Date: 20031128

File: 166-34-31903

Citation: 2003 PSSRB 105

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

RIYAZ KARIMJEE

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

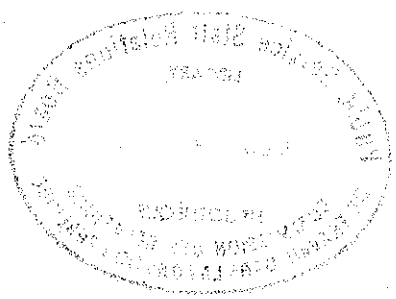
Employer

Before: Léo-Paul Guindon, Board Member

For the Grievor: Paul Reniers, The Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, Counsel

Heard at Vancouver, B.C.
July 22, 2003.



[1] On February 21, 2002, Riyaz Karimjee filed a grievance against his employer, the Canada Customs and Revenue Agency (CCRA), contesting the pay equity readjustment paid to him in application of the pay equity agreement between the Treasury Board Secretariat (TBS) and the Public Service Alliance of Canada (PSAC).

[2] On the date of the grievance, Mr. Karimjee was a member of the Professional Institute of the Public Service of Canada (PIPSC). An approval for presentation of his grievance to adjudication and agreement to represent employee was given by the PIPSC.

[3] The grievance was worded as follows:

> *I grieve the employer's interpretation of the Pay Equity Agreement between the Treasury Board Secretariat (TBS) and the Public Service Alliance of Canada (PSAC). The grievance pertains to the following issues:*
>
> *The salary I received as an Acting PM-1 (Substantive CR-4), for the period October 12, 1993 to March 31, 1994, is lower than the salary received by a CR-4 salary adjusted for Pay Equity.*
>
> *My salary as an Acting PM-1 (Substantive CR-4) starting April 1, 1994 and subsequent appointment to a PM-1 was not recalculated under the terms of the Pay Equity Agreement.*
>
> ***Corrective Action Requested***
>
> *To have my salary as an Acting PM-1 from October 12, 1993 to March 31, 1994, recalculated to a level that exceeds the CR-4 salary adjusted for Pay Equity.*
>
> *To have my salary as an Acting PM-1 and subsequent appointment to a PM-1 recalculated as of April 1, 1994 according to the Pay Equity Agreement using the CR-4 salary adjusted for Pay Equity as salary immediately before acting.*

[4] On December 18, 2002, the employer denied the grievance at the final level by the following decision:

> *I am replying to your grievance in which you request the recalculation of your acting and substantive PM rates of pay in light of the Memorandum of Agreement-Payout Calculation (Pay Equity Agreement) between the Public Service Alliance of Canada and the Treasury Board Secretariat. I have reviewed all the information available and considered the points raised by your Professional*

Institute of the Public Service of Canada (PIPSC) representative.

The terms of the Memorandum of Agreement-Payout Calculation provide for a 5% lump sum retroactive payment in lieu of the recalculation of salary based entitlements for the period between March 8, 1985 and March 31, 1994 for employees occupying positions within the affected groups (CR, ST, DA, HS, LS and EU).

As for recalculations relating to acting situations, promotions and overtime occurring after March 31st, 1994, they are done on an event basis. The Treasury Board Secretariat has confirmed that there is no provision under the terms of the Agreement for a recalculation of your rate of pay.

In addition, as the Canada Customs and Revenue Agency was not one of the signing parties to this Memorandum of Agreement, it is therefore not in the Agency's jurisdiction to modify its application.

In view of the foregoing, I cannot grant the corrective action that you requested and I must deny your grievance.

[5] An agreement on a statement of facts was filed under Exhibit G-1:

1. *Mr. Karimjee was employed by Revenue Canada (now Canada Customs and Revenue Agency) for the following periods:*

   - *Term substantive appointment as PM-01 Collections Contact Officer from November 23, 1992 to March 31, 1993;*
   - *Term substantive appointment as CR-04 Collections Contact Clerk from September 7, 1993 to October 6, 1993;*
   - *This substantive term CR-04 appointment was extended from October 6, 1993 to January 28, 1994;*
   - *This substantive term CR-04 appointment again was extended from January 28, 1994 to March 31, 1994;*
   - *Term acting appointment as PM-01 Collections Contact Officer from October 12, 1993 to March 31, 1994;*
   - *The substantive term CR-04 appointment was again extended from March 31, 1994 to April 15, 1994;*
   - *The term acting PM-01 appointment was extended from March 31, 1994 to April 15, 1994;*
   - *Term substantive appointment as PM-01 from April 18, 1994 to March 31, 1995;*
   - *Indeterminate substantive appointment as PM-01 Collections Contact Officer on February 6, 1995;*

- *Indeterminate substantive appointment as AU-01 Tax Auditor on September 8, 1997.*

2. *While holding appointments as a CR and PM, Mr. Karimjee was covered by the Master Agreement between the Treasury Board and the Public Service Alliance of Canada.*

3. *On October 29, 1999, a Memorandum of Agreement was signed between the Public Service Alliance of Canada and Treasury Board and incorporated into the consent order of the Canadian Human Rights Tribunal Decision. This consent order is attached and entered as evidence by agreement of the parties.*

4. *The parties also agree to enter the following documents as evidence:*

   - *Treasury Board of Canada Terms and Conditions of Employment Policy;*
   - *Public Works and Government Services Canada Pay Equity Questions and Answers.*

5. *Article 9.5 of the Memorandum of Agreement states: "The parties agree that for overtime, acting and promotion situations, a 5% lump sum of the total pay equity adjustment will cover the retroactive period from March 8, 1985 to March 31, 1994. For the period from April 1, 1994 to July 29, 1998, the re-calculation for those items will be on an event basis."*

6. *On April 7, 2000, Mr. Karimjee received a pay equity payment in the amount of $310.20 for the period of September 7, 1993 to October 11, 1993 and a 5% lump sum payment in lieu in the amount of $15.51.*

7. *On November 24, 2000, Mr. Karimjee received pay equity interest in the amount of $91.58.*

8. *The parties agree that the grievance is timely.*

[6] In his testimony, Mr. Karimjee stated that other employees in similar situations (Messrs. Wong and Sidhu), classified PM-01, received readjustment of salary by recalculation. He submitted to the Human Resources Department that he was entitled to recalculation of his salary like the other PM-01s and requested corrections. He considers that it is unfair that he received lower pay as an acting PM-01 than at his former CR-04 position.

[7] On December 20, 2001, Kerri Dewar, Human Resources, answered him that he would receive a recalculation (Exhibit G-24). Later, on, Ardy Hendriks, Compensation Consultant, Pay Equity Unit, came to the conclusion that Mr. Karimjee was not entitled to a recalculation of pay. His notice (Exhibit G-25) sent on January 24, 2002, reads as follows:

> *As I was looking into your account with regard to the recalculation of your salary at the PM-01 level, I required some clarification on the interpretation of the recalculation rules and regulations. The reference material I have at hand did not provide a clear definition of these rules when they were applied to your account.*
>
> *My request was sent to the Compensation Policy Officer in Ottawa, and she then had the information confirmed by Treasury Board before responding to my questions.*
>
> *You were a CR-04 substantive on April 1, 1994. You were in an acting PM-01 position that started Oct. 12, 1993. This acting position continued, unbroken until your appointment to the PM-01 position on April 18, 1994.*
>
> *As per the rules and regulations confirmed by the Treasury Board, "there would be no recalculation on the promotion date of April 18, 1994 as this would be considered as a confirmation of the acting pay, and there is no break from the commencement of the acting (Oct/93) to the promotion date."*
>
> *Your account therefore does not qualify for a recalculation of your PM-01 salary. If you have any questions regarding the above information, please do not hesitate to contact myself, or my supervisor Erica Jacquard regarding this matter.*

[8] Mr. Karimjee pointed out in his testimony that he was in a situation similar to that of Messrs. Wong and Sidhu in April 1994. To his recollection, Mr. Sidhu was a substantial term CR-04 and he was qualified in the PM-01 competition in January or February 1994. An acting PM-01 was offered to Mr. Sidhu on April 18, 1994, and he still was a substantive term CR-04 at that time. Around July 1996, he was appointed as an indeterminate PM-01.

[9] John Wong testified regarding his career in Revenue Canada, Taxation, which can be summarized as follows.

[10] He was appointed as a term CR-04 for the period from September 27, 1993 to January 31, 1994 (Exhibit G-3), and this term appointment was extended to March 31, 1994 (Exhibit G-4) to April 15, 1994 (Exhibit G-5).

[11] He was appointed as a term PM-01 on April 18, 1994 to March 31, 1995 (Exhibit G-7), and he was appointed an indeterminate PM-01 on February 6, 1995 (Exhibit G-8). Later on, he was appointed as an indeterminate PM-03.

[12] Mr. Wong testified that he got pay equity as a CR-04 and his salary was recalculated as a PM-01. In April 1999 and February 2000, he got two increments. In cross-examination, Mr. Wong admitted that his situation (term assignment as PM-01) was different from that of Mr. Karimjee (acting as PM-01).

[13] The following extracts of the Orders included in *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1998] C.H.R.D. No 6, are more precisely relevant to the present file (tab 2 of the Employer's exhibit book):

> *XI. ORDERS*
>
> *Based on the foregoing finding of a breach of s. 11 of the Act, the Tribunal ORDERS:*
>
> [...]
>
> *5. That the effective date for calculation of the retroactive wage adjustment is March 8, 1985.*
>
> [...]
>
> *7. That pay equity adjustment of wages for times after the date of this decision shall be folded in and become an integral part of wages.*
>
> [...]
>
> *13. That the issue of whether adjustment of direct wages for the retroactive period is to be considered wages for all purposes, or wages for purposes of superannuation but not for other pay purposes shall be determined in Phase III of these proceedings.*
>
> [...]

[14] The following extract from the "Memorandum of Agreement" between the PSAC (complainant) and Treasury Board (respondent) signed on October 29, 1999 (tab 3 of the Employer's exhibit book), is relevant to the present file:

> *1. Payout Calculations*
>
> [...]
>
> *1.8 All pay equity adjustments are incorporated into ongoing wages effective July 28, 1998.*
>
> [...]
>
> *Overtime, Acting and Promotion Situations*
>
> *9.5 The parties agree that for overtime, acting and promotion situations, a 5% lump sum of the total pay equity adjustment will cover the retroactive period from March 8, 1985 to March 31, 1994. For the period from April 1, 1994 to July 29, 1998, the re-calculation for those items will be on an event basis.*

[15] The "Terms and Conditions of Employment Policy" and regulations (tab 12) are relevant to the present file.

Arguments

For the Grievor

[16] The question as to how section 9.5 of the Memorandum of Agreement applies is a collective agreement issue. The pay equity agreement did not specify how it will apply and the collective agreement specifies how the calculation of salary should be done in a situation when a promotion has taken place.

[17] The intent of section 9.5 is that a five-percent (5%) lump sum will be given for the period prior to April 1, 1994, and that a recalculation of the salary should be done for the following period.

[18] The decisions rendered by the Board in *Public Service Alliance of Canada and Treasury Board*, 2001 PSSRB 81 and by the Federal Court of Appeal (2002 FCA 447) in the same file state that it is not clear that the Memorandum of Agreement and the Consent Order can be said to give rise to an obligation under the collective agreement.

[19] In *Nadeau*, 2003 PSSRB 17, Vice-Chairperson Joseph W. Potter came to the conclusion that, for the period Mr. Nadeau sought a recalculation of salary, section 9.5 of the Consent Order provided a five-percent (5%) lump sum of the total pay equity adjustment and this does not amend the collective agreement applicable to the grievor. This decision takes into consideration the period prior to April 1, 1994.

[20] For the period after April 1, 1994, the recalculation of salary is left to the parties. The grievor, Mr. Karimjee, wants to apply the collective agreement rules to raise his salary and he submits that the "Terms and Conditions of Employment Policy" and regulations (tab 21) should apply. The following subsections of the regulations should receive application:

> ***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.*

[21] In *Buchmann*, 2002 PSSRB 14, an employee at the PM level was promoted to the AU level and the adjudicator found that he was entitled to a recalculation of salary. That is what happened in Mr. Wong's situation when he was promoted to PM-01 from CR-04 on February 2, 1995. His salary was recalculated and he received a pay equity payment. The recalculation of his salary was performed on the basis of the collective agreement and the provisions of the "Terms and Conditions of Employment Policy". The rules for the recalculation were established by the parties outside the Human Rights Tribunal and this matter was not addressed in the Consent Order.

[22] Mr. Karimjee was appointed as a term PM-01 on April 18, 1994. Prior to that date, he was a CR-04, notwithstanding his acting appointment in a PM-01 position since October 12, 1993. His position of CR-04 was not changed by his acting appointment and he was still, until April 18, 1994, a member of the CR group identified as a pay equity group. That situation is not different from Mr. Wong's.

[23] The Federal Court of Canada, in *Menlar v. Public Service Commission Appeal Board*, [1979] 1 F.C. 411, clarified that an acting assignment is not an appointment under the *Public Service Employment Act*. The Board Member concluded that the employee retains his formal classification (CR-4) until the employer decides to appoint him for an indeterminate period at his new classification (PM-1). Adjudicator Lachapelle in *Galarneau* (Board file 166-2-2639) stated the following:

> *It therefore appears that legally, only the employee who is appointed to a position actually holds that position and that an employee who is appointed in an acting capacity to a position within the meaning of section 27 of the Public Service Employment Regulations or who performs for a temporary period the duties of a higher position than that held by him and who receives acting pay in accordance with section 83 of the Public Service Terms and Conditions of Employment Regulations, does not in fact hold the position the duties of which he is performing; in the latter case, the employee still holds the position to which he was appointed, even though he is performing the duties of another position.*

[24] Following these decisions, Mr. Karimjee has to be considered a CR-04 until April 18, 1994. The pay equity adjustment had altered the rate of pay for the employees in the CR group. Other promotions from CR to PM, after April 1, 1994, received a recalculation of pay according to the "Terms and Conditions of Employment Policy" and in accordance with Board decisions.

[25] Consequently, Mr. Karimjee is entitled to an increase of his rate of pay as a CR-04. The grievance refers to the pay equity agreement but the facts show that the case is related to the application of the "Terms and Conditions of Employment Policy". The Board has jurisdiction in the matter and the grievor should receive a recalculation of his salary as a CR and also readjustment of his PM salary.

For the Employer

[26] The case is clearly a pay equity case and the grievance specifies it. In *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109, the Federal Court of Appeal states that the grievance cannot be changed in front of the adjudicator and new arguments cannot be submitted. In its answer to the Board, on May 28, 2003, the PIPSC submitted that the Consent Order calls for the recalculation on an event basis. The bargaining agent submitted that the present case is related to the application of a collective agreement but it did not file the agreement as an exhibit. The bargaining agent did not relate to a specific clause of a collective agreement in its arguments.

[27] All the cases submitted by the bargaining agent revolve around the interpretation to be given to clause 9.5 of the Memorandum of Agreement confirmed by the Consent Order. The Federal Court itself can enforce its Order by its rules of practice and the Board has no jurisdiction over that.

[28] The pay equity adjustment is not salary and the following orders of the Canadian Human Rights Tribunal in the case published as *Public Service Alliance of Canada v. Canada (Treasury Board)* (*supra*), (tab 2, Employer's exhibit book) can be read as follows:

> *XI. ORDERS*
>
> *Based on the foregoing finding of a breach of s. 11 of the Act, the Tribunal ORDERS:*
>
> [...]
>
> *5. That the effective date for calculation of the retroactive wage adjustment is March 8, 1985.*
>
> [...]
>
> *7. That pay equity adjustment of wages for times after the date of this decision shall be folded in and become an integral part of wages.*
>
> [...]
>
> *13. That the issue of whether adjustment of direct wages for the retroactive period is to be considered wages for all purposes, or wages for purposes of superannuation but not for other pay purposes shall be determined in Phase III of these proceedings.*

[29] Order No. 7 means that after the date of the Human Rights Tribunal decision, the pay equity adjustment of wages will be folded into wages. For the period between 1985 and 1998, order No. 13 does not specify a new salary but rather a pay adjustment, which shall be determined in Phase III of the proceedings.

[30] The Consent Order filed in the Federal Court of Canada (tab 3, Employer's exhibits book) specifies that the Memorandum of Agreement of October 29, 1999, between the PSAC and the Treasury Board is accepted by the Tribunal and constitutes resolution of all remaining Phase II and Phase III issues for the CR group and others. Section 9.5 concerning acting and promotions situations is included in the Consent Order.

[31] The dates specified in section 9.5 lead to different applications in the case of Messrs. Wong and Karimjee. Mr. Wong was appointed as a term PM-01 on April 18, 1994, from his substantive appointment as CR-04. Mr. Karimjee was appointed as a term PM-01 on April 18, 1994, from his acting PM-01 appointment since October 12, 1993, and the employer considers that there is no break from the commencement of the acting to the promotion date and that Mr. Karimjee, therefore, does not qualify for a recalculation of his PM-01 salary.

[32] The Board has no jurisdiction to determine if the application of section 9.5 of the Memorandum of Agreement by the employer is right or wrong. The Federal Court of Canada is the proper jurisdiction to deal with that question and to enforce its order. In the case *Public Service Alliance of Canada and Treasury Board* (*supra*), Chairperson Yvon Tarte disagreed with the PSAC regarding its contentions and specified as follows:

> *The PSAC now contends that all benefits, perquisites and allowances contained in various relevant collective agreements for the complainant groups and which were tied to rates of pay found to be discriminatory by the CHRT must now be adjusted on an events basis for the whole of the retroactive period unless otherwise agreed to by the parties. This would require the employer to go back to its pay records to recalculate every benefit payment previously made on the basis of wage rates now found to have been discriminatory.*

[33] He came to the following conclusion in that case:

> *The imprecision of the language used in the Consent Order can give rise to differing views and interpretations. I do not believe that this Board should attempt to correct the*

> *ambiguity contained in the order of the CHRT. Unless the parties agree on this issue, the matter must go back to the Federal Court and eventually to the CHRT.*

[34] The Federal Court of Appeal agreed with the position of Chairperson Tarte when he held that the language used in the Consent Order was not clear.

[35] In *Nadeau* (*supra*), the Vice-Chairperson Potter came to the following conclusion on the request for recalculation of salary:

> *In the instant case for the period Mr. Nadeau seeks a recalculation of salary, section 9.5 of the consent order provided for "...a 5% lump sum of the total pay equity adjustment..." This does not amend the collective agreement applicable to the grievor. Consequently, I find that I have no jurisdiction to decide this matter under subsection 92(1) of the Public Service Staff Relations Act.*

[36] The adjudicator in the present file should follow the decisions previously cited rendered by the adjudicators and the Federal Court of Appeal on similar questions and the grievance should be denied for lack of jurisdiction.

[37] In rebuttal, the bargaining agent submitted that the Consent Order calls for "recalculation on an event basis" and, accordingly, in Mr. Karimjee's case "gives rise to an obligation under the collective agreement" in the words of Mr. Justice Sexton of the Federal Court of Appeal. Mr. Karimjee was promoted after April 1, 1994, and his case is different from Mr. Nadeau's, who was promoted prior to that date. The Board does have jurisdiction to hear this matter.

Reasons for Decision

[38] The grievor has the onus of proving that he was aggrieved by the interpretation or application in respect of him regarding a matter affecting the terms and conditions of his employment. Mr. Karimjee wants his salary to be recalculated for the time he worked as an acting PM-01 and for his subsequent appointment to a PM-01 position on the basis of a recalculated CR-04 salary.

[39] In the first place, his grievance involves the interpretation of the pay equity agreement in relation to his promotions during the retroactive period specified in subsection 9.5 of the Memorandum of Agreement. The grievor presented as proof the recalculation of salary applied by the employer to Mr. Wong, who was promoted to a

term appointment on the same date as he was. The employer's response to the grievance specified that Mr. Karimjee is not entitled to a recalculation of salary because there is no provision under the terms of the pay equity agreement for recalculation of his rate of pay. On that issue, the grievor presented indirect evidence, by Mr. Wong's testimony, that the base rates of pay were amended by the pay equity agreement. However, to come to this conclusion one must interpret the Consent Order provisions, which is something that the Board is without jurisdiction to do.

[40] The employer's counsel submitted in his argumentation that an adjudicator appointed by the Board has no jurisdiction to determine if the employer properly applied section 9.5 of the Memorandum of Agreement. I concur with the conclusion reached by Chairperson Tarte in the case of *Public Service Alliance of Canada and Treasury Board* (*supra*), stating that the Federal Court and eventually the Canadian Human Rights Tribunal have the jurisdiction to correct the ambiguity contained in the order of the Canadian Human Rights Tribunal. According to Mr. Tarte, the Board should not attempt to correct the ambiguity and the Federal Court of Appeal (2002 FCA 447) agreed with that position. On that issue, Mr. Tarte specified as follows:

> *The imprecision of the language used in the Consent Order can give rise to differing views and interpretations. I do not believe that this Board should attempt to correct the ambiguity contained in the order of the CHRT. Unless the parties agree on this issue, the matter must go back to the Federal Court and eventually to the CHRT.*

[41] Mr. Justice Sexton of the Federal Court of Appeal concluded as follows:

> *In order to succeed it was incumbent upon the applicant to satisfy Chairperson Tarte that the consent order gave effect to an agreement that the specified benefits and allowances be paid so as to give rise to an obligation under the collective agreement. In our view, Chairperson Tarte was on solid grounds when he held that the consent order was not clear on this issue and that accordingly, the existence of the alleged obligation had not been established.*
>
> *We agree that it is far from clear that the Memorandum of Agreement and the consent order can be said to give rise to any such obligation and this was sufficient for Chairperson Tarte to reach the conclusions which he did.*
>
> [...]

> *We are inclined to the view that the effect of the consent order is limited by the explicit terms of the Memorandum of Agreement with the result that what is not articulated in the consent order is not contemplated by the consent order.*

[42] Vice-Chairperson Potter concluded that he had no jurisdiction to decide on the grievance of Mr. Nadeau (*supra*) requesting a recalculation of salary (section 9.5 of the Consent Order providing a five-percent (5%) lump sum) on the basis that the five-percent (5%) lump sum does not amend the collective agreement applicable to the grievor. On this issue, Mr. Potter stated as follows:

> *In the instant case for the period Mr. Nadeau seeks a recalculation of salary, section 9.5 of the consent order provided for "...a 5% lump sum of the total pay equity adjustment..." This does not amend the collective agreement applicable to the grievor. Consequently, I find that I have no jurisdiction to decide this matter under subsection 92(1) of the Public Service Staff Relations Act.*

I agree with that finding made by Mr. Potter.

[43] Consequently, I have to conclude that I have no jurisdiction to determine if the interpretation and/or the application of section 9.5 of the Memorandum of Agreement was properly done by the employer in the case of Mr. Karimjee.

[44] On the other hand, I can give the terms used by Mr. Karimjee in his grievance a broader interpretation, which based his request on the terms of the collective agreement related to the recalculation of salary in cases of promotion. This position was the one advanced by the bargaining agent in his arguments. The employer has responded by pointing to the *Burchill* (*supra*) decision, arguing that the grievor's grievance as written and as argued is different. However, the evidence reveals that the grievance was not changed, as in its final level reply the employer referred to this argument. The employer was not taken by surprise by the argument of the bargaining agent before me and the true issue between the parties had been debated all along. The grievor submitted in his argumentation that the pay equity agreement specifies what type of calculation is required for certain time periods (after or prior to March 31, 1994), but does not specify how it would be applied. The how is, argues the grievor, contained in the "Terms and Conditions of Employment Policy" and regulations and provides that a recalculation must be done in the event that a person is appointed to the indeterminate position from the acting position. This argumentation requires me to apply the "Terms and Conditions of Employment Policy"

and regulations rather than the pay equity agreement. I can interpret the second paragraph of the corrective action portion of the grievance as a request by the grievor that his acting PM-01 salary and his indeterminate PM-01 salary be recalculated according to the "Terms and Conditions of Employment Policy" and regulations using the CR-04 salary, as adjusted by the pay equity agreement, as the basis of the calculation. The grievor refers to the adjusted salary rates as if they were a fact.

[45] Consequently, this second argument of the grievor relies on the pay equity agreement, on whether or not it amended the wage rates of the applicable collective agreement and, finally, the application of the Policy and regulations. On this issue, the grievor did not meet his burden and prove that the rates of pay were amended by the pay equity agreement on the date of his appointment at the PM-01 level (April 18, 1994) or before. The testimony of Mr. Wong, who stated that a recalculation of his pay was done by the employer in his case, is not enough to substantiate this allegation and prove modification of the rates of pay. The employer did not explain how it had proceeded in the calculation of Mr. Wong's salary and instead submitted that the grievor had failed to file the applicable collective agreement as an exhibit. It also argued that the grievor had failed to prove the existence of the specific clause supporting his assertions that the collective agreement specifies how the calculation of salary should be done in a situation of promotion and that the "Terms and Conditions of Employment Policy" and regulations should apply.

[46] Without proof of relevant articles of a collective agreement, I cannot accept the assertion of the bargaining agent that the "Terms and Conditions of Employment Policy" should apply. Without that proof, I am unable to determine if the Policy is incorporated into the collective agreement to provide how the calculation should be done in a promotion situation.

[47] The grievor complains that his salary as a PM-01 was lower than the pay equity adjusted salary of a CR-04. The crux of the pay equity case was the fight of employees occupying female-dominated groups against the discriminatory practice of the employer to pay these people less than it paid those occupying male-dominated groups. The Canadian Human Rights Tribunal decision rendered on July 29, 1998 concluded that a breach of section 11 of the Act had been proven. The Consent Order and the Memorandum of Agreement are documents that were designed to direct the parties to the decision in how to implement the decision of the Tribunal with respect

to employees in the affected groups. The CR group is such an affected group, whereas the PM group is not. Absent a violation of the pay equity provisions of the *Canadian Human Rights Act* (*CHRA*), there is nothing in theory which prevents the employer from paying an employee classified as a CR a salary which is superior to that paid to an employee who is classified as a PM. Had the employer raised the PM wage rates in response to the Tribunal decision, a wage gap would have been maintained and the violation of the *CHRA* would have been perpetuated.

[48] Another problematic aspect of the present case is that Mr. Karimjee is actually a member of the PIPSC, per his AU-01 appointment, yet he requested the application of collective agreements applicable to the CR and PM classifications, collective agreements that are signed by the PSAC. In such a situation, the bargaining agent for the bargaining unit representing the employees in the CR and PM classifications should signify its approval of the reference to adjudication and its willingness to represent the employee or its willingness to allow the PIPSC to argue the PSAC collective agreement in the adjudication process per subsection 92(2) of the *Public Service Staff Relations Act* (*PSSRA*). In the absence of such approval, the employee is not entitled to refer the grievance to adjudication. In the absence of such approval by the PSAC, the reference to adjudication of the grievance of Mr. Karimjee relating to collective agreements signed by this bargaining agent is not valid.

[49] Finally, I make the following comment *in obiter*. Notwithstanding that the Board has no jurisdiction to interpret the Canadian Human Rights Tribunal Consent Order, I doubt that the preliminary assertions of the grievor's representative that the wage rates of pay were amended by the pay equity agreement on or previous to the date of Mr. Karimjee's promotion to the PM-01 position, have a chance to succeed. The wording of the Order No. 7 and section 1.8 of the Memorandum of Agreement seem to specify that the pay equity adjustment of wages are folded in and become an integral part of wages only for periods after the date of the Tribunal decision of July 28, 1998.

[50] For all these reasons, I have no jurisdiction to hear this case and the grievance is consequently dismissed.

Léo-Paul Guindon,
Board Member

OTTAWA, November 28, 2003.