantive matters in issue between the parties.

Evidence

[10] Mr. Kreway was an internal auditor in 2001, classified as an AS-04 and located in Regina. He was one of many internal auditors situated in various locations in Western Canada, but he was the only one situated in Regina.

[11] The Director of the Regina office, Marianne Fitzgerald, was part of a management committee that decided, in 2001, that the regional internal auditors' positions would all be located in Edmonton. The Edmonton positions would involve a change of classification level to that of an AS-05 and therefore a competitive process would have to occur. If an internal auditor was not successful in the competition, his or her local office would have the responsibility for placing the affected employee in another position.

[12] On March 5, 2001, Mr. Kreway received an e-mail from the Regional Manager advising of this impending restructure (Exhibit G-1).

[13] On October 18, 2001, Mr. Kreway received another e-mail stating that the internal audit positions were being moved to Edmonton effective November 1, 2001 (Exhibit G-2). The e-mail read, in part, [sic throughout]:

...

Just to confirm the basics of what will happen:

- *Effective November 1, 2001 everyone (incumbents and secondments) will be given an acting assignment against the new positions (this obviously won't apply to staff who's current positions are higher than the acting levels) These along with current secondment agreements will expire May 1, 2002*
- *A selection process will be run to identify qualified candidates for Edmonton*
- *Staff (incumbents and secondments) not interested or unable to assume in positions in the new organization in Edmonton will return to their substantive positions or new assignments at their current group and level.*

...

[14] Effective November 1, 2001, Mr. Kreway received acting AS-05 pay until May 2002.

[15] In October 2001, Mr. Kreway met Ms. Fitzgerald and expressed his concern about the reorganization; he sought assurances that something would be available locally. In November 2001, Mr. Kreway spoke to Ms. Fitzgerald and was told that if he was not successful in competing for one of the Edmonton positions, she would offer him a Team Leader position at the PM-4 level in Regina. Mr. Kreway testified that when he discussed his interest in obtaining a Team Leader position with the Director, there were never any concerns raised about it, nor was there any question about his qualifications.

[16] The PM-04 Team Leader position had a higher salary than the AS-04 position Mr. Kreway occupied, although I note it is only about \$2,000, but Ms. Fitzgerald was hopeful that she could meet the union and get its agreement to place Mr. Kreway in that position.

[17] In that same meeting, Mr. Kreway told Ms. Fitzgerald he would apply for the Edmonton position.

[18] Later in November, Mr. Kreway spoke to Dave Marshall, who was in the process of filling a vacant Team Leader position in his Client Services Division, at the PM-04 level. Mr. Marshall asked Mr. Kreway if he was interested in that position, but Mr. Kreway said he preferred to be in the revenue collections area. Mr. Marshall then staffed his vacancy through a competition.

[19] The internal auditor positions in Edmonton were classified at the AS-05 level, and Mr. Kreway applied for one of them. He was told in February 2002 that he was successful. At that time, Mr. Kreway had an outstanding classification grievance with respect to his AS-04 position. It was agreed that the staffing of the Edmonton position would be held in abeyance, pending the outcome of the classification grievance.

[20] Early in March 2002, Mr. Kreway was informed that his classification grievance was not successful. Up to that time, he had been told he would be placed in another position without reference to the WFA Appendix, as the employer was of the view that the WFA Appendix did not apply to Mr. Kreway's situation.

[21] Also in March 2002, Mr. Kreway again spoke to the Director of the Regina office and was told that there was a vacant Team Leader position in Collections, but he had to decide by the end of the month if he wanted that position, due to a pending conversion exercise. Mr. Kreway replied that he believed there was a staffing moratorium on those positions, and the Director undertook to find this out.

[22] Ms. Fitzgerald spoke to a representative from Human Resources and was told that a move to the PM-04 level for Mr. Kreway would constitute a promotion and could not be offered, as it would be contrary to the provisions of the WFA.

[23] One week later, the Director informed Mr. Kreway that she would no longer offer the Team Leader position to him due to the salary difference between his AS-04 substantive position and that of the Team Leader, which had been re-classified to an MG-03 level.

[24] The internal auditor position in Edmonton remained open to Mr. Kreway at the AS-05 level, so he told his manager he was prepared to accept it. The position was offered to him by way of a letter dated March 19, 2002 (Exhibit E-5).

[25] In February 2002, the Board issued a decision stating that, in situations such as that of Mr. Kreway, the Work Force Adjustment provisions of the collective agreement

would apply. Following receipt of this decision, Mr. Kreway received a letter from the Assistant Commissioner, Prairie Region, dated May 13, 2002, telling him "... you are affected under the Work Force Adjustment Appendix of the current collective agreement ..." (Exhibit G-4). This was the first time Mr. Kreway was told that the WFA Appendix applied to him. Mr. Kreway then declined the Edmonton position.

[26] The next piece of correspondence Mr. Kreway received was dated May 29, 2002. It read, in part (Exhibit G-5):

...

At our meeting, you were informed that currently there are no anticipated vacancies equivalent to your current AS-4 group and level within the Regina Tax Services, therefore, you will be given consideration for lower level positions with appropriate retraining and salary protection. I confirmed that a PM-2, Collections Officer position within Revenue Collections has been identified for you and a Request for Approval of a Guarantee of a Reasonable Job Offer will be submitted to the Commissioner, CCRA for consideration and final authorization.

...

[27] The employer formally offered Mr. Kreway the PM-02 position in a letter to him dated September 20, 2002, (Exhibit G-6). The letter stated, in part:

...

Following this review, I am pleased to inform you, on his behalf, that the Canada Customs and Revenue Agency wishes to engage your services as a Collections Officer at the PM-2 group and level with Revenue Collections, Regina Tax Services Office. The provisions respecting salary protection will apply and you will continue to be paid at the AS-4 group and level.

The Director, Regina Tax Services Office will be making you an offer, in the near future, of an indeterminate appointment to this position, as a Reasonable Job Offer under the Work Force Adjustment Appendix to the PSAC Collective Agreement. Ms. Linda Weins, Human Resources Generalist, Regina Tax Services will contact you to answer any questions you may have on this matter and to provide you with explanations on your salary protection.

...

[28] Mr. Kreway ultimately accepted the PM-2 position offered to him, but felt he should have been appointed to the Team Leader position and grieved accordingly.

[29] Connie Blackey, a Senior Human Resources Consultant with Canada Customs and Revenue Agency, explained that the WFA provides for an employee to receive a reasonable job offer when affected by a work force adjustment situation. The WFA Appendix defines Work Force Adjustment as:

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

[30] The definition of a reasonable job offer as per the collective agreement between the Canada Customs and Revenue Agency and the Public Service Alliance of Canada (Exhibit G-8) reads:

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

[31] Movement from an AS-04 to a PM-04 would constitute a promotion, according to the pay rules used by Ms. Blackey. The offer of a PM-02 position would, in Ms. Blackey's view, constitute a reasonable job offer. There was also salary protection provided to Mr. Kreway in this case.

[32] In February 2002, Ms. Blackey held a conference call with Mr. Kreway and two other internal auditors who were from Winnipeg. All three were classified at the AS-04 level. There was discussion about Mr. Kreway's being placed into a PM-04 position and Ms. Blackey stated to the conference call participants that this could not be done through the WFA Appendix.

Argument of the Bargaining Agent

[33] On October 20, 2004, the bargaining agent submitted its written argument and the entire text is on file with the Board. It alleges that the employer has violated Appendix "E" of the applicable collective agreement.

[34] The issues to be resolved, as seen by the bargaining agent in its written submissions to the Board, are as follows:

1. *Did the Employer comply with the provisions of Appendix "E" of the collective agreement when dealing with Mr. Kreway throughout the reorganization?*
2. *If not, did the letter of May 12, 2002 correct the Employer's failure to comply with the collective agreement and make Mr. Kreway whole?*
[Note: The letter is actually dated May 13]
3. *If not, is the PM4 position equivalent to the AS4 position?*
4. *If so, should Mr. Kreway have been offered and appointed to the PM4 Team Leader position in November 2001 under the protection provided by the Work Force Adjustment Appendix "E"?*

[35] With respect to the first issue, the employer decided to move the work to Edmonton effective November 2001. This should have triggered the Work Force Adjustment provisions of the collective agreement; however, Mr. Kreway only received his WFA letter in May 2002. Therefore, it is clear that the employer did not comply with the collective agreement when it should have.

[36] The second issue is whether or not the employer's letter of May 13 corrected the failure to comply with the collective agreement.

[37] The May 2002 letter offered Mr. Kreway a PM-02 collections officer position, one that is significantly lower than his AS-04 level, from which he was declared surplus. Mr. Kreway's evidence indicated there were other PM-04 Team Leader positions available during the months between November 2001 and May 2002, but he was not officially offered or appointed to any of them. Even though Mr. Kreway was salary protected, the May letter did not correct the employer's failure, nor did it make Mr. Kreway whole.

[38] The third issue is to determine if the PM-04 position is equivalent to the AS-04 position.

[39] Appendix "E" defines "equivalent position" as one where the salary of the higher position is no more than 6% greater than the salary of the lower position. The applicable salaries of the PM-04 and AS-04 positions clearly fit this definition.

[40] The fourth and final issue is whether or not Mr. Kreway should have been offered the PM-04 Team Leader position in November 2001.

[41] Mr. Kreway should have been given the surplus letter in November 2001 and, if that had happened, he would have most likely been offered the PM-04 Team Leader position. Ms. Fitzgerald consistently and repeatedly told Mr. Kreway that he had nothing to worry about and that he would be placed into a Team Leader position.

[42] Ms. Seaboyer referred to the following cases: *Public Service Alliance of Canada and Canada Customs and Revenue Agency*, 2002 PSSRB 23; *Public Service Alliance of Canada and Canada Customs and Revenue Agency*, 2002 PSSRB 78; *Public Service Alliance of Canada and Canada Customs and Revenue Agency*, 2003 PSSRB 6 and *Canadian Corps of Commissionaires and the Public Service Alliance of Canada Re: Grievances of M. Churchill, C. Birbeck, S. Widenmaier, and C. Trueman - Supplementary Award issued December 3, 2003*, (unpublished).

[43] Since the grievance was filed, Mr. Kreway has been successful in competing for and being appointed to what is now an MG-03 Team Leader position. Therefore, the bargaining agent requests that this decision state that the employer violated Appendix "E" of the collective agreement and deal with the issues that would flow from such a declaration, including determining if Mr. Kreway suffered any financial loss.

[44] In addition, the bargaining agent seeks a lump sum payment of \$1,000 to be paid to Mr. Kreway as damages.

Argument of the Employer

[45] The employer's written argument is dated November 5, 2004, and the full text is on file at the Board.

[46] The employer takes the position that an offer of a PM-04 Team Leader position would have been a promotion for Mr. Kreway and, therefore, this would not be a reasonable job offer. Appendix "E" does not require that a reasonable job offer be a promotional opportunity.

[47] In the bargaining agent's submission, it states that the "6%" rule indicates that a move from the AS-04 to PM-04 level would be a move to an "equivalent" position. This definition only applies to "alternations", that is, where a surplus employee exchanges positions with a non-affected employee. Such is not the case here. A move from AS-04 to PM-04 is a promotion.

[48] The purpose of the Work Force Adjustment directive is to provide employment security through a reasonable job offer. On April 1, 2002, the employer offered Mr. Kreway a position at the AS-05 level. Mr. Kreway declined this offer. By the time he refused the AS-05 position, the only available job was at the PM-02 level.

[49] Ms. Fitzgerald misspoke when she led the grievor to believe he could be placed in a Team Leader position. However, this does make the grievor's case for him, especially given his own role in delaying making a decision to accept an available higher-level position.

[50] Even if Mr. Kreway were to be granted a declaration that he was surplus effective November 1, 2001, it is absolutely clear that he would not be entitled to a PM-04 position. Such a declaration would, in effect, entitle him to a promotion.

[51] With respect to the issue of damages, there was no evidence led which suggested any damages were suffered by Mr. Kreway. It is inappropriate to append a claim for damages when there is no factual foundation laid for them.

Rebuttal of the Bargaining Agent

[52] The rebuttal is dated November 15, 2004, and it is on file in its entirety at the Board.

[53] The bargaining agent contends that the PM-04 position was in fact a reasonable job offer precisely because it was not a promotion.

means there would be different meanings to be attributed to the term "equivalent" within the same Appendix. The parties have turned their mind to defining "equivalent", and if they intended to have another definition apply to a reasonable job offer, they would have indicated that such was the case. They chose not to; therefore, in my view, the one definition that is found within the WFA, at paragraph 6.2.7, must apply through the WFA Appendix.

[68] Given this definition, a PM-04 position would have been a reasonable job offer at an equivalent level. I am comforted in this decision by the fact Mr. Marshall offered Mr. Kreway a PM-04 position, albeit unofficially, and so did Ms. Fitzgerald, again unofficially. To state that the employer can offer him the position unofficially, but not officially, does not, in my view, make sense.

[69] At this point, what the employer needs to do is reconstruct the work place situation, as it existed in November 2001, and make a determination as to what positions could have been offered to Mr. Kreway under the terms of the WFA. This needs to be communicated to the bargaining agent and Mr. Kreway, as well. Given the above finding, this exercise has to be completed before it can be determined what the employer would have done had it issued the affected letter in November 2001, as it should have.

[70] The bargaining agent, in its written submission, asked for \$1,000 in damages to be awarded to Mr. Kreway. I decline to award damages. Firstly, the failure to apply the collective agreement provisions was done in the honest, albeit incorrect, belief that, under these circumstances, the WFA did not apply. There was no malice or bad faith intended by the employer, neither was it alleged that there was. Secondly, when the employer became aware that the WFA applied, a letter was sent to Mr. Kreway explaining his options. The employer acted swiftly. This is not an appropriate case to award damages, in my view, and I decline to do so.

[71] The grievor has asked that he be placed in a Team Leader position. There is nothing in the WFA Appendix that entitles an employee to a specific position. Mr. Kreway is entitled to a reasonable job offer, as that term would have meant on November 1, 2001. As was stated in *Dowton* (PSSRB File No. 166-2-16026 (1987)) at page 22 of the decision:

...

... The only powers of review that I as an adjudicator have are limited to determining whether the provisions of the Work Force Adjustment Policy have been properly applied to the grievor but I have no authority to go beyond that ...

...

[72] In summary, I find that the employer did violate the collective agreement by not invoking the WFA provisions, as it should have, in November 2001. Furthermore, given the facts of this case, I find that the PM-04 position would have been one at an equivalent level. The employer is to reconstruct the workplace vacancies that existed in November 2001 to determine what position it would have offered Mr. Kreway had it applied the WFA, as it should have, at that time. Following that review, the parties will meet to determine where Mr. Kreway should be placed in his current position.

[73] I will remain seized of this issue if requested by the parties to do so within 30 days of the release of this decision.

Joseph W. Potter
Vice-Chairperson

OTTAWA, December 10, 2004.

