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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

TREASURY BOARD

Employer

and

THE PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

RE: Application under section 34 of the
Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Professional Institute of the Public Service of Canada: Michel Paquette

For the Treasury Board: Asha Kurian

For the Public Service Alliance of Canada: [Edith Bramwell](#)

Heard at Ottawa, Ontario
May 16 and 17, 2001.

DECISION

I. Introduction

[1] Myer Herzig and David Martin are members of the Trade-Marks Opposition Board (TMOB) and as such their positions are classified at the PM-06 level in the PA group.

[2] An application under section 34 of the *Public Service Staff Relations Act (PSSRA)* has been made by the Professional Institute of the Public Service of Canada (PIPSC) seeking a determination that the two positions more appropriately belong in the LA group. This application is opposed by both the Treasury Board (employer) and the Public Service Alliance of Canada (PSAC) the bargaining agent for the PA group.

II. Section 34

[3] The responsibility to determine membership in bargaining units rests with the Public Service Staff Relations Board. Section 34 of the *PSSRA* reads as follows:

34. Where, at any time following the determination by the Board of a group of employees to constitute a unit appropriate for collective bargaining, any question arises as to whether any employee or class of employees is or is not included therein or is included in any other unit, the Board shall, on application by the employer or any employee organization affected, determine the question.

III. The facts

[4] Myer (Mike) Herzig testified at length as to the duties of his position and that of his colleague David Martin. Both hold degrees in law and are members of the Bar of Ontario. As members of the TMOB they preside over legal proceedings that are adversarial in nature and render decisions which determine trade-mark disputes.

[5] Messrs. Herzig and Martin preside over a quasi-judicial process in which the parties are nearly always represented by counsel. Their job description, contained at Tab 2 of exhibit A-1, lists the key activities of their positions as:

KEY ACTIVITIES:

Presiding singly at hearings involving counsel representing party litigants, and rendering final decisions, in a judge-like manner.

Rendering oral rulings at hearings, on interlocutory requests or procedural matters, immediately after hearing submissions from party counsel.

Rendering interlocutory decisions respecting pleadings, amendments to pleadings, evidence and cross-examination, and respecting the practice and procedures to be followed by counsel.

Preparing for hearings by reviewing the pleadings, evidence and transcripts of cross-examination, and by conducting independent legal research.

Tribunal members act as their own legal counsel in presiding over hearings, in rendering procedural and interlocutory rulings, and in issuing final decisions.

Developing and maintaining rules of practice to ensure equitable treatment of party litigants.

Revising the Tribunal's practice and procedures in view of current Court decisions and governmental objectives.

Providing advice to the Registrar and to counsel from the Department of Justice, and advising on proposed legislative and regulatory changes.

[6] The work they do as members of the TMOB obviously requires that they interpret and apply certain statutes and case law and generally act in a manner that is consistent with the rules of natural justice.

[7] The *Trade-Marks Act* (RSC 1985, c. T-13) and the *Trade-marks Regulations* (SOR/96-195, registered April 16, 1996, gazetted May 1, 1996) set out in detail the procedures to be followed to register and oppose a trade mark.

[8] Section 55 of the *Trade-Marks Act* gives the Federal Court the jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of the Act or of any right or remedy confined by it. Section 56 creates a right of appeal to the Federal Court from decision rendered by the TMOB.

[9] Decisions of the members of the TMOB are reported and commented on in Canadian and foreign intellectual property reports and journals.

[10] Pursuant to subsection 63(3) of the *Trade-Marks Act*, the Registrar of Trade Marks, who is appointed by the Governor in Council, may, after consultation with the appropriate Minister, delegate to any person he deems qualified any of his powers

under the Act, excluding the power to delegate, but including the power to adjudicate on matters of opposition to the application for registration of a trade mark.

[11] In the past some persons who did not have formal legal training were given the authority to sit as members of the TMOB.

[12] Members of the TMOB have no clients, do no representation, don't prepare leases or contracts or draft legislation. If necessary a member of the TMOB could seek legal advice from the legal counsel to the Registrar of Trade Marks or from a lawyer at the Department of Justice.

[13] Linda Clement, Section Head, Classification Services for the PIPSC testified next. In her view, the LA group definition is a better fit in this case than the PA group definition. In doing her analysis, Ms. Clement did not consider the positions of Adjudicator at the Immigration Refugee Board classified at the PM-05 level or of Recourse Officer at the Public Service Commission which position is classified in the PE group.

[14] The last witness to testify was Pierre Marleau who is a Classification and Pay Equity Officer for the PSAC. Mr. Marleau believes that the two positions at issue are excluded from the LA group definition and fall squarely within the PA group definition. In his review of PM bench mark positions the witness found two positions which he believes are similar in nature. They are Benefit Programs Officer (PM-03) (Exhibit P-4) which requires the adjudication of complex and contentious cases and Senior Entitlement Officer (PM-05, Exhibit P-5) which requires that the incumbent adjudicate complex and precedent-setting claims as well as research legislation and jurisprudence.

IV. Arguments

For the PIPSC

[15] In making its determination, the Board must look at the duties of the two positions at issue and compare them with the PA and LA group definitions.

[16] The TMOB member position fits well within the LA group definition, especially the general portion of that definition.

[17] A departmental classification grievance committee has concluded that these positions should more properly be classified in the LA category (Exhibit A-1, Tab 20).

[18] Even though the LA fit may not be clear cut, it is the better fit. In support of its position the PIPSC referred me to *Federal Government Dockyards Trades and Treasury Board (National Defence)* (Board file 147-2-25); *Public Service Alliance of Canada and Treasury Board* (Board file 147-2-34) and *Public Service Alliance of Canada and Treasury Board* (Board file 147-2-37).

For the PSAC

[19] The question before the Board in this case is simply which bargaining unit between PA and LA is more appropriate. Having appropriate bargaining units is central to effective collective bargaining.

[20] In the application of section 34 of the PSSRA, we must look at positions and their job descriptions and not at the individuals who occupy them and who may, as in this case, bring extra value to those jobs.

[21] The evidence clearly leads us to conclude that the work performed by Messrs. Herzig and Martin more closely resembles the work defined in the PA group definition than the work defined in the LA group definition.

[22] The incumbents have no clients, do not provide legal advice and do no representation work. Less experienced members of the TMOB could obtain legal advice within the department or from the Department of Justice.

[23] The two positions at issue are excluded from the LA group since their primary functions are found elsewhere, namely in the PA group. Furthermore, from a collective bargaining perspective, the positions are more appropriately associated with the PA group than the LA group.

For the Employer

[24] In dealing with a section 34 application the Board must compare the primary duties of the positions in question with the primary duties listed in the group definitions.

[25] The onus is on the applicant to show that the primary duties of the positions occupied by Messrs Herzig and Martin fall within the LA group definition. The applicant has failed to meet that onus.

[26] The positions at issue are in fact excluded from the LA group definition since their primary functions (rendering decisions as a service to the public) are contained in the PA group definition.

Reasons for Decision

[27] The Board's authority under section 34 of the *PSSRA* is fairly straightforward. When a dispute arises as to whether a position is properly included in a particular bargaining unit or another, the Board must on application of the employer or an affected employee organization, determine the question.

[28] The Board has no authority to reclassify positions or order their reclassification which pursuant to section 7 of the Act falls within the sole authority and purview of the employer.

[29] Accordingly, in this matter, the Board must decide upon examination of the primary duties of the TMOB member positions whether they are more properly covered by the PA or LA group definitions. Group definitions, by their very nature, are very sketchy and merely give an overall impression of the general nature of the primary duties to be performed in order to be included in any given definition.

[30] Given the generality of group definitions there may arise conflicts when particular positions, as in this case, at least at first glance, appear to fall within two distinct group definitions. The Board's responsibility in such cases is to assess the evidence presented concerning the duties of the position and determine in which occupational group it is best suited.

[31] On the basis of the evidence presented and the clear subtext of the LA group definition which centers around the solicitor-client relationship, I find that the positions occupied by Messrs. Herzig and Martin as members of the TMOB more properly fall within the PA group definition.

[32] It is clear that only lawyers can be classified in the LA group but also conversely that persons trained in law can occupy positions in other groups where their legal training may be extremely useful.

[33] The best fit in this case remains the PA group. The applicant has failed to convince me otherwise. This application is therefore dismissed and the positions at issue are confirmed to be properly contained in the PA group.

**Yvon Tarte,
Chairperson.**

OTTAWA, June 20, 2001