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File: 148-2-376

Citation: 2003 PSSRB 4

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS

Applicant

and

TREASURY BOARD

Respondent

RE: Application under section 21 alleging a violation of section 52 of the Public Service Staff Relations Act

Before: Evelyne Henry, Deputy Chairperson

For the Applicant: Ron Cochrane, Executive Director, Professional Association of Foreign Service Officers

For the Respondent: Neil McGraw, Counsel
Karl G. Chemsi, Counsel

Heard at Ottawa, Ontario,
November 25 and 26, 2002.

[1] This is a complaint filed pursuant to section 21 of the *Public Service Staff Relations Act* (PSSRA) alleging that the employer has failed to abide by section 52 of the PSSRA and has changed a term or condition of employment of Foreign Service Officers contrary to the provision of that section.

[2] The Professional Association of Foreign Service Officers (PAFSO) alleges that the employer has changed, after notice to bargain was given for the foreign Service group bargaining unit, a practice of calculating the rate of pay on promotion or acting assignment in accordance with the Public Service Terms and Conditions of Employment (PSTCE) Policy. The employer, in September 2001, applied a less favourable calculation of pay on promotion based on the wording of clause 42.07 of the Foreign Service (FS) group collective agreement: Code 312/00. PAFSO also complained that in April 2002 the employer advised the employees concerned that they had been overpaid. The employer began recovery action at the rate of 10% per pay and would only reduce the amount to 5% in the event an employee could show a financial hardship.

[3] Mr. Ron Cochrane testified for the complainant. Mr. Cochrane began working for PAFSO on February 28, 2001.

[4] The notice to bargain for the FS group was served on April 3, 2001. The only option for resolution of disputes open to the employees in the bargaining unit was conciliation with a right to strike.

[5] Mr. Cochrane stated that, at the time of serving notice to bargain, the calculation of rates of pay on promotion was not an issue between the parties. He introduced the last four collective agreements between the parties starting with the one bearing Code: 312/91 with an expiry date of April 30, 1993 (Exhibit B-1). This is the first time the following language appears in the collective agreement: “An employee is entitled on promotion to an increase of four percent (4%) in her rate of pay or such greater amount that would bring her rate of pay to the minimum rate of pay for the higher level.”

[6] The clause was renewed as clause 42.10 in the agreement bearing Code: 312/99 expiring June 30, 1999 (Exhibit B2) and as clause 42.07 in the agreement bearing Code: 312/00 expiring June 30, 2000 (Exhibit B-3). In the collective agreement, Code: 312 expiring June 30, 2003 (Exhibit B-4), this clause has been removed.

[7] The parties had negotiated face to face until August 17, 2001, when they applied jointly for the appointment of a conciliation officer. The parties met with the conciliation officer on October 2 and 3, 2001, and nothing was said by the employer about the application of clause 42.07 or of employees being overpaid.

[8] On October 31, 2001, PAFSO formally applied for the establishment of a conciliation board, the appointment of which was delayed by the requirement to resolve the designation issue. On January 22, 2002, the Chairperson of the Public Service Staff Relations Board (the Board) appointed the chairperson and members of the conciliation board. The over-payment issue or the issue of clause 42.07 was still not raised by the employer with PAFSO. Mr. Cochrane indicated that the employer was aware of a problem and had made a decision to take recovery action because of an alleged over-payment due to its reliance on the PSTCE Policy in the calculation of pay on promotion instead of a strict application of clause 42.07 of the collective agreement.

[9] The first time PAFSO was informed that an alleged mistake occurred was at a meeting held on March 22, 2002, called by the Department of Foreign Affairs and International Trade (DFAIT). The purpose of the meeting was to apprise PAFSO of what DFAIT categorized as a mistake concerning the application of clause 42.07. DFAIT had not applied clause 42.07, which provides for an increase of 4% of an employee's rate of pay on promotion or for acting pay but instead had applied the PSTCE Policy which provides for an increase of 4% of the new maximum rate of pay.

[10] The March 22, 2002 meeting was attended by Jean Bélanger, Johanne Hotte and Robert Daoust for the employer and by Jim Gould and Mr. Cochrane for PAFSO. When queried for more explanation, the employer explained that the 4% of the new maximum salary rule was the standard used for all promotion or acting pay calculations. It applies to all employees except employees in the FS group, to whom clause 42.07 applies, and for those employees such as in the EX category for whom a 5% increment exists.

[11] The employer indicated at that meeting that the mistake had been picked up in September 2001 by a new clerk verifying the application of clause 42.07 of the collective agreement. Mr. Cochrane stated that the employer advised him then that the miscalculation had been going on since 1990 or 1991.

[12] When Mr. Cochrane asked DFAIT why it had taken so long to inform PAFSO of the alleged error, no real explanation was given. The answer given was that, when they discovered the calculation could be wrong, they had to investigate all promotions and acting pay situations going back to 1990/1991. DFAIT representatives confirmed that all promotions and acting pay calculations were based on 4% of the maximum salary rule, that all pay advisors, not just one, had been making the error. That is why they had to seek authority from the Deputy Minister to recover from wages the over-payment relating to all those promotions.

[13] When Mr. Cochrane asked why they went to the Deputy Minister before consulting with PAFSO, he was told they didn't think it was necessary to consult. When he enquired as to the purpose of the meeting, Mr. Cochrane was told it was to ask PAFSO to agree to the recovery action. PAFSO said no.

[14] As of March 22, 2002, although the error was discovered in September 2001, the employees had yet to be informed and the error had yet to be corrected where it was ongoing. PAFSO was advised there were some 68 employees affected by the error who needed to be advised of recovery action. A list was provided (Exhibit E-2).

[15] PAFSO attempted to negotiate an interpretation of clause 42.07 that would lead to non-recovery. DFAIT never wavered on their position that they were compelled to recover and rejected every suggestion that recovery be spread over a greater period of time or be other than the 10% general rule, or 5% in case of demonstrated undue hardship.

[16] An exchange of correspondence between Mr. Cochrane and Mr. Bélanger ensued to no avail. When the final negative response from the DFAIT was received, PAFSO was preparing its position for the conciliation board. PAFSO prepared a hurried proposal on the issue of clause 42.07 for the first time and submitted it in its brief at page 21 (Exhibit B-5). The conciliation board was conducting hearings on May 14, 15 and 16, 2002. PAFSO filed the present complaint on May 13, 2002.

[17] At the conciliation board hearing, Treasury Board strenuously objected to the conciliation board's dealing with the issue, protesting that it was not part of its terms of reference. Although PAFSO argued it was only informed of the problem on March 22, 2002, after the terms of reference had been issued, the conciliation board

refused to deal with the issue unless its terms of reference were changed by the Chairperson of the Board.

[18] Recovery action from the employees' wages started taking place on May 8, 2002, some eight months after the alleged error was discovered. The employer refused PAFSO's request that recovery action be delayed until grievances filed by affected employees were heard or until the present complaint was decided.

[19] The conciliation board filed its report and made recommendations that did not include anything about clause 42.07. Treasury Board rejected the offers made by PAFSO and a strike ensued for four weeks in June and July.

[20] In the post-strike negotiation, one of the issues resolved was clause 42.07, that the employer finally conceded should be removed from the collective agreement. The new collective agreement was ratified and signed on August 13, 2002 (Exhibit B-4).

[21] Johanne Hotte has been a remuneration manager at DFAIT since 1994. She has been employed in the Public Service for some 20 years.

[22] A new pay advisor came to see her as Chief of Remuneration Policy to inquire about acting pay and pay on promotion calculation for the FS group. The pay advisor inquired whether clause 42.07 applied or the PSTCE Policy; this was in September 2001. Ms. Hotte determined that, starting in 1998, promotion pay calculation for Foreign Service Officers (FSO) had been based on the PSTCE Policy rather than on clause 42.07 of the collective agreement.

[23] Ms. Hotte brought this discovery to the attention of her Director, Peter Callahan, and to the Director General of Finance, Claude Caron, who asked her to identify all the employees affected by this mistake. Ms. Hotte produced a list of employees (Exhibit E-2) from the information gathered by her pay advisors. This list was eventually given to PAFSO.

[24] On the list there were 62 active employees. They were notified in writing on April 17 and 18, 2002, of the recovery action which commenced on May 8, 2002.

[25] Ms. Hotte pointed out that a majority of the calculation errors occurred in August and December 2000. This she explained was due to the fact that the FS collective agreement signed on August 31, 2000, provided acting pay for the first time

when Foreign Service Officers were assigned to a higher position. Ms. Hotte found that the first time the error was committed was in 1998.

[26] Ms. Hotte indicated that all of the 62 persons on the list had reimbursed the employer for the over-payment they had received, but that the employer was conducting new searches in the overtime and leave payments to see if some payments had been made at the erroneous rate. Further recoveries are to be expected in such cases. DFAIT is also searching the files of retired or former employees to identify other incidents of over-payment. The search has yet to be completed and the employer's decision regarding whether or not to recover the over-payments in those instances has yet to be made.

[27] The searches made through the pay records went back to 1991. Ms. Hotte stated that between 1991 and 1998 there were no over-payments made in the calculations of pay on promotions that occurred during that period; they were made in accordance with the collective agreement either at the minimum of the higher range or with an increase of 4% of the employee's rate of pay.

[28] In cross-examination, Ms. Hotte was unable to remember all that was said at the meeting of March 22, 2002. She recalled that the report submitted (Exhibit E-2) involved verifying each and every account going back to 1991. She was unable to say how many promotions occurred between 1991 and 1998. She believed there were some, but she did not count them. She was looking for over-payments. No errors were found between 1991 and 1998 in the active accounts.

[29] Ms. Hotte stated that the method used in dealing with acting pay changed in 1998. Only two situations of over-payment were found for 1998 and are reported on the list (Exhibit E-2). The list was prepared from the files of employees still active early in October 2001. Exhibit E-2 represents the majority of acting pay and promotions between 1998 and 2001.

[30] Ms. Hotte's testimony was halted to give her time to review pay records and to see if there were promotions or acting pay situations from 1991 to 1998 and how the pay calculations were made on those occasions.

[31] When she resumed her testimony, Ms. Hotte produced a new list of employees who had salary recovered (Exhibit E-5). This list contained the information provided in

Exhibit E-2 but also provided in addition: the classification of the employee; the classification of the higher position to which the employee was promoted or in which he or she was acting; and, the position number and its level.

[32] All employees on the list were FS-01s who had been acting in or promoted to FS-02 positions. Ms. Hotte and her staff reviewed the records of active employees between 1991 and 2001 and found that only those in Exhibit E-5 had been overpaid.

[33] Ms. Hotte found that a number of employees had been promoted after 1991. Some 294 employees had been paid correctly upon promotion or acting assignments. Ms. Hotte made a list of them (Exhibit E-6). On the last page of Exhibit E-6, Ms. Hotte produced a chart showing the number of promotions or acting assignments per year with a breakdown of how many were paid 4% of their salary and how many were paid the minimum of the higher level. The chart was unreliable as it obviously did not correspond with the list that preceded it.

[34] Ms. Hotte introduced three samples of individual pay records, exhibits E-7, E-8 and E-9 to show how exhibit E-6 was constituted.

[35] Ms. Hotte found no one being overpaid prior to 1998. In 1998, there were 115 promotions; 82 employees went to the minimum of the higher level and 33 received an increase of 4% of their salary. Only one employee was overpaid in 1998 and this in the calculation of acting pay.

[36] In 1999, 15 employees were promoted or received acting pay at the FS-02 level; nine went to the minimum of the higher level; three received an increase of 4% of their pay and three were overpaid and received an increase of 4% of the higher maximum rate of pay.

[37] In 2000, according to Exhibit E-6, ten employees who were promoted or who received acting pay were paid correctly; six went to the minimum of the higher level and four received an increase of 4% of their rate of pay. Fifty-five were overpaid, according to Exhibit E-5.

[38] In 2001, the record of promotions was received after the discovery of the mistake in calculation in September, although they were effective in January or February 2001; only one employee had been overpaid.

[39] In cross-examination, Ms. Hotte confirmed that three clauses in the FS collective agreement refer to pay calculation: 42.01, which incorporates by reference the PSTCE Policy; 42.02 and 42.07. The PSTCE Policy applies when the collective agreement is silent on the calculation of pay in a particular situation.

[40] Ms. Hotte admitted that the promotions effective in 2001 were probably calculated in 2002 as promotions are usually known later than their effective dates. Ms. Hotte was unsure of the date the promotion lists were received in the pay section but she is certain it was after September 2001.

[41] Jean Bélanger has been Director General of Policy and Operations in Human Resources at DFAIT since August 14, 2000. He has been employed in the federal Public Service since December 1975. Mr. Bélanger is responsible for labour relations at DFAIT.

[42] Mr. Bélanger was informed in September 2001 at a meeting with the Director of Finance, the Chief of Pay Operations and a pay advisor that an over-payment situation had been discovered. His first reaction was to ascertain that there was in fact a miscalculation and an over-payment. His second action was to contact his colleague, the Director General of Finance, Claude Caron, to inquire about the requirements of the *Financial Administration Act* (FAA) concerning the recovery of over-payments.

[43] Mr. Bélanger's third action was to request that Labour Relations Officer, Robert Daoust, obtain from his Treasury Board contacts what their position was regarding such a situation.

[44] After a week or so, Mr. Bélanger had gathered more information about over-payments and concluded that DFAIT had no alternative but to recover the amount that had been overpaid. Robert Daoust's contacts at Treasury Board had confirmed his interpretation of the law and the situation.

[45] Late in October, or early in November, everything indicated that DFAIT had to recover the over-payment; there was no other option. There was some discretion regarding the period during which recovery could occur but none regarding the fact that recovery must occur. Normally, such a situation involves only one or two people; such a large number was unusual.

[46] Mr. Bélanger introduced as Exhibit E-4, Chapter 7, "Recovery of Amounts due to the Crown" of the Treasury Board Manual, Pay Administration Volume. Mr. Bélanger also read from section 155 of the FAA to show that DFAIT had no option but to undertake recovery action.

[47] Mr. Bélanger indicated that the bargaining agent's representatives were informed on March 22, 2002, of DFAIT's intention to take recovery action. Employees were advised the following month on April 17, 2002.

[48] Recovery was to take place from employees' pay cheques, at the rate of 10% of salary until all over-payments were recovered. Employees could request a lesser rate of deduction in case of undue hardship. The amounts of over-payments varied from some 30 odd dollars to thousands of dollars. Only two employees requested a reduction in the rate of repayment.

[49] Mr. Bélanger explained that the delay in advising the bargaining agent was due to two factors. One month or two were spent researching pay records, checking interpretations and obtaining confirmation. When this was done, the timing for advising PAFSO was considered. Treasury Board and PAFSO were negotiating the renewal of the FS collective agreement and DFAIT thought it best to wait in the hope that an agreement would be reached before the end of the year. DFAIT decided not to advise PAFSO that 62 employees had been overpaid in error to avoid a negative impact on negotiations.

[50] In November 2001, DFAIT was advised that a conciliation board was to be appointed and could meet as soon as January 2002. DFAIT decided then to await the outcome of the conciliation board process. In the New Year, it became apparent that the process was going to take longer than anticipated. The over-payment of active employees was continuing and the amounts to be recovered were increasing. By March 2002, DFAIT decided that it could not await the conclusion of the conciliation board process and proceeded to advise PAFSO on March 22, 2002, of the situation. In April, the affected employees were informed in writing.

[51] Mr. Bélanger explained that DFAIT believed this error would have a negative impact on the negotiations, which the employer wished to avoid. DFAIT believed that recovery of over-payments was not a negotiable item and wanted to avoid having this issue interfere with negotiations. In March, the conciliation board process was still

pending. In April, DFAIT was advised that dates for hearing were set for May 14, 15 and 17, 2002. The conciliation board issued a report on June 12, 2002, and a collective agreement was signed on August 13, 2002.

[52] The new FS collective agreement no longer contained clause 42.07; the PSTCE Policy now governs the calculation of pay upon promotion.

[53] In cross-examination, Mr. Bélanger confirmed that DFAIT took no steps to minimize the over-payments when it discovered what it believed to be an error in the calculation of pay. DFAIT took action to prevent new over-payments but none to stop the ongoing ones. Mr. Bélanger stated that on April 1, 2001, DFAIT was applying clause 42.07 of the FS collective agreement except for the mistakes that were already made.

[54] Mr. Bélanger explained that the FS-01 level, which was the working level, was being phased out. A new Foreign Service Developmental Program (FSDP) was initiated in 1998. The FSDP and FS-01 level have the same scale of pay. The FS-01 level now has a single level which is the top of the FSDP scale which has a number of increments. The FS-02 level also has increments; this constitutes a new development in the collective agreement.

[55] With every promotion the number of FS-01s decreases and eventually this level will disappear and the FSDPs will be promoted to the FS-02 level automatically after five years of satisfactory performance.

[56] Mr. Bélanger confirmed that Ms. Johanne Hotte, Ms. Julie Gauthier and Peter Callahan were the persons who informed him of the over-payment situation. Mr. Bélanger explained that compensation services are part of the Corporate Finances, Planning and Systems Bureau; they are not part of the Human Resources Policy and Operations Bureau.

[57] Mr. Bélanger stated that by March 22, the research of active employees' files for over-payments was completed but that the search of inactive employee files is still ongoing. It was also established that the miscalculation of pay may have affected overtime and leave payments and that further recovery actions may have to take place.

[58] Mr. Bélanger repeated DFAIT's motives for not advising PAFSO and the employees in a timely fashion. He did not wish to raise anything that could upset the

atmosphere of the negotiations. Mr. Bélanger still believes today that their action was appropriate ("le bon geste"). If only one employee had been involved, DFAIT would not have delayed its recovery action but 62 employees involved a large number of employees and could have an impact.

[59] Mr. Bélanger stated he did not know the principles of "*laches*". He believed DFAIT was acting in good faith and did the appropriate thing.

[60] Mr. Bélanger confirmed that DFAIT refused PAFSO's request to wait for the determination of the grievances or the outcome of the present complaint before undertaking recovery action. He also confirmed that DFAIT refused PAFSO's request to spread the recovery over a period similar to the one over which the over-payments had accumulated.

[61] Mr. Bélanger stated that employees who wished to reduce the recovery rate from 10% to 5% could do so by applying to a Committee. Mr. Bélanger stated that Recovery of Amounts due to the Crown (Exhibit E-4) is not negotiable.

[62] Mr. Bélanger confirmed that PAFSO applied for the conciliation board on November 3, 2001, and that it could not know of the problem created by clause 42.07 at that time. Mr. Bélanger did meet with Mr. Cochrane around that time but withheld the information from him. Mr. Bélanger confirmed that when PAFSO became aware of the problem, it did raise it with the conciliation board.

[63] DFAIT is the major employer of Foreign Service Officers. Mr. Bélanger is not aware of any complaint of bad faith bargaining on the part of PAFSO.

Arguments for the Bargaining Agent

[64] The present complaint alleges that the employer violated a statutory prohibition during negotiation, more specifically that contained in section 52 of the PSSRA. PAFSO referred to the decision of *Public Service Alliance of Canada and National Capital Commission* [1995] C.P.S.S.R.B. No. 101, Board files 148-29-218 and 161-29-761, as the leading case with respect to the application of section 52.

[65] The bargaining agent referred to pages 27, 28 and 29 and submitted that the *National Capital Commission* case establishes the principle of business as usual during the period of negotiation. It also provides that the Board will look at the employer's

normal business practices through the evidence to see if the changes complained of are part of the employer's normal practices. In PAFSO's opinion this decision was confirmed by the Federal Court in [1996] F.C.J. No. 57 DRS 96-14988.

[66] The bargaining agent submits that the statutory freeze is not just about the language of the collective agreement but also about informal agreements and employees' normal expectation of how the employer applies these agreements. The bargaining agent submits that the test to be applied is not as onerous as that required in estoppel arguments. It simply requires a look at what were the practices of the employer when notice to bargain was given.

[67] The evidence establishes that the employer conducted itself in a certain manner, and the Board can decide how it was calculating the rate of pay on promotions and acting assignments. It is that conduct which is frozen by section 52 and, without the express consent of the bargaining agent, would have to continue for the life of the collective agreement or until, in the present case, June 19, 2002, when PAFSO was in a legal position to strike.

[68] When notice to bargain was given on April 3, 2001, the collective agreement being renegotiated was the one which expired on June 30, 2001 (Exhibit B-3). It covered the period June 1, 1999, to June 30, 2001, and was signed on August 31, 2000. The bargaining agent submits that what the Board must look at is the conduct of the employer from August 31, 2000, to the date notice to bargain was served on April 3, 2001 and how it applied the collective agreement in the calculation of pay on promotion.

[69] The evidence shows that in 2000, six promotions were calculated in accordance with the employer's interpretation of clause 42.07 and 21 promotions were calculated using another provision of the collective agreement, clause 42.01, which includes the PSTCE Policy. In 2000, four acting-pay calculations were made using clause 42.07 as the basis for calculation and 51 using clause 42.01.

[70] During the life of the collective agreement until notice to bargain was given, ten calculations were made on the basis of clause 42.07 and 72 on the basis of 42.01. The promotions that were effective in 2001 would have occurred after the date the employer believed it had made a mistake in pay calculation and decided to rely solely on clause 42.07.

[71] It is PAFSO's view that the evidence clearly shows that the conduct of the employer with respect to the calculation of pay on promotion or acting pay strongly favours the rule of using 4% of the higher maximum rate as opposed to 4% of the employee's rate of pay. That conduct prevailed when notice to bargain was given and was frozen by section 52.

[72] In the alternative, PAFSO is arguing that section 52 includes in the freeze the employer's conduct in how it administers the collective agreement. A further review of the evidence reveals that the employer decided to change the way it was doing business in September 2001 and, instead of informing the bargaining agent of its intention, it decided to withhold disclosure of this change in conduct until after a collective agreement would have been entered into. The employer not only decided not to tell the bargaining agent but decided not to tell the employees affected by this decision.

[73] The employer's strategy of waiting until a collective agreement was signed would prevent the bargaining agent from negotiating a change to the collective agreement that would regularize the practice of paying employees who were promoted or on acting pay on the basis of 4% of the higher maximum rate of pay instead of 4% of their rate of pay.

[74] The second effect of that strategy of waiting a further eight months to tell employees of the over-payment and failure to negotiate the recovery amounts placed the employees in the position of having to pay a further eight months of the alleged mistake made by the employer.

[75] The evidence further shows that the employer decided to come clean with the bargaining agent after the conciliation board had been appointed by the Chairperson of the Board and its terms of reference established. This strengthened PAFSO's view that the employer was trying to prevent the bargaining agent from attempting to seek a modification of the clause which the employer had decided to rely on in September 2001.

[76] The broader idea of section 52 is the idea of creating a level playing field to ensure there are no surprises during negotiations. There are enough issues and the relationship is stressful enough during the bargaining process. It is unfair to either side to alter the way to do business during negotiations because that goes to the very

important part of bargaining: trust on both sides. PAFSO is convinced the employer clearly intended that clause 42.07 as written not be altered until the next round.

[77] Section 52 must be given its broadest interpretation and the Board must look at the employer's conduct, which was the calculation of the increase upon promotion and acting pay at 4% of the higher maximum in an overwhelming number of cases during the previous collective agreement.

[78] In the alternative, the bargaining agent argues "*laches*" or estoppel in the application of the collective agreement. It is now apparent that the employer intends to recover over-payments relating not only to salary but also to overtime and vacation pay. There has to come a point when delays in recovery that the employer has caused when it decided on its own not to take action create a *laches*, a "sleeping on its right". To go back now and suggest further recovery actions only makes matters worse for the employees.

[79] In the alternative, the bargaining agent argues equitable estoppel and that what was frozen by section 52 is the practice of the employer. PAFSO cited *Canadian National Railway Co. et al and Beatty et al*, 128 D.L.R. (3d) 236 (CNR case) to show that a practice does not have to apply to all employees in order to exist. In the *CNR* case there was a practice of applying a payment to some 664 employees and not to some 415 employees. The arbitrator found that there was an estoppel. The Court looked at the equitable doctrine of estoppel in judicial review and maintained the arbitrator's decision. The bargaining agent read from pages 240, 241 and 242 and quoted more specifically from pages 243, 244 and 245:

> *… True, a collective agreement, like a contract, should be construed without reference to extrinsic evidence if it is clear upon its face. What the arbitrator did here, however, was not to interpret the agreement but to make a finding as to its proper application and to give consequential relief.*
>
> *… By its conduct, in persistently paying many classifications of employees from the first day of illness in the face of a clause providing for a waiting period, the company gave the union an assurance which was intended to affect the legal relations between them. The union took the company at its word and refrained from requesting a formal change in the agreement. The company should not now be allowed to revert to the previous relations as if no such assurance had been given.*

> *… We think the arbitrator was within his powers in applying the doctrine of estoppel. No jurisdictional error has been demonstrated and the application to quash should be dismissed with costs. …*
>
> *…*
>
> *I am aware of no decision by the Court of Appeal to the effect that the doctrine of estoppel by conduct may not in a proper case be applied by an arbitrator. As I have already stated, this is such a case. The reliance by the union on the company's long-established practice and the company's failure to indicate or request any change in that practice led the union not to make any proposals on its part regarding the maintenance or the alteration of that practice and represented an act by the union to its detriment. That act justified the invocation of the doctrine.*

[80] PAFSO submits that the present case goes beyond what occurred in the *CNR* case in that the employer was prepared to hide the alleged mistake until the collective agreement was signed.

[81] The bargaining agent then cited a CLV summary report No. LV13276, dated April 1, 2002, involving *Owens Corning Canada and Union of Needletrades, Industrial and Textile Employees, Local 1305*. In the present case not only the bargaining agent, but also the employees, believed the pay calculations were correct until the employer decided to alter the practice and rely only on a strict interpretation of clause 42.07 and not apply clause 42.01.

[82] PAFSO then introduced an unreported decision of a board of arbitration chaired by Jane H. Devlin, file MPA/Y200472, between *Rouge Valley Health System and Ontario Public Service Employees Union*. This was a grievance where estoppel was invoked by the employer. The employer had breached the collective agreement by scheduling a short tour in one area of the hospital. The union had not grieved the employer's decision and was estopped from grieving when the employer applied the same practice in other parts of the hospital, until the employer was given an opportunity to negotiate a change in the collective agreement.

[83] In conclusion the bargaining agent submitted that the Board does not have to go as far as estoppel in deciding what is contained in the statutory freeze provisions of section 52.

[84] In the alternative, what is frozen is the application of clause 42.07 in light of an estoppel argument. The fact is that here is a conduct that existed in year the 2000 illustrating how the employer was not relying strictly on the provisions of clause 42.07 but rather relying on clause 42.01 in a majority of cases. The evidence shows the employer more consistent in using 4% of the higher maximum than the alleged correct calculation of clause 42.07, which is more of an anomaly and which can be compared to the practice in the *CNR* case.

[85] The bargaining agent relied on this application of the clause, not being advised of the change until it was too late to propose a change, thus creating the detriment. In both scenarios, the employer's conduct of withholding information adds considerable weight to the PAFSO submission.

Arguments for the Employer

[86] The central argument of the employer in this complaint before the Board is that the correction of an error does not constitute a change in terms or conditions of employment.

[87] In the employer's view, this situation is not one where the interpretation of the collective agreement came into question. The collective agreement is very clear in its writing. While there is a mention in clause 42.01 of the PSTCE Policy, it is important to note the qualifier "except as provided in this article".

[88] For the 62 people subject to the over-payment, it was not clause 42.01 that applied because it clearly states that all the clauses under Article 42 applied foremost before resorting to the Policy. Clearly, clause 42.07 applied and there is no other interpretation that can be given. On promotion, an employee is given 4% of his rate of pay or the minimum of the higher level. There is no interpretation possible where it could mean 4% of maximum rate of the FS-02 level.

[89] The central point is that it is not a change or modification in the terms or conditions of employment but an honest mistake in the application of the collective agreement. The language does not bear the application of an increase of 4% of the maximum higher rate of pay. In its reference to an "alleged mistake", the bargaining agent made no real statements of fact that it was something other than a mistake.

[90] In reference to the *National Capital Commission* decision (supra) there is no issue of the conduct of the employer. What is clearly stated in the decision is that the principle which applies is business as before. The employer has the ability to continue to manage its operation. The rights of the employer continue just as do the rights of the employees.

[91] Something made clear in the evidence is that the employer has a continued right to recover an over-payment in salary. The only testimony heard in two days regarding the proper calculation of pay was from Johanne Hotte. She stated what proper calculation was found in the collective agreement. If this proper calculation was applied, there was an error for these 62 employees who were overpaid. The statutory freeze does not prevent recovery. The central focus is whether this constitutes a change.

[92] There are a number of Board decisions that refer to this. The employer referred to *Public Service Alliance of Canada and Treasury Board* [1982] C.P.S.S.R.B. No. 68 (Board file 148-2-75) at paragraph 15 on the last page. If the employer had a right to recover over-payment before notice to bargain was given, it continues to have the right to recover after notice to bargain is given.

[93] The employer referred to *United Food and Commercial Workers Union, Local 1973 and Staff of the Non-Public Funds, Canadian Forces* [1986] C.P.S.S.R.B. No. 95 (Board file 148-18-114) on the last page. There is no way the employer, by action or inaction, indicated that 4% of the higher maximum rate of pay would be the way to calculate pay on promotion.

[94] The employer referred to *Professional Institute of the Public Service of Canada and Treasury Board* [1991] C.P.S.S.R.B. No. 23 (Board file 148-2-185) at page 9. It was made clear that the employer let slide the over-payment regarding inactive employees and with regard to overtime and vacation pay, but it demonstrated its intention to recover these over-payments. With this statement of intention, the employer never gave up the right to recover the over-payments. The employer at no time stated that the calculations would be different nor that they would not recover over-payments.

[95] A central point is the authority to recover found in subsection 155(3) of the *Financial Administration Act*. This section deals with over-payment in salary. There are no time limits and no limit on how far back the calculations can be verified. At no

time did the employer indicate that it would not be applying its discretion to recover over-payments.

[96] The employer cited another decision involving the *Professional Institute of the Public Service of Canada and Treasury Board (Agriculture Canada)* [1991] C.P.S.S.R.B. No. 82 (Board file 161-2-692) where the issue was the same as the central point of this complaint, that is the employer's authority under section 155 of the FAA. In that case, it was a complaint under section 23 of the PSSRA and the Board found on the last page:

> …
>
> *However, I also added that an adjudicator has no jurisdiction under the Public Service Staff Relations Act to decide on the validity of the Crown's exercise of its authority under subsection 155(1) of the Financial Administration Act. The essence of this complaint is a challenge to the right of the employer to exercise that authority.*

[97] The employer underlined that the bargaining agent mentioned the inability to negotiate a change. There were no requests made to deal with the recovery of over-payments because those salary over-payments were not a condition of employment.

[98] To sum up its main argument, the employer stated that section 52 prohibits any change in terms or conditions of employment. An error in calculation does not on its own become a term or condition of employment. A simple fact is that an error was committed for several months for a lot of employees, the majority of which occurred after August 31, 2000, but only four mistakes occurred before that date. All errors occurred after August 31, 2000, while the clause in the collective agreement existed over the course of 10 years. Over these ten years, 150 individuals were paid on promotion an increase at the rate of 4% of their salary.

[99] A clear interpretation and application of clause 42.07 has occurred since 1991 and at no time over the last 10 years was any individual or union grievance filed that employees were improperly paid.

[100] A central issue of estoppel or past practice argument begins with a promise or unambiguous representation by the employer, then a clear reliance based on that promise and finally a clear detriment from reliance on that promise.

[101] To demonstrate a promise, the bargaining agent attempted to demonstrate a practice over a limited period of time. What occurred, in fact, was that there were no errors until 1998, seven years after the clause was inserted in the collective agreement.

[102] The bargaining agent claims there were 21 errors on promotion and 51 on acting pay; this is rather odd since 62 employees were on the list. When the error continues from acting pay to promotion, this does not inflate the figures by counting the same error twice.

[103] In commenting on the *CNR* case, the employer pointed to a number of differences. What is underlined in that decision are errors that occurred over many years. Estoppel by conduct or past practice requires a long standing course of conduct. The facts of the instant case do not demonstrate a longstanding practice; there was not a practice at all.

[104] At page 241 of the *CNR* case, there is a reference to an agreed statement of facts. At no time in the instant case did the employer agree that there was a practice or that these errors would constitute a practice. There were 150 cases where the collective agreement was applied correctly and which were never grieved. The error in calculation was unknown to everyone until a pay advisor discovered the error. It was not something that the bargaining agent was aware of when it entered into negotiations. No one knew the error had been made. A correct application also continued over ten years.

[105] The employer then referred to Chapter 3:4430 Past Practice from *Canadian Labour Arbitration* (3d Edition) by Donald Brown, Q.C. and David Beatty, where a number of cases are referred to. This chapter describes a number of different events that may constitute a past practice.

[106] The employer also referred to the case of *International Association of Machinists, Local 1740*, and *John Bertrand & Sons Co. Ltd.*, LAC Volume 18, p. 361, and argued that past practice is no aid to the interpretation of clause 42.07, which is quite clear.

[107] To conclude, the employer stated there was no bad faith on the part of the employer. This complaint is not a complaint of bad faith bargaining, nor is it a reference of a grievance to adjudication. While there may be grievances brought by

employees, this is not a grievancee and the effect on employees is not an issue here, as it would be in an individual grievance.

[108] The central point here is about terms or conditions of employment. Does the conduct of the employer over time make it a term of employment if the employer interpreted the collective agreement correctly but errors occurred over a short period of time? If it did, section 155 of the FAA would be rendered moot. It cannot be said that there was a change in the terms or conditions of employment. To quote the *PSAC* case, the first case cited by PAFSO, the ability to rectify and recover over-payments is "business as usual".

Reply Arguments

[109] The bargaining agent stated that the cases cited by the employer were clearly distinguishable on their facts.

[110] Because the employer characterizes its practice as a mistake, it claims the bargaining agent cannot claim it is a practice.

[111] It was in Johanne Hotte's evidence that pay advisors were using the PSTCE policy to calculate pay on promotion after August 2000 instead of a strict application of clause 42.07. Honest mistakes are the odd mistakes, not the consistent application of clause 42.01.

[112] The bargaining agent is not sure it can bargain out of the Policy; that is, for something less than what the PSTCE Policy provides.

[113] The bargaining agent differed with the employer in its opinion that there was no bad faith on the part of the employer and referred to the evidence of Mr. Bélanger.

Reasons for Decision

[114] The issue to be determined in this case is whether the employer has violated section 52 of the PSSRA after PAFSO gave notice to bargain on April 3, 2001. Section 52 reads:

> ***52.*** *Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective*

> *agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement that may be entered into by the employer and the bargaining agent, until such time as*
>
> *…*
>
> *(b) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to conciliation,*
>
> *(i) a collective agreement has been entered into by the parties,*
>
> *(ii) a conciliation board has been established, or a conciliation commissioner has been appointed, in accordance with this Act and seven days have elapsed from the receipt by the Chairperson of the report of the conciliation board or conciliation commissioner, or*
>
> *(iii) the Chairperson has notified the parties pursuant to subsection 77(2) or 77.1(4) of the Chairperson's intention not to establish a conciliation board or appoint a conciliation commissioner and seven days have elapsed from the date of the notice.*

[115] PAFSO is asking the Board to find that there was, when notice to bargain was given, a practice of calculating pay on promotion in accordance with the PSTCE Policy and that the practice constituted a term or condition of employment applicable to the employees in the FS group. PAFSO alleges that the recovery action taken by the employer was a violation of section 52 of the PSSRA.

[116] The evidence that was submitted shows that the employer used the PSTCE Policy to calculate the salary of a vast majority of employees in the FS group after August 2000, but not of all employees.

[117] No evidence was submitted by PAFSO to explain the employer's departure from the application of clause 42.07, which had been in the FS collective agreement since 1991, and which reads:

> ***42.07 Promotion***
>
> *An employee is entitled on promotion to an increase of four percent (4%) in his rate of pay or such greater amount that would bring his rate of pay to the minimum rate of pay for the higher level.*

[118] In fact, PAFSO was unable to say why the clause appeared in the FS collective agreement in the first place or how and why it was renewed in the collective agreement signed on August 31, 2000 (Exhibit B-3). Along with clause 42.07, clause 42.01 was renewed, it reads:

> *42.01 Except as provided in this Article, the existing terms and conditions governing the application of pay to employees, where applicable, are not affected by this Agreement.*

[119] The employer's witnesses explained the departure from the application of clause 42.07 to that of the PSTCE Policy as a mistake made in good faith by remuneration staff. The PSTCE Policy applies to all other employees in various groups except to the FS and EX groups. The employer's witnesses were unable to say why the mistake seems to coincide with the implementation of the collective agreement (Exhibit B-3). It appears to be a coincidence.

[120] The employer discovered the mistake in September 2001 and, within a month of discovery, made the determination that at least 62 employees were overpaid and that recovery would be initiated pursuant to section 155 of the FAA. The decision to recover was implemented in May 2002.

[121] The pertinent provision of section 155 of the FAA provides:

> ***PART XI***
>
> ***MISCELLANEOUS***
>
> *Deduction and set-off*
>
> ***155.*** *(1) Where any person is indebted to*
>
> *(a) Her Majesty in right of Canada, …*
>
> *the appropriate Minister responsible for the recovery or collection of the amount of the indebtedness may authorize the retention of the amount of the indebtedness by way of deduction from or set-off against any sum of money that may be due or payable by Her Majesty in right of Canada to the person or the estate of that person. …*
>
> *(3) The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of*

> *Canada to the person to whom the over-payment was made.*
> *…*

[122] Exhibit E-4 which is "Chapter 7 – Recovery of Amounts due to the Crown" provides at item 2:

> ***2. Overpayments of salary or wages***
>
> *The Receiver General has authority to recover an overpayment of salary or wages made to an employee from any money payable by the Crown to the employee or to the employee's estate (*Financial Administration Act, *Section 155(3)).*
>
> *Where possible, the overpayment is deducted from subsequent salary payments, but it may also be recovered from superannuation benefits or any other money payable to the employee or to the employee's estate, or to a third party, pursuant to an assignment or a power of attorney.*
>
> *Where there is any conflict between the provisions of this policy and those in a collective agreement, the terms of the collective agreement will apply.*
>
> ***2.3 Responsibilities***
>
> *The department, not the paying office, is responsible for ensuring that all overpayments of salary, wages, or pay and allowances are recovered from any sum of money that may be due or payable to an employee or former employee.*
>
> ***Paying office responsibility***
>
> *When an overpayment is discovered by the paying office pertaining to an active employee, the department or agency will be advised of the amount of the overpayment. The paying office will take no further action until the appropriate department or agency provides written advice as to the method, rate and/or period of recovery.*
>
> *When an overpayment of salary remains after all available funds of an employee who has terminated employment have been applied, the paying office will advise the department or agency of the outstanding balance of the salary overpayment. Once the department or agency has been notified of the outstanding amounts, no further action will be taken by the paying office.*
>
> ***Departmental responsibility***
>
> *When a department or agency discovers an overpayment with regard to an active employee and the overpayment can*

be recovered over a specified period, the reporting document sent to the paying office must indicate the method, rate and/or period of recovery. If no direction on the reporting document is given to the paying office, the recovery of the overpayment will be made in full from the first available funds payable to the employee.

When the paying office notifies the department or agency that an overpayment still exists after all available funds of a former employee have been exhausted:

- *the former employee should be contacted as soon as possible to solicit voluntary payment of any amount still owing. Failing voluntary arrangements more stringent collection action may be pursued with the aid of senior departmental financial officers in accordance with the policy and guidelines on the collection of overdue accounts;*

- *should the individual be entitled to an immediate annuity, an immediate annual allowance or a deferred pension benefit under the PSSA, the departmental personnel must advise the Superannuation Branch of the amount and method of recovery of the overpayment. When the individual's public service pension becomes payable, the Superannuation Branch will recover the overpayment either at the rate specified by the department or agency or by instalments equal to a minimum of 10% of the individual's monthly basic pension. If the overpayment is liquidated prior to the commencement of the pension, the department or agency must inform the Superannuation Branch accordingly.*

When an overpayment has been partially or fully recovered from a pension benefit, it is the responsibility of the department or agency to inform the paying office in order that their records can be kept current.

In order to prevent over-payments, the practice of withholding or returning for cancellation or amendment, any payroll cheques which are obviously inaccurate must continue. Furthermore, departments should make every effort to eliminate overpayments by prompt dispatch of pay action documents.

(emphasis added)

[123] The reason given for the delay in implementing the recovery of the over-payments was the employer's fear of a negative impact on the negotiations for the

collective agreement because of the magnitude of the error and the number of employees affected.

[124] Both parties agree that section 52 of the PSSRA includes in the statutory freeze not only expressed and implied terms of employment, information agreements and established employer policies, but also the employees' reasonable expectations as to the employer's conduct, in other words "normal business practice" or "business as usual". Where they disagree is what, on the facts of this case, was the "normal business practice" or "business as usual".

[125] I cannot find on the basis of the evidence presented that a practice existed of calculating salary on promotion according to the PSTCE Policy for the FS group. The only evidence I heard regarding pay calculation on promotion came from the employer's witnesses who claimed it was a mistake that affected a majority of, but not all, employees promoted or acting in a higher classification for a limited period of time. No evidence was submitted to show that the bargaining agent was even aware of the "practice" or "mistake" of calculating salary or promotion in accordance with the PSTCE Policy. The only witness for the bargaining agent was new to PAFSO and unable to provide any history of clause 42.07 or of its application. The principle of "business as usual" during the statutory freeze means that the collective agreement as well as the other employer policies were to continue during the negotiation period. These include the "Recovery of Amounts due to the Crown" (Exhibit E-4).

[126] While the calculation of pay on promotion in accordance with the PSTCE Policy instead of clause 42.07 may have been an honest mistake initially, the process of recovery of over-payment was deliberate, and in violation of the employer's own policy.

[127] Clearly the principle of "business as usual" entails that the employer had to notify the employees as soon as possible of the alleged mistake. By its own policy the employer had an obligation to prevent over-payments but it chose to wait almost eight months before taking any action.

[128] I cannot accept that the employer was acting in good faith when it withheld the information from the bargaining agent and from the employees concerned. The mistake was the responsibility of the employer and by allowing it to continue during the negotiation period, which was also the statutory freeze period, the employer was not only violating its own policy but contravening section 52 of the PSSRA.

[129] This complaint did not allege a violation of section 51 of the PSSRA so I will not deal with the effect of bad faith on the part of the employer on negotiations.

[130] It would appear that the bargaining agent has no remedy, except a declaration, when the employer is wilfully causing an injury to employees whom it represent by overpaying them over a long period of time knowing it will recover the sums over much shorter periods. The employer's witnesses have said that recovery of over-payment was not negotiable and, therefore, they had no alternative but to recover in the manner that they did. I disagree. The very words of the policy imply that it is negotiable because it states: "Where there is any conflict between the provisions of this policy and those in a collective agreement, the terms of the collective agreement will apply".

[131] The beliefs of the employer's witnesses that they had no option but to recover in the manner they did make their contravention of section 52 even more serious. It shows a callous disregard for the employees' right to be treated fairly by their employer. The evidence has revealed that active employees have reimbursed the over-payments identified in Exhibit E-5 but that employees who have left, transferred or retired may still be facing recovery action. I cannot find words to describe my outrage at the unfairness of a system that lulls employees into believing their employer is properly calculating their pay or their retirement allowance but who may face not only a reduction in their income but also a recovery action against which recourse is doubtful.

[132] In conclusion, I hereby declare that a violation of section 52 of the PSSRA has taken place in so far as the employer failed to abide by its policy of preventing over-payments from continuing when it found a mistake in pay calculation. The evidence presented does not support PAFSO's submission that a practice existed that employees not be paid on promotion in accordance with clause 42.07 of their collective agreements.

[133] Accordingly, for all these reasons, this complaint is allowed to the extent indicated.

Evelyne Henry,
Deputy Chairperson.

OTTAWA, January 28, 2003.