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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS

Bargaining Agent

and

TREASURY BOARD

Employer

RE: Reference under Section 99 of the Public Service Staff Relations Act

Before: Guy Giguère, Deputy Chairperson

For the Bargaining Agent: Ron Cochrane

For the Employer: Harvey Newman, Counsel

Heard at Ottawa, Ontario,
July 4, 2001.

[1] The Professional Association of Foreign Service Officers (PAFSO) filed this reference under section 99 of the *Public Service Staff Relations Act* (*PSSRA*) alleging a breach by the employer of a Letter of Understanding dated August 31, 2000. In this Letter of Understanding, the parties agreed to re-open the collective agreement between the Treasury Board and PAFSO covering all employees in the Foreign Service Group (Code: 312/00). The Letter of Understanding reads as follows:

> *SUBJECT: Re-Opening of Agreement*
>
> *If during the term of this Agreement, the rates applicable to the employees in the Management Trainee Program are revised, the parties agree that the FS Developmental Pay Structure will be revised to reflect those changes effective the later of July 1st, 2000 or the date on which the MTP rates are amended. The parties also agree to update the rates contained in Clause 42.06 to maintain the relationship with the FS Developmental Pay Structure.*

[2] PAFSO explained in a letter filed with the reference that the parties, on March 6, 2001, signed a Memorandum of Settlement that adjusted the Foreign Service Developmental Pay (FSDP) rates as required by the Letter of Understanding. However, the employer did not update all the FS-1 rates contained in clause 42.06 to maintain the relationship with the FSDP rates. PAFSO also explained that the Memorandum was signed without prejudice to avoid any unnecessary delays in implementing adjustments to the FSDP rates with the understanding that PAFSO would pursue further amendments. The amended clause 42.06 (third column updated) and Appendix "A" (line B updated) read as follows:

ARTICLE 42

PAY

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42.06 In-Range Relativity Increase for FS-1 employees

Notwithstanding paragraph 42.04(b)(ii), commencing on December 31, 1998, the pay of an employee at the FS-1 level shall be at least equal to the following rates of pay which are based on completed years of experience at that level as of December 31, 1998:

Completed Years of Experience as of Dec. 31, 1998	***Dec, 31, 1998***	***Dec. 31, 1999***	***Dec. 31, 2000***	***Dec. 31, 2001***
1	*$37,794*	*$44,671*	***$48,986***	*$51,507*
2	*$39,387*	*$46,554*	***$51,051***	*$51,507*
3	*$40,980*	*$48,437*	***$51,051***	*$51,507*
4 or more	*$42,572*	*$48,437*	***$51,051***	*$51,507*

APPENDIX A

FOREIGN SERVICE GROUP
PAY RANGES
(in dollars)

A) Effective July 1, 1999
B) Effective July 1, 2000

Developmental Pay Structure

From:	*$*	*36201*	*40074*	*44421*	*47514*
To:	*A*	*38605*	*42788*	*48765*	*50670*
	B	***39570***	***43858***	***49984***	***51937***

[3] On May 9, 2001, Mala Khanna, of Legal Services, Treasury Board, wrote to the Board stating that the employer's position was that the Board was without jurisdiction to hear this reference under section 99 of the *PSSRA*.

[4] On May 25, 2001, Mr. Cochrane wrote back to the Board in reply to the employer's position. On the issue of the Board's jurisdiction under section 99 of the *PSSRA*, he relied on the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Public Service Alliance of Canada,* [1993] 1 S.C.R. 941.

[5] At the outset of the hearing, both representatives informed me that they would not call any witnesses. The only evidence produced at the hearing was adduced by counsel for the employer and it is the collective agreement (Exhibit E-1).

[6] Both representatives informed me that no FS-1's have been hired by the Department since 1998, and that new recruits are hired under the FSDP. The working level effective in the Department is now FS-2.

[7] Mr. Cochrane explained that employees in the FSDP would move into the program at the FS-2 level without competition under normal circumstances after four years. This has left the employees at the FS-1 level in a peculiar situation. It is understood that all the FS-1 employees, after four years experience, will have moved to the FS-2 level pursuant to a competitive process. In 1998, there were about 200 FS-1's and in 2001, there are now about 98 FS-1's left. There should be a competition soon where 60 FS-1's will be eligible to compete; therefore, the expectation is that the number of FS-1's will diminish further. Mr. Newman did not dispute these explanations.

Argument of the Employer on the Jurisdiction Issue

[8] Mr. Newman submitted that the Board is without jurisdiction to hear this reference as the employer did not consent to this matter proceeding by way of subsection 99(1.1) and this matter could form the subject of a grievance under paragraph 92(1)(*a*) of the *PSSRA* by an employee affected by the collective agreement. He explained that an individual employee could argue that he is being underpaid and could file a grievance under paragraph 92(1)(*a*) of the *PSSRA* and establish the right to grieve.

[9] Mr. Newman submitted that the difference between the recourse under a section 99 reference and a grievance under section 91 or 92 is more than a technicality. In terms of the review process, the decision of an adjudicator on a grievance would go to the Federal Court, Trial Division, but a decision of the Board on a reference goes directly to the Federal Court of Appeal. Even more important, a grievance will have to go through the different levels of the grievance process before it comes to adjudication, which will give the employer and the employee an opportunity to discuss the issues. A reference goes directly to the Board and the parties do not have an obligation to sit down and discuss the matter in advance of the hearing. Therefore, it is very important to reserve references to situations falling within the ambit of section 99.

[10] Mr. Newman argued that the decision of the Supreme Court in *Canada (Attorney General) v. Public Service Alliance of Canada* (*supra*) dealt with an unusual contracting-out case. This decision should not be applied here because of the distinct facts surrounding that case. Section 99 was amended in 1993, subsequent to the decision of the Supreme Court, where subsection 99(1.1) now provides that when a bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement which might be also subject to a grievance, the parties can jointly agree to refer the matter to the Board. There is no such agreement in the circumstances of the instant case.

[11] Mr. Newman concluded by saying that it is not the complete bargaining unit that is affected by this reference; it is only the FS-1's and this issue should be appropriately dealt with by way of a grievance.

Argument of the Bargaining Agent on the Jurisdiction Issue

[12] Mr. Cochrane pointed out that the obligation that PAFSO is trying to enforce is contained in a Letter of Understanding signed by the representatives of the bargaining agent and the employer. The obligation is to increase the wages and to maintain a salary relationship between employees at the FSDP and FS-1 levels. Mr. Cochrane submitted that this is an obligation that is owed to the bargaining agent and the redress sought (to adjust the FS-1 rate as of December 31, 2001 in order to maintain the relationship) is not one which could be enforced by an individual employee because the obligation is to amend the collective agreement. If the employer's position were correct, there would never be a proper case that could be brought before the Board under a section 99 referral, which would make section 99 redundant. Mr. Cochrane submitted that, if an employee were to grieve as the employer suggested, then the employer would likely respond that the adjudicator does not have jurisdiction to amend the collective agreement. Therefore, a grievance by an employee would be a waste of time.

[13] Under the Letter of Understanding, the obligation is clearly between PAFSO and the employer. Under section 99 of the *PSSRA*, the Board cannot amend the collective agreement but it can direct the employer to live up to the obligation to amend the collective agreement to reflect what it committed itself to do in the last sentence of the Letter of Understanding.

Argument of the Bargaining Agent on the Merits of the Reference

[14] Mr. Cochrane submitted that the Memorandum of Settlement of March 6, 2001 adjusted the rates of pay identified in column 3 of clause 42.06 by 2.5% to maintain the relationship with the FSDP but the employer refused to adjust column 4 in clause 42.06 by the same 2.5%. In order to maintain the relationship with the FSDP rates, if the maximum FSDP rate is modified then the FS-1 maximum has to be adjusted accordingly.

[15] In support of this position, Mr. Cochrane indicated that the most appropriate definition of the word "maintain" in *Black's Law Dictionary* is "…and other acts to prevent a decline, lapse or cessation from an existing state or condition". With this definition in mind and the parties' use of the word "update" in the Letter of Understanding, it is clear that the parties intended to adjust all of the FS-1 rates and

not only those below the maximum; otherwise the second undertaking would read: "The parties also agree to update the rates below the maximum contained in…."

[16] The bargaining agent is therefore asking the Board to direct the employer to do what it had committed to do on August 31, 2000 in the Letter of Understanding; that is, to adjust all of the rates of pay, including the maximum, in order to maintain the pre-existing relationship.

Argument of the Employer on the Merits of the Reference

[17] Mr. Newman submitted that clause 42.02 sets out what an employee covered by the collective agreement can be paid. Clause 42.02 reads as follows:

> ***42.02*** *An employee is entitled to be paid, for services rendered, within the pay range specified in Appendix "A" for the level prescribed in his certificate of appointment issued by or under the authority of the Public Service Commission.*

[18] Clause 42.06 establishes the minimum that will be paid to an employee at the FS-1 level; it does not indicate what is the maximum that an employee at the FS-1 level could be paid because that is addressed in Appendix "A", which sets out the pay range for FS-1's and other employees covered by the collective agreement. Appendix "A" sets out the minimum and maximum of the pay range and actually is the cap on what an employee can be paid. The relevant section of Appendix "A" dealing with employees classified at the FS-1 level reads as follows:

"APPENDIX A"
FOREIGN SERVICE GROUP
PAY RANGES
(in dollars)

A) Effective July 1, 1999
B) Effective July 1, 2000
[…**]**

Level		***Minimum of Range (Annual)***	***Maximum of Range (Annual)***
FS-1			
From:	*$*	*36210*	*49266*
To:	*A*	*36934*	*50251*
	B	*37857*	*51507*

[19] In the Letter of Understanding, the FS-1's are not mentioned but it is indicated that the parties agree to update the pay rates in clause 42.06 to maintain the relationship with the FSDP rates. In Appendix "A", the maximum rate for an FS-1 is $51,507. Therefore, the minimum pay for an FS-1 as of December 31, 2001 has to be $51,507, because it is the maximum which an FS-1 can be paid under Appendix "A", which is the cap, and cannot be updated further. If Appendix "A" had provided for a higher pay range, then there would have been room to update the minimum pay range as of December 31, 2001 beyond $51,507. However, the parties did not do that; they only agreed within the range to update clause 42.06. The parties could not provide for a minimum pay for an FS-1 under clause 42.06 that goes beyond the maximum pay rate as indicated in Appendix "A" unless the parties had negotiated a new maximum pay rate, but they did not.

[20] Mr. Newman concluded by indicating that the burden of proof rests with the bargaining agent which did not discharge it.

Reasons for Decision

[21] The first question to be answered is whether the Board has jurisdiction to deal with this reference. Subsection 99(1) reads as follows:

> *99(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board.*

[22] The text of subsection 99(1) of the *PSSRA* clearly allows a reference to the Board only where the alleged breach of obligation contained in the collective agreement could not be the subject of an individual grievance.

[23] In *Canada (Attorney General) v. Public Service Alliance of Canada* (*supra*) (at paragraph 51), Justice Cory indicated that "the nature of the relief sought is relevant in deciding whether the proceeding should be undertaken by an individual employee of the bargaining unit". In the instant reference, PAFSO is asking, as a relief, that the employer update all the rates of pay in clause 42.06.

[24] While a pay grievance could be presented by an employee based on the Letter of Understanding, the obligation to update the pay rates for the FS-1 level is between the employer and the bargaining agent. The text of the Letter of Understanding specifies that "the parties also agree to update the rates contained in clause 42.06". The distinction to be made with a pay grievance is that, if it was allowed, an adjudicator could not order the employer to update clause 42.06 but could only order the employer to pay the employee an updated rate of pay.

[25] I therefore find that a reference to the Board under section 99 is the proper way for the bargaining agent to seek an enforcement of any obligation arising out of the Letter of Understanding.

[26] The second question to be determined is whether there is an obligation to update clause 42.06 pursuant to the Letter of Understanding signed on August 31, 2000. As I have received no evidence, I have to rely solely on the text of the Letter of Understanding and the collective agreement to make this determination.

[27] Updating the minimum pay rate for an FS-1 as of December 31, 2001 by 2%, which was the relationship that existed between the two maxima prior to the adjustment to the FSDP rates, would put the minimum pay of an FS-1 beyond the maximum rate of pay as set out in Appendix "A". In the Letter of Understanding, the parties did not agree to update the FS-1 pay structure in Appendix "A". Therefore, to accept the submission of Mr. Cochrane and update the last column of clause 42.06 would be in contradiction and inconsistent with clause 42.02 and Appendix "A".

[28] This would be contrary to the well-known principle of interpretation that the ordinary sense of words should be adhered to, unless this would lead to a contradiction or inconsistency with the rest of the text.

[29] Professor Palmer in *Collective Agreement Arbitration in Canada*, Third Edition, Palmer and Palmer, Buttersworth, 4.14 and 4.16, enunciated two principles of interpretation that are useful in the instant case. The collective agreement should be construed as a whole where words and provisions must be interpreted in light of the entire agreement. When more than one interpretation of a provision is possible, the one which best harmonizes with the document as a whole should be chosen.

[30] Accordingly, the last sentence of the Letter of Understanding to the effect that "the parties also agree to update the rates contained in clause 42.06 to maintain the relationship with the FS Developmental Pay Structure", has to be read so it is in harmony with clause 42.02 and Appendix "A" of the collective agreement. This means that the agreement to update the rates has to be within the range of pay for an FS-1 that is provided for in Appendix "A". The maximum rate of pay for an FS-1 employee is $51,507 and under clause 42.06, as of December 31, 2001, the pay for an FS-1 level employee is $51,507. For all these reasons, the reference under section 99 of the *PSSRA* is dismissed.

[31] It is unfortunate that this text of the Letter of Understanding was not clearer in regard to the FS-1 employees. This should be avoided in the future for the sake of good labour relations and the morale of the concerned employees.

Guy Giguère,
DeputyChairperson

OTTAWA, October 24, 2001.