**Date:** 20041209

**Files** 166-2-32552
166-2-32554

**Citation:** 2004 PSSRB 171

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

**SHERRY ENNS**

Grievor

and

**TREASURY BOARD**
**(Correctional Service of Canada)**

Employer

***Before:*** Paul Love, Board Member

***For the Grievor:*** Corinne Blanchette, UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

***For the Employer:*** John Jaworski, Counsel

Heard at Abbotsford, British Columbia,
August 17, 2004.

The grievances before me

[1] The question on the merits of the grievances is whether a part-time employee must work 1956 hours to obtain a pay increment, or whether the part-time employee is entitled to an increment every twelve months. The employer, however, submits that I have no jurisdiction to hear these grievances on the basis of timeliness. I heard evidence on the employer's objection and on the merits of these cases from two witnesses: the grievor, Sherry Enns, and Rick Oakes, Compensation Manager, Pacific Region, Correctional Service of Canada. I also considered the exhibits, the case law and the arguments of the grievor's representative and the employer's counsel.

[2] The grievor, Sherry Enns, is employed with the Correctional Service of Canada as a Correctional Services Officer Supervisor (CX-2) at Matsqui Institution. Ms. Enns filed grievances on October 16, 2002 (PSSRB File No. 166-2-32552) and on March 10, 2003 (PSSRB File No. 166-2-32354), to the effect that her pay increment date was miscalculated (pro-rated) during her part-time employment from January 17, 2000, to January 20, 2001. In substance, there is no difference between the two grievances. The grievor claims in both grievances to have been denied a pay increment, based on the employer's action in pro-rating her employment by her part-time status and miscalculating the pay increment date during the period of Ms. Enns's part-time work status.

[3] Both grievances were referred to adjudication on July 21, 2003. Given the parties' unavailability to attend a hearing in the fall of 2003 or in the winter or spring of 2004, the hearing was held on August 17, 2004.

[4] The *Terms and Conditions of Employment and their Duration for Employees in the Correctional Groups* (codes 601/99 and 651/99) was the collective agreement applicable to Ms. Enns up to May 31, 2000 and remained in force until the *Agreement between the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN* for the Correctional Services Group (codes 601 and 651) came into force on April 2, 2001. The *Terms and Conditions of Employment and their Duration for Employees in the Correctional Groups* (the collective agreement) was therefore the collective agreement applicable to the period grieved.

Ms. Enns's employment background

[5] Ms. Enns commenced her career with the Correctional Service of Canada in 1989, as a clerk (CR-3) at Kent Institution. She was appointed as a Correctional Officer (CX-1) in January, 1999. She is currently a CX-2 at Matsqui Institution. Up until January 2000, she was a full-time employee. Her pay increment date as at the end of December 1999 was January 3, 2000.

[6] Ms. Enns made a request to work part-time in January 2000. She remained as a part-time employee from January 2000 to January 2001. Her work on the part-time schedule was from 7:30 a.m. to 3:30 p.m., Monday and Tuesday, and then Monday, Tuesday, and Wednesday the following week. Ms. Enns chose to become a part-time employee because of her involvement in a custody dispute over her children. Her husband was claiming custody of their children and claimed that he was better able to care for them because he worked a day shift. Ms. Enns's work at Matsqui Institution as a CX-1 involved shift work, seven days on, three days off, and then seven days on and four days off.

[7] Prior to becoming a part-time employee, Ms. Enns made an oral request to that effect to George Elder, a Correctional Supervisor. She did not sign an agreement. After she became part-time, she received a letter dated January 4, 2000, from Daryla Cuthbertson, Compensation Services (Exhibit 5). The letter reads, in part, as follows:

. . .

> *The following information is provided to clarify the specific terms and conditions of employment and other authorities, which will govern your compensation and benefits while you are employed on a part-time basis.*
>
> *Collective agreements generally provide that part-time employees are entitled to benefits in the same proportion that their hours of work compare with the normal hours of work of a full-time employee of the same occupational group.*
>
> . . .
>
> *PAY INCREMENTS*
>
> *You will become entitled to a pay increment when your total hours of work equal those required by a full-time employee to earn an increment.*
>
> . . .

[8] Ms. Enns did not meet with any representative of the employer to discuss the terms of this letter and did not sign the letter. Exhibit 5 is not drafted to provide for any agreement by the employee, or any acknowledgement of receipt of the terms by the employee. Ms. Enns testified that, if she had not changed her employment status from full-time to part-time, she would have "lost her children, her sanity and her job". Ms. Enns filed a medical certificate from her doctor, dated December 14, 2001 (Exhibit 6), which contained a recommendation for family therapy arising out of her divorce.

[9] Following her change in status from full-time to part-time, Ms. Enns continued to work at Matsqui Institution. She performed her regular duties. She did not perform any duties different from those performed by full-time employees. She was under the care of a doctor for what Ms. Enns referred to as "post-traumatic disorder and depression". There was no medical evidence filed in this case confirming this medical condition.

[10] Photocopies of Ms. Enns's pay cards were filed by the employer at the hearing (Exhibit 23). The pay cards demonstrate that Ms. Enns was promoted from a CR-3 position to a CX-1 position on January 1, 1999, and obtained a pay increment on January 6, 2000. The pay cards indicate that Ms. Enns was acting in a CX-2 position by April 30, 2001.

[11] Ms. Enns was in a continual acting position at the CX-2 group and level commencing April 30, 2001. Mr. Oakes's evidence was that when an employee is continually acting in a position, the date on which the employee commenced continually acting becomes the increment date. In successive years, the increment date would be April 30. At this hearing, Mr. Oakes admitted that there had been an error in the calculation of the increment period and that Ms. Enns was entitled to an increment calculated from April 30, 2001, for the years 2002, 2003, and 2004. Mr. Oakes stated that this error was in the process of being rectified at the time of the hearing. The pay cards filed as Exhibit 23 show that the rate of pay for Ms. Enns has now been changed to reflect the pay increment due to her as of April 30, commencing on April 30, 2002. Ms. Enns admits that the error was corrected by e-mail four days before this hearing commenced, but she has not yet received the money.

[12] On November 28, 2001, Ms. Enns was offered an indeterminate appointment as a Correctional Officer (CX-2) at Matsqui Institution, effective November 14, 2001

(Exhibit 12). She accepted this offer on December 5, 2001. Ms. Enns agrees that her increment date would have been November 14 for years after 2001, although, in her case, the increment was retroactive to the date on which she was first acting in the position on a continual basis.

[13] Ms. Enns is a grievance officer and a shop steward at the Matsqui local of the bargaining agent, and she has received some training in the handling of grievances. She was not, however, a grievance officer with the bargaining agent during the period from January 2000 to January 2001.

Earlier grievances

[14] Ms. Enns filed a grievance which related to statutory holiday pay, when her bargaining unit was represented by another bargaining agent, the Public Service Alliance of Canada. She says that her grievance was "gone" but she took internal steps about pay issues, and requested an internal investigation or an audit on her file. The date on which she requested the audit is uncertain.

[15] As a result of her request, Ms. Enns received a letter from Ruth Lloyd, Compensation Advisor, dated October 25, 2001 (Exhibit 7), advising Ms. Enns that she owed money to the employer. This was for an error in the pay increment date which was incorrectly paid by the employer on June 1, 2001, rather than July 3, 2001, the date on which the employer claimed the pay increment was due. As a result of receiving the letter of October 25, 2001 (Exhibit 7), Ms. Enns noted that it stated that her pay increment date was July 3, 2001, and that the amount of the over-payment was recovered by August 15, 2001.

[16] Exhibit 7 detailed the hours worked by Ms. Enns during the period from January 7, 2000, to July 5, 2001. Ms. Enns worked 1956.6 hours by the end of the day on July 5, 2001. The salient portions of Exhibit 7 indicate as follows:

. . .

> *The following is the results of the audit on your stat increment date that you requested. Stat increments are paid on the completion of 1956.6 hours of employment.*
>
> *Your last stat increment paid to you, prior to your job share agreement, was January 6, 2000. . . .*

. . .

> *Stat increment* [*sic*] *due July 3, 2001. Initially the stat was paid incorrectly June 1, 2001 and was amended and recovered August 15, 2001. . . .*
>
> *Your stat increments will fall on July 3rd of each year while you are working full time hours.*

. . .

[17] Ms. Enns admitted in cross-examination that she read this letter when she received it. Ms. Enns admitted that she received her pay cheques by direct deposit, and she received a pay stub every two weeks. She also advised that she sometimes received supplemental cheques. Ms. Enns was asked during cross-examination why she had not brought her pay stubs at the hearing. She responded that she did not understand what it would have achieved, since her pay stubs indicate what money was paid to her.

[18] Ms. Enns indicated in cross-examination that she was upset that the employer was recovering money from her. Ms. Enns filed a grievance contesting the employer's decision to recover amounts from her following the audit (Exhibit 14), on November 17, 2001.

[19] Ms. Enns also received letter from Ms. Lloyd, dated October 29, 2001 (Exhibit 13), advising Ms. Enns of another recovery. This recovery related to those statutory holidays on which Ms. Enns did not work, but was paid 4.25 % on her pay cheque in lieu of statutory holidays, for the part-time period. Ms. Enns testified that this was a huge amount for her, given that she was going through a divorce, and she made a request to the employer to pay the money back over time. The audit results made her "gun shy" about raising pay issues with the employer.

[20] Ms. Enns also presented a grievance on January 16, 2001, concerning the effect of her part-time status on statutory holidays (Exhibit 15). This grievance reads as follows:

> *That Article 35.06 is inappropriately applied to job sharing employees and as a result I have not been paid the wages for* [*sic*] *which I am entitled. To apply when determining pay for statutory holidays for job shareworkers* [*sic*].

Ms. Enns requested the following corrective action:

> *That article 34 of the Terms and Conditions of my employment be applied in determining the money owning* [*sic*] *me for statutory holidays from Jan 2000 to Jan 2001.*

[21] The employer provided a final-level grievance response on May 9, 2002 (Exhibit 16). I note that these grievances arose from Ms. Enns's part-time status, during the period January 2000 to January 2001.

[22] On August 14, 2002, Ms. Enns made an access to information and privacy request (ATIP request), and a copy of the request was before me as an exhibit (Exhibit 9). On or about September 19, 2002, she received a handwritten note which confirmed that the employer pro-rated by 50 % the 256 working days during the job share period to arrive at 960 hours credited towards the pay increment, during the period of her part-time employment. She received in total 43 pages of documents and indicated that she did not understand some of the documents she received.

[23] Ms. Enns made some inquiries as to why other part-time employees got their increments and she did not. She indicated that this was over a period of time. She filed an e-mail from a co-worker, Brenda Scott, to Sherry Enns dated March 9, 2003 (Exhibit 11), which indicated that under the collective agreement, the increment took twice as long because of job sharing. Ms. Enns also referred to a first-level grievance reply dated April 17, 2003 (Exhibit 10), which indicated that as of November 19, 2001, annual increments for part-time employees were no longer pro-rated to reflect full-time hours. Exhibit 10 also attached an e-mail from Rick Oates, giving advice to Dianne Bazinet, Director, Compensation Policy in Ottawa, that part-time employees were to be treated the same as full-time employees for increments, as of November 19, 2001.

Grievance in PSSRB File No. 166-2-32552

[24] On October 16, 2002, Ms. Enns submitted a grievance at level one:

> *I grieve that my increment date was miscalculated (pro-rated) during my part-time (job share) employment from January 17, 2000 to January 10, 2001 as per the collective agreement and other relevant policy.*

She sought the following corrective action:

> 1. *That my increment date be retroactively re-calculated.*
>
> 2. *That all monies owed to me as a result of the miscalculation be retroactively reimbursed (including Overtime, Shift Differential, Statutory Holidays, etc).*

[25] She received the following reply (Exhibit 10) from the employer:

> *In consultation with the Compensation Advisor it was determined that the annual increments were no longer prorated to reflect full time hours as of November 19, 2001*
>
> *This direction came from the Director, Compensation Policy/ Labour Relations CSC-SCC.*
>
> *As your previous job share was before the direction was issued, the changes made to the increment structure do not apply to your case.*
>
> *As a result your grievance is denied.*

Grievance in PSSRB File No. 166-2-32554

[26] Ms. Enns submitted a second grievance on March 3, 2003 as follows:

> *I grieve that when I was job sharing from January 17, 2000 to January 10, 2001 that I did not receive an increment every 12 months but that my increment was pro-rated.*
>
> *Full time employees that are currently at Matsqui Institution and are currently job sharing, are currently given and are entitled to an increment every 12 months, as stated in the agreement between the Treasury Board and the Union of Canadian Correctional Officers.*
>
> *The contract in* [*sic*] *which was applied to my job share employment (Terms and Conditions of Employment and Their Duration for Employees in the Correctional Group: Expiry of May 31, 2000) and the contract (Between the Treasury Board and the Union of Canadian Correctional Officers: Expiry of May 31, 2002) indicates* [*sic*] *no significant change to the wording and interpretation when determining when an employee receives an increment.*

[27] The relief sought in the March 3, 2003 grievance was similar to the relief sought in the October 16, 2002 grievance.

The employer's processes

[28] Mr. Oakes gave evidence concerning the employer's pay system. Mr. Oakes is involved in the administration of 7 to 9 collective agreements, including the collective agreement for the Correctional Officers Group. As well as the terms of the collective agreements, the employer also considers the Treasury Board Compensation and Pay Administration Guidelines for Part-time, casual and seasonal employees (Exhibit 19), and the pay administration manual in administering pay and benefits for all employees. Excerpts from the pay administration manual were marked as Exhibit 20.

[29] Mr. Oakes testified that the pay increment statement in the letter directed to Ms. Enns when she became a part-time employee was taken from chapter 4, clause 5.4 and clause 6.3.1 of the pay administration manual.

[30] Clause 5.4 of the pay administration manual states, in part,

> *An employee continues to be entitled to pay increments in the substantive position while performing the duties of the higher position on an acting basis. . . .*

[31] Clause 6.3.1 of the pay administration manual states as follows:

> *The first pay increment becomes due at the end of the period specified in the relevant collective agreement or terms and conditions of employment, calculated from the date of the employee's appointment.*

[32] Mr. Oakes testified that, if a collective agreement is silent regarding the increment date, the employer looks to the pay administration manual, particularly, the notes on page 33 of chapter 4. This note reads as follows:

> *If the collective agreement is silent, the increment period shall be that period over which the part-time employee has been paid for the same number of straight-time hours as required by a full time employee.*

[33] Over the relevant time period claimed by Ms. Enns, she was governed by the collective agreement, which expired on May 31, 2000 (Exhibit 1). The increment period for a full-time employee is set out in the Pay Notes to each collective agreement (Exhibit 1, at page 90):

. . .

1. *The pay increment for a full-time employee is twelve (12) months.*

. . .

[34] Mr. Oakes stated that when the issue arose as to the entitlement of part-time employees to the annual increment, he sought clarification. The employer filed e-mails from Bambra Majel, Compensation Advisor, Pacific Region setting out confirmation of the policy that part-time correctional officers were required to work 1956.6 hours before they were entitled to a pay increment.

[35] Mr. Oakes's evidence was that if Ms. Enns had not worked part-time, she would have received an increment next on January 6, 2001. Because she worked part-time, the increment date was July 3, 2001, although the employer paid the increment in error in June 2001 and recovered it by August 2001. Mr. Oakes stated that when an employee is promoted, the date of the promotion becomes the date for calculating the pay increment date. Mr. Oakes stated that when an employee acts continuously, the date on which the employee commences to act continuously becomes the date for calculation of the pay increment.

[36] Mr. Oakes said that for 2002 and successive years, Ms. Enns should have received her pay increment on April 30, 2002, April 30, 2003, and April 30, 2004, rather than on July 3, 2003, because she had been acting in a CX-2 position since April 30, 2001. Mr. Oakes testified that the employer has rectified this error.

[37] At this hearing, the employer filed copies of Ms. Enns's pay cards, which had been edited to remove personal information (Exhibit 23). The employer also filed copies of the payroll register for Ms. Enns. Ms. Enns was paid by direct deposit of funds to her bank account. She would receive a pay stub every two weeks accounting for her pay. Codes which are noted on the pay register for entitlements and deductions correspond to an acronym or explanation on the employee's pay stub. Employees in an acting position for a short period of time receive a supplementary cheque. Employees in a long-term acting position receive acting pay, showing as an acting premium on their pay stub. The pay register filed shows that Ms. Enns received her increment on July 3, 2001.

[38] The employer filed a copy of the Pay Administration Guide for part-time, seasonal and casual employees (Exhibit 19). This document is not part of the Treasury Board Terms and Conditions of Employment Policy. The part-time, seasonal and pay administration guidelines provide:

> *s. 2.3 Benefits*
>
> *Part-time employees are entitled to the same benefits as full-time employees but on a pro-rated basis. (i.e. in the same proportion as their assigned weekly hours of work compare with the normal weekly hours of work of full-time employees).*
>
> *The benefits provided are specified in the relevant collective agreement or in Section 52 of the Public Service Terms and Conditions of Employment Regulations, whichever is applicable.*
>
> *The following entitlements are calculated in the same manner as for full-time employees:*
>
> - *Revisions,*
> - *Promotions, transfers, demotions,*
> - *Acting pay,*
> - *Pay increments (Refer to Chapter 4, section 6 for examples)*
> - *Severance pay (Refer to Chapter 9, section 3 for examples).*

[39] Mr. Oakes's evidence was that the collective agreement was silent on the method for calculating the increment for part-time employees. Mr. Oakes indicated that the general approach was that benefits were pro-rated based on hours worked in accordance with clause 35.02 of the collective agreement:

> ***35.02*** *Part-time employees shall be entitled to the benefits provided under this collective agreement in the same proportion as their normal weekly hours of work compare with the normal weekly hours of work, unless otherwise specified in this agreement.*

[40] At level two of the grievance process in PSSRB File No. 166-2-32552, the employer raised the issue of timeliness as a bar to the adjudication of the grievance. The employer, however, also provided an answer to Ms. Enns on the merits of her grievance:

. . .

> *I am satisfied that compensation and benefits has paid your increment in accordance with the Collective Agreement and Treasury Board Policy. The "Pay Notes" in the Agreement between the Treasury Board and Union of Canadian Correctional Officers state "(a) The pay increment for a full-time employee is twelve (12) months)* [*sic*]*." The Collective Agreement is silent with respect to the calculation of the increment date for Part-time employees. Compensation and Benefits must therefore, refer to the Treasury Board's Pay Administration Manual. The Treasury Board's Pay Administration Manual chapter entitled "Pay Rate Change" section 6.3.11 Part-time employees, states "The method of calculating pay increments for part-time employees varies from one collective agreement to another. Reference must therefore be made to the relevant collective agreement to determine the method of calculating the increment period and effective date. If the collective agreement is silent, the increment period shall be that period over which the part-time employee has been paid for the same number of straight-time hours as required by a full-time employee." Therefore, your increment calculation was based on the total hours worked of a full-time employee and not in calendar months.*
>
> *Accordingly your grievance is denied.*

. . .

[41] Ms. Enns did not make any application for an extension of time to file the grievances prior to the hearing.

Arguments of the parties

For the grievor

[42] Ms. Enns says that the employer's pay system is difficult to understand, and that she only became aware that she had a grievance when she received an answer to her ATIP request. The grievor suffered stress as a result of a marriage breakdown and she should not be held to strict time limits. Further, she argues that the grievance can be seen as a continuing grievance, with each failure to pay constituting a separate breach of the collective agreement: extracts from Brown and Beatty, *Canadian Labour Arbitration*, at ¶ 2:3128; and *Moyes v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File No. 166-2-24629 (1994) (QL). The employer has waived its timeliness argument by failing to object on the basis of timeliness prior to the first

hearing date scheduled for April 2004: Brown and Beatty (*supra*), at ¶ 2:3130; *Guillemette v. Treasury Board (Canadian Space Agency)*, PSSRB File No. 166-2-23827 (1993) (QL); and *Chadwick v. Canadian Food Inspection Agency*, 2003 PSSRB 38. The grievor says that there is no prejudice to the employer from proceeding at this time. Further, Ms. Enns says that she is not limited by *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No 813 (FCA) (QL), in seeking a remedy for more than 25 days before the filing of the grievance, given that this is a continuing grievance (*Phillips v. Treasury Board (Labour Canada)*, PSSRB File No. 166-2-20996 (1991) (QL)) and given some uncertainty in the facts or clear position from the employer (*Tremblay v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-2-25241 (1994) (QL); *Public Service Alliance of Canada v. Treasury Board* (1993) (QL); *Camilleri v. Canada Customs and Revenue Agency*, 2003 PSSRB 90). Ms. Enns further relied upon *Sinclair v. Canada (Treasury Board)* (1991), 137 N.R. 345 (FCA).

[43] The collective agreement is silent on the issue of pay increment for part-time employees. This does not mean that the employer has discretion to impose a different pay increment. Clause 48.01 of the collective agreement incorporates by reference the Terms and Conditions of Employment Policy, but not the employer's pay administration manual. Article 31 of the Treasury Board Terms and Conditions of Employment Policy (Exhibit 3) is clear that, if a collective agreement is silent on the pay increment for part-time employees, it should be 12 months, in accordance with the Terms and Conditions of Employment Policy: *Kreuger v. Treasury Board (Revenue Canada – Customs, Excise and Taxation)*, 2000 PSSRB 1. The employer's decision to pro-rate the 12 months and apply a different scheme to part-time employees is a violation of the collective agreement. If the employer wished to apply a different scheme to part-time workers, it should be the subject of negotiations during collective bargaining: *Re Valbay Hotel Ltd. and U.F.C.W.U.*, Local 175 (1994), 44 L.A.C. (4th) 8.

[44] Ms. Enns further argues that *Coallier* (*supra*) should not be followed because it would have the unfortunate effect of demanding that employers take no longer than 20 to 25 days to make decisions. This may lead to a proliferation of grievances, or employer's bad faith in delaying decision-making for more than 25 days: *Macri v. Treasury Board (Indian and Northern Affairs Canada)*, PSSRB File No. 166-2-15319 (1987) (QL). Further, Ms. Enns argues that the lack of a monetary remedy because of *Coallier* (*supra*) should not prevent an adjudicator from hearing a case, as an

adjudicator has the power to grant declaratory relief: *Brittle v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-18372 (1989) (QL).

[45] Ms. Enns requests that I reserve jurisdiction over the implementation of this decision, in the event of any difficulties arising.

For the employer

[46] The employer says that the grievances are "untimely on their face" as each grievance was filed more than 25 days after the implementation of the decision related to the grievance. Ms. Enns knew by as early as January of 2000, when she received the letter, that her increment date would be affected by her change in status from full-time employment to part-time employment.

[47] Further, the employer argues that this case is moot, because the grievor continuously acted as a CX-2 for the period April 30, 2001, to November 14, 2001, when she became a CX-2. If Ms. Enns had remained a full-time employee in her CX-1 position, without acting as a CX-2 or without being appointed to an indeterminate CX-2 position, her increment date would have been July of each year, and she would have been entitled to an increment in July of 2001. Ms. Enns, however, was entitled to a revision in the increment date calculated as of April 2001, because she was in a long-term acting CX-2 position. Given the dates on which they were presented, the grievances cannot be viewed as continuing ones, but only as grievances arising between the period from January 2001 to April 2001, and were moot at the time of their filing. Further, pursuant to the decision in *Coallier* (*supra*), the grievor has no entitlement to money in the period twenty-five days prior to the filing of the grievance and therefore there is no remedy.

[48] The employer also relies on *Horvath v. Treasury Board (Solicitor General Canada – Royal Canadian Mounted Police)*, PSSRB File Nos. 166-2-21133 and 21134 (1991) (QL); *Guaiani v. Treasury Board (Department of National Defence)*, PSSRB File Nos. 166-2-21358, 149-2-109 and 110 (1992) (QL); *Camilleri* (*supra*); *Lusted v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-21370 (1991) (QL); *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113; *Wilson v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File Nos. 166-2-27330 and 149-2-165 (1997) (QL); *Rouleau v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSSRB 51.

[49] In the alternative, the grievances should be dismissed on their merits. A full or part-time employee is required to work 1956.6 or 1957 hours before being entitled to the increment. The employer argues that it properly applied the pay administration manual, in the face of silence in the collective agreement on the entitlement of part-time employees to a pay increment. The increment issue is moot in this case, as Ms. Enns acted as a CX-2 since April 2001 and obtained a CX-2 position effective November 14, 2001, and these dates (April 2001 and then November 14, 2001) became the dates for calculating her increment.

Reply by the grievor

[50] Ms. Enns says that a distinction can be drawn in the timeliness cases, between termination cases, which involve a discrete identifiable event, and pay issues, which are often unclear and ongoing. On the merits, Ms. Enns argues that *Kreuger* (*supra*) is a similar case providing for incorporation of the Treasury Board policy, as it is a regulation. The employer, however, cannot rely upon *Kreuger* (*supra*) to incorporate its pay administration manual.

Reasons

[51] At this hearing, I heard both the evidence related to the employer's objection on the basis of timeliness and the evidence on the merits. After giving this matter considerable thought, I have determined that this case must be dismissed on the basis of timeliness. I therefore have not addressed the merits of the grievance in detail. My reasons for deciding this grievance on the basis of timeliness are set out below.

[52] Clause 20.10 of the collective agreement provides for a time limit of 25 days in the filing of grievances:

> ***20.10*** *An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 20.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

[53] I was advised by the grievor's representative that this hearing was set for an earlier date, in April 2004, and the employer did not advise the Board that it was relying on timeliness as a defence. I note that there is correspondence from

Lise Bourgeois-Doré, Employer representation advisor, dated July 23, 2004, on the record:

. . .

> *This is further to the above-noted references to adjudication, which are presently scheduled to be heard on August 17 and 18, 2004 in Abbotsford. It is the Employer's position that the Public Service Staff Relations Board* [*sic*] *(the Board) is precluded from hearing the above-noted grievances for want of jurisdiction.*
>
> *These grievances were presented in October 2002 (166-2-32552) and March 2003 (166-2-32354), to the effect that the statutory increment date should have been January 2001. In its reply at the second level of grievance PSSRB reference number 166-2-32552, the Employer raised the issue of timeliness. Given that both grievances deal with the same issues and that the first grievance was untimely and the grievor was informed as such, the Employer submits that both grievances are, on their face, untimely. There is no evidence to demonstrate that the grievor sought an extension of time frames for filing her grievances. Consequently, the employer respectfully submits that these references to adjudication should be dismissed for want of jurisdiction without a hearing.*

. . .

[54] The grievances filed in this case are untimely on their face. Ms. Enns has, however, suggested that the employer waived the time limits.

[55] This is not a case where the employer waived the time limits. The employer raised the issue of time limits in its second-level answer to the grievance in PSSRB File No. 166-2-32552. The employer did not raise a timeliness issue during the grievance process in PSSRB File No. 166-2-32554. That last fact, however, is inconsequential. As can be seen from the issues raised in the grievances, set out in paragraphs 24 and 26 (*supra*), the grievance in PSSRB File No. 166-2-32554 deals with the same issue which was raised in PSSRB File No. 166-2-32552. A party cannot invoke waiver by simply filing another grievance on the same subject matter, where the matter is not a continuing grievance. I find that the employer has raised a timeliness defence with respect to Ms. Enns's grievances, which has not been waived, and which I must determine as a preliminary issue in this proceeding.

[56] Sitting as an adjudicator and as a division of the Board, I do have the power to extend the time for the filing of a grievance. In deciding whether I should relieve against the consequences of delay, I have considered the length of the delay, the reasons for the delay, and briefly considered the merits of the case and prejudice to the parties. I note that the Board in *Wyborn* (*supra*), stated as follows:

. . .

> *The 25-day limit found in clause 18.10 of the collective agreement is the standard time limit for filing a grievance in the federal Public Service. It is the same time limit found in the Board's Regulations at subsection 71.(3). This 25-day limit is considered to be a sufficient time period for an employee to reflect, seek advice and decide whether or not to grieve. However, the Board has discretion under section 63 of the Board's regulations to relieve a party who failed to meet the time limit if to do otherwise would cause an injustice (see Rathew (supra)). To make a determination on this, the Board in the past has considered the length and reasons of the delay as well as weighed the balance of prejudice if the extension was granted or not.*

. . .

[57] In this case, the grievor should have been aware of the facts constituting the grievance as of the date that she received her letter describing the terms and conditions of her part-time employment in January 2000 (Exhibit 5). I accept the grievor's evidence that she did not meet with anyone or discuss with anyone the contents of the employer's letter. This, however, does not explain a lack of understanding of a very clear letter.

[58] I note that, even if the grievor did not read this letter or agree to the terms in the letter, surely she must have been aware that she did not receive her pay increment when it would have been otherwise due, but for her part-time work, in January 2001. I note that Ms. Enns would have received pay stubs, and the pay stubs would have alerted her that she had not received her pay increment. While there is some complexity about the employer's pay system, I am satisfied that any reasonable person reading a pay stub would have determined that the increment was not being paid in January of 2001.

[59] This is not a case of ongoing confusion about the employer's position concerning a term of employment, which was consistently under discussion. There is

no indication of employer bad faith in this matter. The employer followed an approach which it presumed to be correct in administering the terms of the collective agreement. The approach followed by the employer was consistent with the information it provided to Ms. Enns in January 2000, concerning the effect of part-time employment on the pay increment.

[60] There are a number of dates and events which should have triggered a person to file a grievance, in the sense of knowing what the facts were that constituted the grievance. Ms. Enns did not file her grievances within 25 days of any of them. Those events are:

> January 4, 2000 – when the employer advised of its position on the increment date at the start of the part-time employment;
>
> January 3, 2001 – when Ms. Enns did not receive the increment that she would have received but for the part-time employment;
>
> July 3, 2001 – when Ms. Enns received the increment that she believed was due in January 2001;
>
> October 25, 2001 - when Ms. Enns received further notice of the increment date of July 3, 2001;

[61] The employer's letter of January 4, 2000, clearly sets out the its position with regard to increment dates. I note that this clearly represents a change from the grievor's entitlement as a full-time employee. The words are plain and unambiguous, and any person reading the letter should have realized that the employer was going to implement a change to the increment date based on the grievor's status and work hours as a part-time employee. The grievances in this case were not filed until October 2002 and March 2003, well after the limits for the filing of grievances set out in the collective agreement.

[62] I accept Ms. Enns's evidence that it was imperative for her to change her hours in order to support her custody claim for her children. I also have no hesitation in accepting her oral testimony that she was under stress during this period, arising from the breakdown of her marriage and a battle over the custody of her children. I am, however, unable to find, on the evidence before me, that there is a reasonable explanation for the delay in the filing of this grievance.

[63] I note that Ms. Enns was also able to perform her job duties on an unrestricted basis during her part-time period of employment. Following her part-time employment, from April 30, 2001 onward, she acted continuously at the CX-2 level. Further, Ms. Enns filed other grievances related to part-time status and holiday pay on January 16, 2001 (Exhibit 15), and her part-time status and recovery of monies on November 17, 2001 (Exhibit 14). Ms. Enns may have chosen not to file a grievance because her earlier inquiries had resulted in a recovery of money by the employer. She may also have chosen not to file her grievances at that time because she had more pressing concerns with her family law litigation and coping with familial changes arising from separation and divorce. The oral testimony in this case, and the fact that Ms. Enns consulted her family doctor for medical assistance and was "prescribed family therapy" for her divorce on December 14, 2001, does not demonstrate, however, any incapacity that would explain Ms. Enns's failure to file the present grievances in a timely manner.

[64] I note that the grievance in PSSRB File No. 166-2-32552 would have been filed within the 25-day time-limit if one were to regard the information provided by the employer pursuant to the access for information request to be a "triggering event" for the purpose of filing a grievance. In my view, however, there was no lack of clarity in the employer's position with regard to increment dates, and therefore the receipt of information pursuant to the request is not an event which triggers the right to file a grievance. The employer's calculations were consistent with its letter of July 4, 2000, and with the first recovery letter sent by the employer to Ms. Enns on October 25, 2001.

[65] I have considered whether the grievances in this case can be properly characterized as a continuing grievance. The authorities filed by the grievor support the view that, in the case of a continuing grievance, the Board may exercise its discretion in favour of relieving against the time limits set out in the collective agreement for the filing of grievances. There is a further suggestion that, when the employer's position on the grievance is unclear, the Board may exercise its discretion to relieve against time limits.

[66] In my view, the cases relating to timeliness in continuing grievances and timeliness in cases where the employer's position is unclear or evolving do not assist the grievor. I note that, even if one can say that the pay increment was a recurrent

entitlement and, thus, a continuing breach of the collective agreement, there has been a very substantial and unexplained delay in the filing of the grievance. I cannot accept that the reasons advanced by the grievor constitute a reasonable excuse for failing to file the grievances on a timely basis. Further, there were changes to the pay increment date made as a result of changes in Ms. Enns's acting duties and her appointment at the CX-2 group and level prior to the filing of her grievances. At the time that she filed the grievances, she may have believed that the employer owed her a sum of money on a continuing basis. If she is correct in the interpretation of her entitlement arising from the collective agreement, no monies are owed to her as the result of a continuing breach during the 25 days prior to the filing of the grievances; the only amount arguably owing is a sum of money arising from the period from January to April 2001.

[67] One of the factors that I must consider in deciding to relax the grievance is the strength of the merits. In my view, the grievor has an arguable point that the method used by the employer to calculate the pay increment period for her as a part-time employee violated the terms of the collective agreement. The collective agreement is silent on the method of calculating the entitlement for part-time employees. The pay increment period for full-time employees is set out in the pay notes (Appendix "A") and is twelve months. In the absence of a method set out in the collective agreement, clause 48.01 of the collective agreement provides that:

> ***48.01*** *Except as provided in this article, the terms and conditions governing the application of pay to employees are not affected by this agreement.*

[68] The Treasury Board Terms and Conditions of Employment Policy (Exhibit 3) were before me. The terms and conditions are set out in Appendix "A". These terms and conditions provide a definition of "employee" which includes the part-time employee. According to the Terms and Conditions of Employment Policy, the pay increment period means "in respect of a position, the period between pay increments for the position". Clause 31 of the policy provides:

> *When the collective agreement is silent, the pay increment period shall be 12 months.*

[69] The bargaining agent relied on *Kreuger* (*supra*) as support for the proposition that, where the collective agreement is silent on a point, it is necessary to look at the Terms and Conditions of Employment Policy to determine entitlements. The issue

before the adjudicator in *Kreuger* (*supra*) related to whether consecutive or cumulative time spent in acting positions "counted" for the purpose of calculating increments. While this is a different issue from the one before me, *Kreuger* (*supra*) is some support for the proposition of reviewing the Terms and Conditions of Employment Policy where the collective agreement is silent on the point. The case cannot be extended, in my view, to incorporate the employer's pay administration manual.

[70] In my view, the employer arguably erred in applying the terms of the pay administration manual, when it should have applied the Treasury Board Terms and Conditions of Employment Policy.

[71] It is, however, apparent that Ms. Enns has no claim arising in the 25 days preceding the filing of the grievances for a continuing breach of the collective agreement: *Coallier* (*supra*). I note that no principled reason or special considerations have been put forward for departing from *Coallier* (*supra*). This is not a case of a continuing grievance, nor is it a case where the facts were sufficiently unclear, or the employer's position was unclear, or the basis of calculating the increment was unclear. While I accept that Ms. Enns was under stress for a period of time during 2000 as a result of her divorce, she was able to perform her regular duties on a part-time basis, she continually performed duties at a higher supervisory level as early as April 2001, she became involved in extra duties as a bargaining unit representative, and she was able to request an audit in 2001 and file other grievances arising out of her part-time status during 2001.

[72] I find it difficult to comprehend how Ms. Enns could not be aware of the employer's approach to the increment, given the very clear wording in the January 4, 2000 letter approving her request to change from full-time to part-time, the fact that pay stubs illustrate whether or not an increment is received (and this would have been apparent from the pay stub), and the fact that she did not receive an increment when she expected an increment in January of 2001. If there was any mystery, this mystery was cleared up as of July 2001, when Ms. Enns did receive her increment. The fact that she had not received an increment appears to have triggered her request for an audit or inquiry, which resulted in a recovery from her, written confirmation of the increment date, and the filing by her of a grievance related to the recovery. One would have thought that this would also have triggered the filing of a grievance regarding the increment.

[73] As indicated by the adjudicator in *Camilleri* (*supra*), the Federal Court of Appeal decision in *Coallier* (*supra*) is clear and has not been overturned. The increment date changes arising from Ms. Enns's appointment to a CX-2 position, with the increment date revised to the early continuous acting date, renders her claim a very limited claim for a pay increment during the period from January to April 2001. In my view, this is not a classic continuing grievance, because of the two changes to the increment dates at a relatively early stage after Ms. Enns's claim arguably arose. If the grievance had been filed during 2001, or if there was any confusion about the employer's position, I might have come to a different conclusion on the timeliness issue.

[74] The claim, however, was filed in the grievance presented in October 2002. This is a grievance which should have been filed at a much earlier time, arguably triggered by the letter of January 4, 2000, when her part-time status was approved and arguably triggered by her failure to receive the increment to which she believed she was entitled in January of 2001. The employer raised the defence of timeliness at an early stage. I am not satisfied that any significant reason has been advanced to explain a delay in the filing of a grievance from any of the trigger dates arising from the employer's notification to the grievor of her entitlement to the increment as a part-time worker, pro-rated based on the hours worked.

[75] I have considered the prejudice to the grievor, and particularly the comments of the Board in *Wyborn* (*supra*) set out below:

. . .

> *As Ms. Khanna submitted, the Federal Court of Appeal found that the Board is not required to weight the prejudices that might follow upon the granting or refusal of an extension of time limits when it has found that the grievor did not form the intention to grieve until after the time to do so had expired. However, if there were such a requirement in the instant case, concerning the prejudice to Mr. Wyborn I would find that the greatest prejudice would be to the employer. Time limits contribute to the stability in labour relations and should not be set aside lightly.*

. . .

[76] It is apparent in this case that Ms. Enns did not form the conclusion to grieve the employer's action of January 5, 2000, until well after the expiry of any time limits. Time limits do contribute to stability in labour relations, and I am satisfied on the facts

of this case that there is a greater prejudice to the employer and to the stability of labour relations in the hearing of this case. I therefore find that there is no justification to extend the time for the filing of these grievances. These grievances are denied.

**Paul Love**
**Board Member**

CAMPBELL RIVER, December 9, 2004