Date: 20041220

File: 166-34-32926

Citation: 2004 PSSRB 178

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PATRICK HARRISON

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

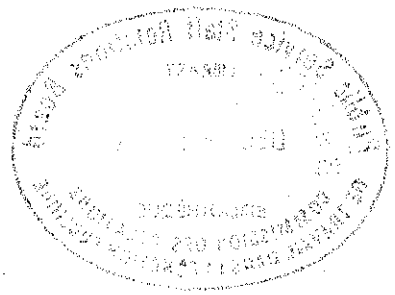
Employer

Before: Ian R. Mackenzie, Board Member

For the Grievor: K.L. Wilcock, The Professional Institute of the Public Service of Canada

For the Employer: R.A. Armstrong, Counsel

(Decision rendered based on written submissions.)



DECISION

[1] Patrick Harrison has grieved the failure of his employer, the Canada Revenue Agency (CRA) (Canada Customs and Revenue Agency, as it was then known), to adjust his parental leave allowance following a promotion to a position in a different bargaining unit. At the commencement of his parental leave, he was subject to the collective agreement between the CCRA and the Public Service Alliance of Canada (PSAC). During his leave, he was promoted to a position as an auditor (AU-01) and became subject to the collective agreement between the CCRA and The Professional Institute of the Public Service of Canada (PIPSC) governing employees of the Audit, Financial and Scientific (AFS) Group (effective date: July 22, 2002).

[2] The parties agreed to proceed by way of an agreed statement of facts and written submissions, which appear below. The appendices attached to the agreed statement of facts are on file with the Public Service Staff Relations Board (the "Board").

AGREED STATEMENT OF FACTS

> *1. Mr. Patrick Harrison (hereinafter referred to as "the grievor") is an employee of the Canada Revenue Agency, previously the Canada Customs and Revenue Agency, (hereinafter referred to as "the employer").*
>
> *2. This dispute concerns the parental allowance pay provisions of the AFS Group collective agreement between PIPSC and Canada Customs and Revenue Agency (now known as Canada Revenue Agency) as set out in clause 17.07. These provisions are substantially the same as the provisions of the Public Service Alliance of Canada (hereinafter referred to as PSAC) collective agreement at Article 40.02.*
>
> *3. As of October 1, 2001, the grievor began a fourteen (14) week period of parental leave without pay from October 1, 2001 to January 6, 2002. As a PM-02 (program administration) on October 1, 2001 he was covered by the PSAC collective agreement and his parental allowance was based on his annual salary of $43,747. This was adjusted to $45,147 as a result of a new PSAC agreement signed March 22, 2002.*
>
> *4. The grievor was sent a letter dated October 5, 2001, from Mr. R.D. Mann, Assistant Director, Verification and Enforcement, Edmonton Tax Services, indicating the grievor would be appointed to an AU-01 position at a salary of $47,162 per annum, effective October 15, 2001.*

5. On October 15, 2001 the grievor's appointment/ promotion became effective and he was classified as an AU-01. As an AU (auditor) the grievor would, as of October 15, 2001, be covered by the PIPSC AFS collective agreement.

6. On January 7, 2002, the grievor returned to work from parental leave.

7. On April 22, 2002, as a result of a new collective agreement signed with PSAC, retroactive pay at the PM-02 level was paid to the grievor for the period November 1, 2000 to September 30, 2001.

8. On June 7, 2002, based on the revised PM-02 salary, a retroactive pay adjustment of $349.30 was made to the grievor's parental allowance for the 14-week period of leave from October 1, 2001 to January 6, 2002.

9. On August 26, 2002, as a result of a new collective agreement signed with PIPSC, retroactive pay at the AU-01 rate was paid to the grievor for the period January 7, 2002 to August 28, 2002.

10. In May 2003, the grievor enquired about the parental allowance issue and the employer confirmed on May 27, 2003 that the adjustment to the parental allowance was based on the grievor's PM-02 salary.

11. On June 24, 2003 the grievor filed the subject grievance #03-1225-59298, claiming that the parental allowance for the period October 15, 2001 to January 6, 2002 should have been adjusted to reflect his rate of pay on promotion to the AU-01, Excise Tax Auditor position, effective October 15, 2001.

12. As corrective action, the grievor requested:

"That the parental allowance for Oct. 15/01 to Jan. 6/02 be adjusted to reflect my promotion effective October 15, 2001."

13. The employer's final level response dated October 10, 2003, was sent to the grievor (Appendix "I").

[Article 17.07(f)(i) of the collective agreement between the Professional Institute of the Public Service of Canada and the Canada Customs and Revenue Agency specifies that a full-time employee is entitled to parental allowance based on his weekly rate of pay on the day immediately preceding the commencement of...parental leave without pay. In addition, article 17.07(i) provides that, where an employee becomes eligible for a pay increment or pay revision while in receipt

of parental allowance, the allowance shall be adjusted accordingly.

I note that at the time you commenced parental leave without pay, you occupied a PM-02 position. Accordingly, your parental allowance is based on your PM-02 salary. I further note that you subsequently received an adjustment to your parental allowance on June 07, 2002. This adjustment was the result of a salary revision to your PM-02 rates of pay following the signing of a new collective agreement between the Public Service Alliance of Canada and the Canada Customs and Revenue Agency. As such, I am satisfied that the collective agreement has been applied correctly to your situation.

In view of the foregoing, your grievance is denied and the corrective action you have requested will not be forthcoming.]

14. As the grievance was not dealt with to the grievor's satisfaction at the final level, it was referred to adjudication.

15. This Reference to Adjudication was acknowledged by the Public Service Staff Relations Board in a letter to Mr. C. Leclerc, dated November 13, 2003, and assigned file number 166-34-32926.

SUBMISSIONS OF THE PARTIES

[3] The written submissions of the parties have been edited for style only. The full submissions are on file with the Board.

For the Grievor

Background to the Dispute

As set out in the Joint Statement of Facts signed and submitted on June 7, 2004, Mr. Patrick Harrison (hereinafter referred to as the grievor) was granted fourteen (14) weeks of parental leave without pay between October 1, 2001, and January 6, 2002. The grievor returned to work on January 7, 2002.

The grievor started parental leave as a PM-02 on October 1, 2001, and was promoted to an AU-01 two weeks into the leave, October 15, 2001. The Canada Revenue Agency (hereinafter referred to as the employer) would only pay the parental allowance and apply retroactive adjustments based on his PM salary. For the first two weeks of leave, the parental allowance and any applicable adjustments should be based on his PM-02 salary. However, as the grievor was promoted on October 15, 2001, the remaining twelve (12) weeks allowance payments and adjustments should have been based on the appropriate AU-01 salary.

This dispute concerns the provisions of sub-clause 17.07(f)(g) and (i) of the collective agreement. Specifically, the parties differ as to whether the parental allowance should be adjusted to reflect the new classification and salary of the recipient as a result of the promotion received during the period of paternal leave.

The grievor's representative inquired into the retroactive adjustment which was made to his parental allowance, and received an e-mail from the employer dated May 27, 2003, in response. This e-mail outlined the employer's interpretation and administration of the parental allowance entitlements. Subsequent to receiving this e-mail, a grievance was filed on June 24, 2003, stating:

> *Based on information received from CCRA on May 27, 2003, I grieve the employer's refusal to adjust my parental allowance to reflect the revision of my salary effective October 15, 2001. This is in violation of Article 17 of the collective agreement between CCRA and PIPSC.*
>
> *Corrective action requested:*
>
> *That the parental allowance for October 15, 2001 to January 6, 2002 be adjusted to reflect my promotion effective October 15, 2001.*

In the employer's final level grievance reply, the employer stated that a parental allowance is based on the "weekly rate of pay on the day immediately preceding the commencement of...parental leave without pay". In this reply, the employer also acknowledged that the grievor is entitled to revisions or changes to his parental allowance. This is evidenced by the retroactive adjustment made to the parental allowance due to the revision of the PM salary rates in the new collective agreement with PSAC. However, the employer has not acknowledged that the parental allowance and adjustments should be revised as a result of a promotion.

Purpose of Parental Allowance

The purpose of the parental allowance is to supplement Employment Insurance benefits to provide the employee 93% of the salary he/she would be receiving if the employee were working. If the grievor had been at work on October 15, 2001, the date of his promotion, he would have received AU-01 pay at the rate of $47,162 per year as stated on the letter of offer dated October 5, 2001.

The parental allowance operates in conjunction with section 23 of the *Employment Insurance Act* and provides for:

(i) the payment of an allowance equating to 93% of the employee's salary during the two week waiting period for EI parental benefits; and,

(ii) the topping up of parental benefits to 93% of salary for the remaining portion of leave during which the employee is entitled to EI parental benefits.

(See Article 17.07c)i) and ii) of the Collective Agreement between the PIPSC and the CCRA and Article 40.02c)i) and ii) of the Collective Agreement between the Public Service Alliance of Canada and the Canada Customs and Revenue Agency.)

Pursuant to clause 17.07 of the AFS collective agreement, an employee - either the mother or the father of a new-born or newly adopted child - who is granted parental leave becomes entitled to a parental allowance subject to certain eligibility requirements being met. The eligibility requirements in respect of the parental allowance are set out in sub-clause 17.07(a) which reads:

> *17.07(a) An employee who has been granted parental leave without pay, shall be paid a parental allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs (c) to (i), providing he:*
>
> *(i) has completed six (6) months of continuous employment before the commencement of parental leave without pay,*
>
> *(ii) provides the Employer with proof that he has applied for and is in receipt of parental benefits pursuant to Section 23 of the* Employment Insurance Act *in respect of insurable employment with the Employer.*
>
> *(iii) has signed an agreement with the Employer stating that:*
>
> *(A) the employee will return to work on the expiry date of his/her parental leave without pay, unless the return to work date is modified by the approval of another form of leave;*
>
> *(B) following his return to work, as described in section (A), the employee will work an amount of hours paid at straight-time calculated by multiplying the number of hours in the work week on which the parental allowance was calculated by the number of weeks for which the allowance was paid;*
>
> *(C) should he fail to return to work in accordance with section (A) or should he return to work but fail to work the total period specified in section (B), for reasons other than death, lay-off, early termination due to lack of work or discontinuance of a function of a specified period of employment that would have been sufficient to meet the obligations specified in section (B), or having become disabled as defined in the* Public Service Superannuation Act, *he will be indebted to the Employer for an amount determined as follows:*

(remaining period to be worked following her return to work)

(allowance received) x ———————————————— *[total period to be worked as specified in (B)]*

however, an employee whose specified period of employment expired and who is rehired by the CCRA within a period of five (5) days or less is not indebted for the amount if his new period of employment is sufficient to meet the obligations specified in section (B).

Mr. Harrison, the grievor, met the requirements of 17.07(a)(i) to (iii).

Weekly Rate of Pay

Article 17.07(f) of the AFS collective agreement states that the parental allowance is based on the salary being paid on the day immediately before the date the leave begins. It does not state that this rate cannot be subject to change. In fact, it allows for change or revision of the weekly rate. The weekly rate of pay on the day immediately preceding the commencement of parental leave without pay should be viewed as a starting point only for calculating the parental allowance and is subject to change for a variety of reasons, including incremental salary increases. This is substantiated by "Parental Leave Without Pay", Article 17.06(g), which states:

> *17.06(g) Leave granted under this clause shall count for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave.* ***Time spent on such leave shall count for pay increment purposes.*** [Emphasis added]

Paragraph 17.07(i) allows for adjustments to salary during this leave period by stating:

> *17.07(i) Where an employee becomes eligible for a* ***pay increment or pay revision*** *while in receipt of parental allowance, the allowance shall be adjusted accordingly.* [Emphasis added]

The Maternity and Parental Benefits Guide found on the Treasury Board website states the following under "Notes" on page 3 of Part 2 of 2:

> *Any salary increment or economic increase to which the employee would normally be entitled that comes into effect while the employee is in receipt of maternity or parental benefits will be reflected automatically in the maternity or parental allowance.*

Had the grievor been at work, he would have "normally been entitled" to an incremental increase to his salary by reason of promotion effective October 15, 2001.

The Canada Revenue Agency has been a separate employer since November 1999 (from Revenue Canada to Canada Customs and Revenue Agency). The parental allowance

provisions of the collective agreement covering auditors at Revenue Canada as a Treasury Board employer were substantially the same as today. Specifically, clause 21.07(B)(5) of the "Agreement between the Treasury Board and The Professional Institute of the Public Service of Canada", Expiry Date: May 4, 1999, stated:

> *Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.*

Therefore, we submit that the intent of the "Notes" in the Treasury Board Guide above apply to the current application of parental allowance payments by the employer, the CCRA, as they do to Treasury Board departments.

Promotion and Remuneration

A promotion provides for an "incremental" increase or revision of salary as set out in the *Public Service Employment Act and Regulations*, and these provisions are adopted and administered by the CRA for promotional purposes through the "Terms and Conditions of Employment Policy – July 2002".

Stated at paragraph 2 in the Terms and Conditions of Employment:

> ***"allowance"*** *means compensation payable*
>
> [In this case the allowance is the paternal allowance.]
>
> ***"relevant collective agreement"*** *means the collective agreement for the bargaining unit to which the employee is assigned or would be assigned were the employee not excluded.*
>
> [In this case, the grievor is on leave without pay and is receiving a parental allowance.]
>
> ***"substantive level"*** *means the group and level to which an employee has been appointed or deployed under the* Public Service Employment Act, *other than in an acting assignment situation.*
>
> [In this case the substantive level changed when the grievor was appointed from PM-02 to AU-01 effective October 15, 2001.]

Stated at paragraph 20 in the Terms and Conditions of Employment:

> *Remuneration – General*
>
> *Entitlement to remuneration*
>
> *20.(1) Subject to these regulations and any other enactment of the Treasury Board, an employee is entitled to be paid, for services rendered, the appropriate rate of pay in the relevant collective agreement or the rate approved by the Treasury*

> *Board for the group and level of the employee's classification.*
>
> *20.(2) Unless modified by these regulations, the rates of pay and allowances and any other compensation established by the Treasury Board in effect immediately before the coming into force of these regulations and conditions respecting their payment shall continue in effect.*

Section 43 of the Terms and Conditions of Employment states:

> *Sections 29 to 41 apply to every employee who has been granted leave without pay,* ***except where the relevant collective agreement provides that time spent on a particular kind of leave without pay does not count for pay increment purposes.*** [Emphasis added]

Sections 29 to 41 inclusive of the Terms and Conditions of Employment deal with pay increments and pay increment periods (including when related to promotions) and Clause 17.06(g) of the Collective Agreement states:

> *Leave granted under this clause shall count for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave.* ***Time spent on such leave shall count for pay increment purposes.*** [Emphasis added]

Section 2(2) of the *Public Service Employment Regulations* states:

> *Interpretation:*
>
> *2(2) For the purposes of the Act and these Regulations, "promotion" means the assignment to an employee of the duties of a position,.....for which the maximum rate of pay exceeds the maximum rate of pay applicable to the employee's substantive level immediately before the assignment of those duties by an amount equal to or greater than*
>
> *(a) the smallest* ***increment*** *on the pay scale for the new position has more than one rate of pay;* [Emphasis added]

The AU Pay Notes (Appendix "A" to the collective agreement) are further evidence that the employer and the bargaining agent consider promotions to be incremental in nature. Therefore, because the application of a promotion involves an incremental increase to one's salary, the interpretation of clause 17.07(i) must include promotions. Because the grievor clearly met the criteria for 17.01(i), namely he actually did become eligible and in fact did receive a pay revision or pay increment while in receipt of the parental allowance (as per the letter of October 5, 2001, from R.D. Mann), his parental allowance should be adjusted accordingly. The parental allowance and any retroactive adjustments must reflect his AU-02 rate of pay between October 15, 2001, and January 6, 2002.

Effective Date

The employer stated in the e-mail dated May 27, 2003, from Charlene Hall to Karen Wilcock that the grievor did not receive regular pay until he returned to work effective January 7, 2002. However, this January 7, 2002, date should not have any bearing on the effective date of the promotion or on the application of the parental allowance. This parental allowance is paid because an employee is **not** receiving regular pay.

In the instrument of appointment, the employer's letter of offer, dated October 5, 2001, the effective date for the grievor's new substantive position to which he was promoted was clearly October 15, 2001.

Section 22 of the Part III of the *Public Service Employment Act* states:

> *An appointment under this Act takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument.*

The effective date of promotion, October 15, 2001, is substantiated by two additional employer-generated documents; the CCRA PSAC Automated Retro Calculator document, and the AFS Automated Retro Calculator document:

a) Line #5 of the PSAC document indicates that the grievor was temporarily struck off strength (T-SOS) as a PM-02 effective October 14, 2001, and that he received no regular pay for the period October 1-14, 2001. This is the last line entry for the grievor on this document.

b) Line #1 of the AFS document indicates the grievor was promoted to an AU-01 effective October 15, 2001, and his salary was revised from $45,147 to $47,162 on that date. It also shows that because the grievor was on leave without pay, he received no regular pay.

c) Line #3 indicates that the grievor was again taken on strength (TOS) after parental leave effective January 6, 2002, and once again received regular pay.

d) These two documents indicate that the grievor changed bargaining units from PM (PSAC) to AU or AFS group of PIPSC on October 15, 2001.

Thus, there is only one effective date for this promotion, October 15, 2001. There were no qualifications pertaining to his return to work date nor parental leave dates in the letter of offer of October 5, 2001, yet the employer has treated the grievor as if the effective date of promotion was January 7, 2002.

Change in Bargaining Agent Representation and Collective Agreement

As of October 15, 2001, the grievor was promoted to an auditor and became a member of the PIPSC, the exclusive bargaining agent of the CRA auditors. As of that date he would be covered by and entitled to the provisions of the PIPSC/CCRA collective agreement. The "Notice of Change in Union Affiliation"' shows October 15, 2001, as the effective date of appointment to PIPSC from PSAC.

Conclusion

For the reasons given and according to the documentary evidence, we submit that because the grievor was promoted to an AU-01 on October 15, 2001, payment for the first two weeks of the parental allowance (October 1 - 14, 2001) was correctly based on his PM-02 salary but the last twelve (12) weeks of parental allowance should have been based on his AU-01 salary. It was incorrect, irrational, unreasonable, and a violation of the PIPSC/CCRA collective agreement to pay the grievor the parental allowance based on the salary of a position he no longer occupied and to apply provisions of a collective agreement that no longer applied to him.

Had the grievor been entitled to receive an annual increment as a PM during this period of leave, the parental allowance would have been adjusted to reflect the revision of salary. It is unreasonable and inconsistent to treat an employee who receives a promotional increment differently from an employee who receives an annual increment. The grievor was appointed to the AU-01 position on October 15, 2001, and from that date is entitled to benefits flowing from the promotion and new rate of pay of his new substantive position. The employer is bound to comply with the provisions of clause 17.07(g) of the collective agreement, which states:

> *The weekly rate of pay referred to in paragraph (f) shall be the rate to which the employee is entitled for the substantive level to which he is appointed.*

The employer, in denying the adjustment to the grievor's parental allowance, based on his AU-01 as of October 15, 2001, had effectively denied his promotion and the grievor has thereby suffered a financial penalty.

We request that all parental allowance payments and adjustments be corrected to reflect the salary the grievor was entitled to receive as an AU-01, effective October 15, 2001.

Jurisprudence

Thériault v. Treasury Board, PSSRB File Nos. 166-2-14508 and 14509, (1984) (QL) relates to grievances resulting from the employer's refusal to adjust the maternity allowance payable to two employees. A six percent increase to rates of pay in the collective agreement became effective during the employees' period of maternity leave without pay and was denied the employees while they were on leave without pay.

Although the reason for the change in the rate of pay is somewhat different in this case, the essence of the case is similar. An increase to the grievors' rates of pay became effective while they were on maternity leave without pay. Board Member D. MacLean allowed the grievances and ordered an increase in the allowances payable to the grievors, effective the date of the change in rates of pay, not the date that the employees returned to work. To do otherwise would have penalized the grievors.

Mr. Harrison is asking for the same treatment in this situation.

For the Employer

From the outset, it is important to understand that the employees on parental leave without pay do not receive a salary. They receive a parental allowance. The terms under which this allowance is paid are set out in Article 17.07 of the PIPSC collective agreement.

In the Agreed Statement of Facts, the parties agreed that the PIPSC collective agreement applied to the within case, as the grievor is currently a member of PIPSC as an AU employee. However, when the grievor commenced his leave, the employer maintains the position that at that time he was a PM, and therefore subject to the Agreement between CCRA and the Public Service Alliance of Canada, Program Delivery and Administrative Services that governs the PM group. However, given the fact that the same language governs both groups with respect to parental leave, in Article 17.07 of the PIPSC Agreement and Article 40.02 in the PSAC agreement, the employer did not take any position with respect to PIPSC's ability to represent the grievor in this grievance.

The following are what the employer says to be the relevant articles of the PIPSC collective agreement:

> *17.07 Parental Allowance*
>
> *(a) An employee who has been granted parental leave without pay, shall be paid a parental allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs (c) to (i), providing he* [Note: article goes on to describe criteria to get allowance with respect to matters not in issue here.]
>
> *(f) The weekly rate of pay referred to in paragraph (c) shall be:*
>
> > *(i) for a full time employee, the employee's weekly rate of pay on the day immediately preceding the commencement of maternity or parental leave without pay...*
>
> *(i) Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.*

For reference and comparison purposes, Article 40.02 on Parental Allowance, as found under the PSAC agreement, is included in its entirety, in an Appendix to this submission. (Note: On file with the Board.) The salient articles for the purpose of these submissions are as follows:

> *40.02 Parental Allowance*
>
> *(a) An employee who has been granted parental leave without pay, shall be paid a parental allowance in accordance with the terms of the Supplemental*

> *Unemployment Benefit (SUB) Plan described in paragraphs (c) to (i) providing he or she.....* [Note: article goes on to describe criteria to get allowance with respect to matters not in issue here.]
>
> *(f) The weekly rate of pay referred to in paragraph (c) shall be:*
>
> > *(i) for a full-time employee, the employee's weekly rate of pay on the day immediately preceding the commencement of maternity or parental leave without pay...*
>
> *(i) Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.*

Before the grievor took parental leave without pay, from October 1, 2001, to January 6, 2002, the employer takes the position that the grievor's substantive position was as a PM-02. His parental allowance was calculated based on his PM-02 salary of $43,747. Months after he finished his parental leave without pay, on April 22, 2002, he received a retroactive salary increase, effective November 1, 2000, to September 30, 2001, to which the members of the PM group became entitled as a result of the March 22, 2002, revision.

Based on this retroactive change, the parental allowance that he had received from October 1, 2001, to January 6, 2002, was adjusted to reflect these revised PM rates. The PM salary on which the parental allowance was based was then determined to be $45,147, rather than $43,747 as it was at the commencement of the parental leave without pay. The employer takes the position that the grievor received all of the appropriate entitlements as a result of the revision of the PM pay rates.

In this grievance, the grievor alleges that he is entitled to an increase based on the fact that on October 15, 2001, he was promoted to the AU group while he was on parental leave without pay. Because the grievor never performed work as an AU until his return from parental leave on January 7, 2002, the employer's position is that he was not entitled to have his parental allowance based on a salary he never received.

The employer takes the position that the grievor's allowance was based on Article 17.07 of the Collective agreement, which is very clear in terms of its application:

> *(a) An employee who has been granted parental leave without pay, shall be paid a parental allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs (c) to (i)....*

The section then goes on to enumerate the various conditions for receiving the parental allowance. The most important for the within case is 17.07(f), which is very clear that for a full time employee, the allowance is determined by:

> *...the employee's weekly rate of pay on the day* ***immediately preceding*** *the commencement of maternity or parental leave without pay.* (Emphasis added)

In the days "immediately preceding" the parental leave without pay, the grievor was a PM-02. In the employer's position, subsection 17.07(f) makes it clear that the allowance is not to be based on intervening events such as appointment to another group and level with a higher salary range, but rather, to the work performed immediately before the parental leave without pay is taken.

Subsection 17.07(i) of the collective agreement sets out the obligations on the employer when an employee becomes eligible for a "pay increment or pay revision". It is clear that when these occur, the parental allowance "...shall be adjusted accordingly".

As already stated earlier in these submissions, a revision of rates occurred in the PM group, on March 22, 2002. With respect to the grievor, the parental allowance based on the PM-02 salary was recalculated to reflect the "pay revision".

The employer's position is that the fact that the grievor received a promotion to a different group, AU, during the time of his parental leave without pay, does not constitute a "pay increment" or "pay revision" within the meaning of Article 17.01(i) of the collective agreement. Because a promotion was not contemplated to trigger the adjustment of parental allowance, no adjustment should occur in this case.

The employer takes the position that the union and the employer no doubt had the opportunity during negotiations to include any language they wished in this article, but it is plain from the wording that the "promotion" is not found in article 17.07(i). Therefore, it would be inappropriate to impute such language to this provision of the collective agreement as the grievance appears to be suggesting should have been done.

The employer reserves the right to advance further argumentation as to the meaning of "pay increment" or "pay revision" once it has had the opportunity to review the submissions of the union. However, before assuming the duties of a job, such as when one is on leave without pay, it is clear that there would not be any "pay" accruing to a worker within that occupational group. The employer takes the position that an allowance cannot be based on pay that was never earned.

In closing, the employer takes the position that Mr. Harrison was treated fairly in terms of the calculation of his parental allowance. The language of the collective agreement was followed to the letter - in terms of ascertaining the amount of parental allowance based on his PM-02 salary, and then adjusting it after there was a revision to the PM collective agreement. The parental allowance salary is to be calculated based on the work performed "immediately preceding" the parental leave without pay. In this case the work actually performed before the leave was as a PM-02. The employer should not be expected to recreate history, and base the grievor's allowance on work that he did not even perform until his return from parental leave without pay.

The employer submits that this is a straightforward case involving the interpretation of the collective agreement, and asks that it be resolved in the employer's favour.

REPLY SUBMISSIONS

For the Grievor

In the employer's submission, it is acknowledged that the grievor, Mr. Harrison, was promoted to the position of auditor during his period of leave without pay. It is also acknowledged that the collective agreement that covers the grievor as an auditor is the PIPSC collective agreement. Therefore, the parental allowance should be paid under the terms set out in the PIPSC collective agreement. Article 17.07(g) cannot be ignored. It states:

> *17.07(g) The weekly rate of pay referred to in paragraph (f) shall be the rate to which the employee is entitled for the substantive level to which he is appointed.*

On October 15, 2001, the substantive level to which Mr. Harrison was appointed was that of an AU-01.

Further, the terms "pay increment" and "pay revision" are not defined in the collective agreement. To restrict their meaning by limiting any adjustment to the parental allowance to revisions or increments relating only to the grievor's previous PM position is inappropriate and imputes language into the collective agreement that was not intended.

For the Employer

The employer wishes to reiterate its position that the grievor is not entitled to receive an increase based on his promotion to the AU group while on parental leave without pay. The parental allowance he was receiving at that time was based on his PM-02 salary, which, as 17.07(f) of the collective agreement makes very clear, is based on the weekly rate of pay "immediately preceding" the commencement of the parental leave without pay. Prior to October 1, he was a PM-02.

The collective agreement does not contemplate the allowance being based on intervening events such as appointment to another group and level at a higher salary range and in which the person has not ever worked.

Union counsel is, with respect, attempting to modify the collective agreement so that it does something it does not contemplate. The promotion to another group or level, and the resultant change in pay, is not a "revision" in pay or an "increment." These terms of art are clearly defined in policies and guidelines of the Treasury Board, which were adopted by the Board of Management of the (then) Canada Customs and Revenue Agency in October of 1999. Specifically, when one consults the Glossary of terms and definitions within the Pay Administration Guide, the meaning of terms such as increment and revision are defined as follows:

> *Increment (augmentation): is where there are intermediate steps, a progression from one step to the next higher step in any range of pay rates;*
>
> *Revision (révision): is a change in the rate or rates of pay applicable to an occupational group and level.*

Let us first consider the definition of "increment." It is clear that when the grievor received his promotion to the AU group, he did not progress from "one step to the next higher step in any range of pay rates." On the contrary, he left one range of pay rates—those of the PM group—and became eligible when he began working as an AU—to a new range of pay rates in another group. This eligibility was a contingent interest: one based on his performing duties in the new group when he had returned from leave without pay.

Considering the definition of "revision," the same logic applies. A revision is a change in the rates of pay applicable to an occupational group and level. By the use of the word "an" it is clear that the revision occurs within one occupational group and level, and not between disparate occupational groups and levels. As the employer has already made clear in its initial submission, the employer took care to ensure that the grievor was provided with the revision that occurred within his substantive occupational group and level - PM - while on leave without pay. Based on a retroactive revision dated March 22, 2002, the grievor's parental allowance was adjusted to reflect that change.

There is no allowance in the collective agreement, nor in Treasury Board Policy or Guidelines, that envisions an increase in the parental allowance based on a situation such as the one before you. There is no case law on the point, and indeed the one advanced by the union is, with respect, inapplicable to the within case. The *Thériault* case (*supra*), is distinguishable from the within matter, as it deals with workers who missed out on a salary increase within their own substantive group and level while on maternity leave. They did not, as had the grievor, gained a promotion during their leave. Indeed, the salutary result that the grievors were seeking in that case has been obtained for the grievor: he has obtained the salary increase that others within the PM group obtained even though he was on leave. The *Thériault (supra)* case does not advance the argument in the grievor's favour in this case that he should have his allowance adjusted as a result of a promotion to a position in which he never worked until he returned to work in January 2003.

FURTHER SUBMISSIONS

For the Grievor

In its submission, the employer puts forward definitions of "increment" and "revision" as set out in the "policies and guidelines of the Treasury Board, which were adopted by the Board of Management of the (then) Canada Customs and Revenue Agency in October of 1999." The definitions are from the Treasury Board "Glossary of terms and definitions" which does not form part of the collective agreement. The union was not consulted regarding the definitions of the "increment" and "revision" and cannot be bound by any definition or meaning that the employer may choose to give a particular word or term.

Counsel for the employer states that when the grievor received his promotion to the AU group, he did not progress from "one step to the next higher step in any range of pay rates." We maintain that that is precisely what he did, even by the employer's own definition of promotion from the "Glossary of terms and definitions":

> ***Promotion*** *- is an appointment where the maximum pay rate for the new position exceeds that for the substantive position by:*

> *(a) an amount equal to the lowest pay increment for the new position (where there is a scale of rates).*

With the promotion the grievor progressed to the appropriate next higher step (or increment) in the AU-01 range of pay rates.

The employer's argument that the grievor should not have his allowance adjusted while on leave because he has not yet worked in the position to which he was promoted is faulty. If this was to be accepted, then it would have to follow that any benefits that flow from promotions that become effective while an employee may be on vacation leave, sick leave, bereavement leave, etc. would not take effect until that employee returned to work.

For the Employer

The employer says that its reference to the Treasury Board Pay and Administration Guide does not mean that it is raising new arguments. The employer maintains its position that the grievor is not entitled to receive an adjustment based on his promotion to the AU group during the time that he was on parental leave without pay. Immediately prior to receiving the promotion, he belonged to another group and was a PM-02. As stated in previous submissions, the collective agreement itself is very clear that in such a situation as that of the grievor, a person would not receive the benefit of an adjustment.

The union objects to the employer's use of definitions from the Treasury Board Pay and Administration Guide. The employer submits that this objection is without merit. The guidance provided in this Treasury Board document applies to the determination of benefits provided by the employer, and are often cited by both union and employer in adjudication cases to advance certain arguments. The words "increment" and "revision" are used in the collective agreement, and the use of other documentation to assist in the understanding of what these terms mean is in the employer's view completely appropriate.

The employer's position is that the definition of certain terms of art in the Treasury Board Pay and Administration Guideline does not change the fundamental fact that the collective agreement in play in this case, as stated in previous employer submissions, clearly would prevent a person in the grievor's situation from receiving the adjustment that he is seeking in this matter.

REASONS FOR DECISION

[4] The issue in this grievance is whether an adjustment to a parental leave allowance should be made if an employee is promoted during the period of leave without pay. The complicating factor in this grievance is that Mr. Harrison was promoted to a different bargaining unit and therefore came under a different collective agreement during his period of leave without pay.

[5] The grievance was filed under the AFS agreement, which was the applicable agreement for his new position as an AU-01. The employer has suggested that the collective agreement that he was under at the beginning of his leave (the PM agreement) should apply. The parental leave article is the same in both agreements. However, the applicable agreement is the AFS agreement, as Mr. Harrison came under this agreement as of the effective date of his appointment to the AU position.

[6] The AFS collective agreement provides as follows:

> *17.07(f) ... parental allowance is based on the salary being paid on the day immediately before the date the leave begins.*

[7] The date on which the leave without pay began was October 1, 2001, and the grievor was at that time receiving salary at the PM-02 group and level. Therefore, his parental allowance was properly based on that amount.

[8] The collective agreement further provides:

> *17.(07)(i) Where an employee becomes eligible for a pay increment or a pay revision while in receipt of parental allowance the allowance shall be adjusted accordingly.*

[9] The question here is whether an adjustment is required as a result of Mr. Harrison's promotion on October 15, 2001. In other words, was the promotion a "pay increment" or a "pay revision?" Neither term is defined in the collective agreement. It is clear from the collective agreement that a "pay increment" refers to a step within a level (this is clear from a review of the AU pay notes that specify the pay increment period as one year). Article 45 contains provisions that refer to "pay revision". Clause 45.04 states:

> ***Pay Administration***
>
> *When two or more of the following actions occur on the same date, namely appointment, pay increment, pay revision, the employee's rate of pay shall be calculated in the following sequence:*
>
> *(a) the employee shall receive his pay increment;*
>
> *(b) the employee's rate of pay shall be revised;*
>
> *(c) the employee's rate of pay on appointment shall be established in accordance with this Agreement.*

[10] Clause 45.05 sets out the procedure for determining retroactive pay increases. In this clause, "revision" is used to describe increases in rates of pay. From both of these clauses (45.04 and 45.05), it can be concluded that "pay revision" refers to a change in the rates of pay for an occupational group and level, and not a change in salary as a result of a promotion.

[11] The Terms and Conditions of Employment Policy are incorporated by reference into the collective agreement (clause 45.01). "Pay increment period" is defined in the Policy as referring to the pay increments for the position.

[12] While it is true that employer policy documents (other than the Terms and Conditions of Employment Policy) are not part of the collective agreement, they can be useful documents for determining what the common understanding of compensation-related terms are. "Increment" is defined in the Pay Administration Guide as "a progression from one step to the next higher step in any range of pay rates." Pay revision is defined in the pay administration guide as "a change in the rate or rates of pay applicable to an occupational group and level."

[13] The implication of a promotion does not fit either of these definitions (pay increment or pay revision). A promotion results in a change in group or level and not a change in the rate of pay for a group and level. If the parties had intended the allowance to be adjusted to reflect a promotion during the period of leave, the language in the article would have specifically referred to the new rate of pay on promotion as a further trigger for an adjustment of the parental allowance.

[14] Accordingly, this grievance is denied.

Ian R. Mackenzie,
Board Member

OTTAWA, December 20, 2004