Date: 20240514

Files: 566-34-43134 to 43136, 43682 to 43688, and 43690

Citation: 2024 FPSLREB 65

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

DIANA DESENDER, FULVIO DIPETTA, ELLEN QUIGG, ANETA BOLOGNONE, DAVID BROWN, AGATA DIMASSIMO, MARK FEDUCK, ANTONIUS GEURTS, DIANA LANGMAN, TERRI-LANE BAILEY, AND SUSAN BORTHWICK

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Desender v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Mylan Ly and Jean-Rodrigue Yoboua, Public Service Alliance of Canada

For the Employer: Brenden Carruthers, counsel

Decided on the basis of written submissions, filed October 6, 19, and 24, 2023.

REASONS FOR DECISION

I. Summary

[1] This matter considers a group of 11 grievors (Diana Desender, Fulvio Dipetta, Ellen Quigg, Aneta Bolognone, David Brown, Agata DiMassimo, Mark Feduck, Antonius Geurts, Diana Langman, Terri-Lane Bailey, and Susan Borthwick; "the grievors") who alleged that the Canada Revenue Agency ("the employer") violated clause 63.07(a) of the collective agreement with the Public Service Alliance of Canada ("the bargaining agent") that expired on October 31, 2021 ("the collective agreement") when it failed to compensate each of them appropriately in terms of acting pay for the duties that they performed for up to 14 years (for Mr. Brown).

[2] The employer replied with a motion to dismiss the grievances, arguing that the Federal Public Sector Labour Relations and Employment Board ("the Board") is without jurisdiction to accept the referrals to adjudication of what it said are not acting pay grievances, but classification grievances. It further stated that even if the Board accepts jurisdiction to hear them, the maximum remedy period for back pay that could be awarded would be the 25 days immediately before the grievances were filed rather than the periods ranging from 3 to 14 years that the grievors requested.

[3] The clause of the collective agreement at issue requires that work performed at a higher classification in an acting capacity be paid for the "period in which they act." A common-sense approach to interpreting that text requires that the period of assignment include an end date. An assignment with no end date is not a period.

[4] Many years of work, such as was presented in these grievances, with no end date, other than when some external event occurs that is triggered by an office reorganization, is not a true period in terms of being properly related to an acting assignment of duties for a period. Therefore, the claims in these grievances are not related to acting pay for a period as defined in clause 63.07(a) of the collective agreement.

[5] After carefully considering the employer's motion to dismiss these grievances for the Board's want of jurisdiction and the bargaining agent's detailed reply, as well as the many cases from the jurisprudence that each party provided, I conclude that the pith and substance of the grievances contest the grievors' classification.

[6] For these reasons, the employer's motion is granted, and the grievances are dismissed due to the Board's lack of jurisdiction.

II. The employer's motion to dismiss the grievances

[7] The grievances arise out of a workplace reorganization that the employer initiated in April 2016. At the time, the grievors were all Excise Duty and Taxes officers in the Excise Duty and Taxes Division (EDTD) of the employer's Legislative Policy and Regulatory Affairs Branch (LPRAB). Before and after the reorganization, the grievors were classified at the SP-06 group and level. The reorganization involved the LPRAB, which provided legislative guidance and issued excise-tax rulings and interpretations, and another of the employer's branches, the Domestic Compliance Programs Branch (DCPB). The key change was the transfer of the DCPB's audit function to the EDTD of LPRAB, which was responsible for compliance activities related to the employer's Excise Duty program. The goal of the restructuring was to combine the excise program delivery into a single division that would manage compliance for the employer's Excise Duty and Excise Tax Programs.

[8] As a transitional measure, until work descriptions could be updated, the audit positions were transferred to the LPRAB under a job-sharing agreement with the DCPB. On November 21, 2018, the employer advised employees that it was proceeding with the implementation of the new organizational structure, which included transitioning to a new staffing structure.

[9] Prior to the reorganization, the Excise Duty program had a structure based on positions classified in the Applied Science & Patent Examination (SP) group, while the Excise Tax program's structure was largely based on positions classified in the Audit, Commerce and Purchasing (AU) group. The restructuring was aimed at harmonizing the work descriptions, to allow the employees to work on both excise-duty and excise-tax-type files while providing management flexibility to assign work.

[10] Work descriptions were streamlined and incorporated components of both excise-duty and excise-tax functions. In addition, a new work allocation tool was introduced to assign audit files. The new structure comprised positions classified at the SP-06, AU-02, AU-03, MG-AFS-05, and MGAFS-06 groups and levels. The grievors' SP-06 work description was amended to align with the new structure. The remaining positions had been newly introduced. Positions classified at the following groups and

levels did not form part of the new structure: SP-05, SP-07, MG-03, MG-04, AU-01, AU-04, and MG-SPS-05. However, the job-competency profiles remained consistent, and if education requirements were met, the SP-06s were provided with new AU classifications.

[11] On November 21, 2018, the employer held a town hall meeting about the restructuring at which the transformation of the Excise Duty program in the LPRAB to the Excise Duties and Taxes program was announced, with the aid of a presentation that explained it in detail. On November 22, 2018, the employer sent an email reiterating the announcement of the Excise Duty program's new regional structure. On November 30, 2018, the grievors were provided with an "Administrative Letter and Work Description" notice that implemented the new national structure and work descriptions for the Excise Duties and Taxes program, effective November 21, 2018.

[12] Also on November 30, 2018, considering the reorganization, management wrote to the SP-06 employee group and requested that they review their work in progress, help identify the assignments that they had to complete, and state if they were uncertain or had concerns about the classification level.

[13] As part of the 2018 restructuring, the LPRAB developed and issued a new complexity table that resulted in reallocating some responsibilities between the SP-06s and the jobs in the AU group as the new complexity scale rating determined whether an audit was to be assigned to an SP-06, AU-02, or AU-03. The result was that after November 21, 2018, some files previously assigned to SP-06s were to be assigned to AU-02 (and higher) auditors due to the changes in the division's scope and structure.

[14] Between December 19 and 24, 2018, the grievors filed acting pay grievances alleging that, after the reorganization, the employer violated article 63 of the collective agreement by requiring them to perform the duties of a higher classification level, but failing to compensate them at the rate of the higher classification.

[15] As a remedy, the grievors sought, among other things, retroactive pay to their start dates as SP-06 officers as compared to those classified SP-07, AU-02, and AU-03 due to the November 21, 2018, reorganization of the Excise Duty team.

[16] The employer framed the dispute as follows in its motion to dismiss:

…

> *17. During the "Acting Pay" grievance process the grievors sought, among other things, retroactive pay to the date of the commencement of their employment as SP-06 officers in comparison to those of the SP-07, AU-02, and AU-03 classification group and levels as a result of the November 21, 2018 reorganization of the Excise Duty team. In other words, the grievances were the result of the factual changes to the organization of the workplace as the grievors were seeking reimbursement for the number of hours that they worked on files that are now completed by AUs based on the revised complexity scale*
>
> …

[17] The 11 grievors also filed classification grievances between December 19 and 24, 2018. At the present time, they are advancing 5 active classification grievances. Each classification grievance has this similar wording: "I grieve that my position is incorrectly classified."

[18] The corrective action requested in them is also similar: "That my position be classified to a higher level effective November 21, 2018; and any other remedy that would make me whole."

III. The bargaining agent's reply

[19] Between December 19 and 24, 2018, the 11 grievors filed individual acting pay grievances (they were excise duties and taxes officers and were formerly excise duties officers). They were classified at the SP-06 group and level. The bargaining agent referred the grievances to adjudication on June 15 and September 28, 2021.

[20] The grievors were employed in different locations across Ontario in the LPRAB. The start date of the acting pay period varies by grievor. However, the end date is the same for each of them, November 21, 2018.

[21] Before their new job description's effective date, November 21, 2018, the grievors were regularly assigned audits rated at the highest complexity level. During the alleged acting pay period, the workload was measured using the "Time Allocation Tool" (TAT), which scored audit files at a level between 1 and 4. TAT 1 audit files were the least complex, and TAT 4 were the most complex and time consuming.

[22] After the grievors' new job description was implemented, the TAT was replaced by the "Workload Allocation Model" that assigned "Complexity Factors" based on a

score of between 1 and 3. Level 1 files were less complex and were assigned to the grievors in SP-06 excise duties and taxes officer positions, level 2 files were assigned to the new AU-02 positions, and level 3 files were assigned to the new AU-03 positions.

[23] The grievors contended that the new level 2 and 3 audits were equivalent in scope and complexity to the TAT 3 and 4 audits that they worked on during the alleged acting pay period and that their complex cases were reassigned to the new AU positions. Therefore, they asserted that they were required to perform duties of a higher classification level but that they were not compensated at the higher classification rate. They maintained that the employer violated clause 63.07(a) of the collective agreement.

[24] On November 22, 2018, the employer sent a notice about the new regional structure for program delivery in the EDTD. On November 26, 2018, as part of the new restructuring, the employer requested all excise duties officers (SP-06) to validate their educational levels, to move to the AU group. On November 30, 2018, the grievors received an email with their new job description as excise duties and taxes officers with a retroactive effective date of November 21, 2018. Also effective on the same date were two new job descriptions for the excise duties and taxes auditor positions, one classified AU-02 and the other AU-03.

[25] Also on November 30, 2018, the employer instructed the grievors to review the TAT 3 and TAT 4 cases assigned to them and to confirm whether they would be willing to complete them or would prefer to return them, due to the uncertainty of the new Workload Allocation Model, which at that time was not yet complete.

[26] By December 5, 2018, the Workload Allocation Model had not been implemented. However, the grievors' new job description and the AU-02 and AU-03 job descriptions delineated the audit work's complexity based on that model.

IV. Summary of the arguments

A. For the employer

[27] In their grievances, the grievors alleged that the acting pay clause, clause 63.07(a) of the collective agreement, was violated. That clause stated the following:

63.07 *a. When an employee is required by the Employer to*	***63.07*** *a) Lorsque l'employé est tenu par l'Employeur d'exécuter à titre*

substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least three (3) consecutive working days or shifts, the employee shall be paid acting pay calculated from the date on which they commenced to act as if they had been appointed to that higher classification level for the period in which they act.	*intérimaire une grande partie des fonctions d'un niveau de classification supérieur et que l'employé exécute ces fonctions pendant au moins trois (3) jours de travail ou postes consécutifs, l'employé touche, pendant la période d'intérim, une rémunération d'intérim calculée à compter de la date à laquelle l'employé commence à remplir ces fonctions, comme si l'employé avait été nommé à ce niveau supérieur.*

[28] The employer argued that in essence, the grievances advance classification issues. It submitted that true acting pay grievances should reflect a situation in which the employer required that an employee perform duties that were not part of their regular position but were associated with a higher-level position, and the period during which the higher-level duties were to be carried out was limited (see *Fong v. Canada Revenue Agency*, 2017 PSLREB 45 at para. 218).

[29] The employer further stated that that is to be distinguished from the grievors' situation, in which they were simply not happy with their position as of the reorganization and seek retroactive acting pay to the dates on which they began their SP-06 employment.

[30] In short, the grievors seek corrective measures that would result in being reimbursed the number of hours that they worked on AU files, dating back to the when their employment began. At their cores, these are not acting pay but classification grievances rooted in work-description issues that flowed from the structural reorganization of audits.

[31] The employer cites the decision in *Bungay v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40, in which a predecessor Board set out some of the indicators that have been used to distinguish a classification issue from an acting pay issue:

…

> *[59] In summary, some of the indicators that a grievance is a classification grievance and not an acting pay grievance (and therefore where an adjudicator has no jurisdiction) are:*

> - *the claim for acting pay is an ongoing claim and not for a specified period;*
> - *the grievor has sought a reclassification, either informally or through a classification grievance;*
> - *the grievor continues to perform the duties he/she has always performed and only the classification levels in the workplace have changed; and*
> - *the acting pay grievance is based, in part, on a comparison with similar positions in other work areas.*
>
> *…*

[32] As discussed as follows in *Lagueux v. Treasury Board (Department of National Defence)*, 2012 PSLRB 80 at para. 58, the criteria in *Bungay* are not exhaustive:

> *58 …*
>
> *[111] There is, however, no requirement that all of the indicators discussed in Bungay must be present to support a conclusion that classification comprises the real subject matter of a grievance. The individual indicators suggested in Bungay are neither necessary conditions nor, taken together, do they constitute an exhaustive or definitive list. They nevertheless do provide a helpful test.…*

[33] The employer submitted that in *Fong*, the Board's predecessor stated that a classification issue involves a systemic and continued undervaluing of the duties that an employee regularly carried out and that "… that problem can be rectified only by permanently assigning a new value to the job." The work that the grievors seek redress for was, when they completed it, part of their SP-06 work description. In part, the grievors seek to retroactively alter their position's value before November 2018 by assigning new value to the jobs that they previously completed as SP-06s, as compared to the post-November 2018 structure.

[34] The employer submitted that in applying the *Bungay* criteria to the facts and evidence of this case meets the "common sense characterization" of a classification grievance articulated by the Board in *Doiron v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 77 at para. 97. Therefore, the Board does not have jurisdiction to decide these grievances, as the employer's right to classify positions is entirely preserved in s. 7 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). There is a factual and legal basis on which to find that the Board is without jurisdiction to hear these grievances.

B. For the grievors

[35] The grievors did not dispute that the Board has no jurisdiction over classification matters. As the employer stated, under s. 7 of the *Act*, the employer has the power to determine its classification rules and procedures. However, an adjudicator does have jurisdiction to hear acting pay matters, as these grievances alleged.

[36] While not an exhaustive list, *Bungay* sets out some of the factors to consider when distinguishing between a classification grievance and an acting pay grievance.

[37] Addressing the first *Bungay* factor, that the claim is ongoing and not for a specified period, the grievors stated that their claims all vary but that they all have start and end dates. As such, they are not ongoing. For many of the grievors, the start date of their claim is around the date on which they were hired and ends on November 21, 2018, when the employer removed the more-complex TAT 3 and TAT 4 duties. Those duties then became rated at the new Complexity Factor levels 2 and 3.

[38] The grievors also stated that the duties of the position changed on November 21, 2018, when the employer transferred all higher-complexity files to the AUs. As such, not only did the classification levels change but also the position's core duties.

[39] The grievors argued that *Fong* should not apply to this case. Central to *Fong* was the notion that the grievors' duties did not change and that they continued to perform the same duties. It stated as follows:

> …
>
> ***226** Nonetheless, **a common sense understanding** of **the idea of acting pay suggests that an employer must have some intention to require more from an employee than he or she would normally expect** or at least an awareness that it is doing so; **there must be some change to the employee's level of responsibility that the employer initiates**. In this case, the evidence did not suggest that management attempted to exploit the grievors by changing their duties to a higher level without compensating them properly; **they continued to perform the same duties they always had**. Although they developed a concern about whether the employer undervalued those duties, that concern belongs more appropriately to a discussion of whether their position's classification was misaligned with its duties.*
>
> …
>
> [Emphasis added]

[40] By contrast, in this case, the grievors submit that their duties clearly changed after November 21, 2018, when the more-complex audits were transferred to the AU-02 and AU-03 positions. As such, there was a clear change to the duties that they were required to perform.

[41] The grievors submitted that each of their claims has a start and an end date for when they alleged that they were working in an acting capacity and carrying out the duties of a higher-classified position. That distinguished their situations from what the Board's predecessor found were classification grievances in both *Bungay* and *Doiron*.

[42] As to the second *Bungay* factor, the grievors noted that while it is true that five of them filed classification grievances, it is important to note that not all of them did. As such, a few grievors' actions cannot be attributed to them all. Further, it is important to note that those who did file classification grievances grieved only the SP-06 classification that became effective on November 21, 2018. The classification grievances relate to the new November 21, 2018, job description and its related classification decision. The acting pay grievances relate to the work that the grievors performed before and up to November 21, 2018.

[43] The grievors also noted that periods claimed for the remedies in the acting pay grievances and the classification grievances do not overlap. While in the classification grievances, the grievors who filed them seek to be made whole effective November 21, 2018, in the acting pay grievances, the grievors seek compensation that ends on November 21, 2018.

[44] The grievors stated that it is important to note that in the classification grievances, the grievors who filed them seek compensation at the SP-07 level, while in the acting pay grievances, the grievors seek compensation at the AU level. That approach highlights the fact that while one does not require all the qualifications and education to receive acting pay, they are necessary when seeking reclassification.

[45] The grievors' submit that their actions clearly demonstrate that the classification grievances are entirely different from what is alleged in the acting pay grievances. As such, this factor weighs in their favour.

[46] As to the third *Bungay* factor, and as mentioned above, the grievors took the position that the position's duties changed on November 21, 2018, when the employer transferred all higher-complexity files to the AUs. As such, not only did the classification levels change but also the position's core duties.

[47] The employer relied on *Gvildys v. Treasury Board (Health Canada)*, 2002 PSSRB 86, when it argued that this factor should weigh in its favour. The grievors at bar submit that while restructuring and reclassification did occur, the facts of that case are materially different from this one. The grievors in *Gvildys* sought acting pay from a specific start date but with no specific end date, which effectively meant that they were pursuing a classification grievance. They also pursued a typical classification grievance and were unsuccessful. Finally, they sought acting pay for their new job description, which effectively meant that they grieved duties that had not changed.

[48] The grievors at bar submit that the facts in this case are quite different. The grievors do not seek classification for an indefinite period. They have not pursued classification grievances that mirror their acting pay grievances and can point to a specific time when the duties were performed.

[49] Further, the grievors say that it cannot be said that the duties that the grievors performed were regular. As mentioned, they pointed to three specific duties in addition to the higher-complexity audits that they performed, that were not in their job description, and that can now be found in the new AU job descriptions.

[50] As to the fourth *Bungay* factor, comparison with similar positions in other work areas, the employer argued that this factor should weigh in its favour because it alleged that the grievors compared "… their prior work with those of people with a higher classification level, specifically those of AUs and SP-07 [*sic*] based on the former and current structure and scope of the audit responsibilities."

[51] For greater clarity, the grievors did not refer to the SP-07 job description in their acting pay grievances. They seek acting pay at the AU-02 or AU-03 level. Further, the AU-02 and AU-03 positions to which the grievors compared themselves existed within their work location and reporting structure.

[52] The grievors state that comparing one's job description to another in the same work unit does not suggest that a grievance is a classification grievance. The

employer's position is an overly broad interpretation of the *Bungay* factors, which consider only whether the grievors made a comparison to positions in other work areas. As such, comparing one's work to duties in one's work area should not weigh against the grievors.

[53] In *Bungay*, the Adjudicator stated the following:

> …
>
> *[64] There was evidence from Ms. Bungay that she felt that the PG-02s in Halifax were doing the same work as PGs in Ottawa, who were classified at the PG-04 level. There was no evidence presented that described the duties of PG Supply Officers in Ottawa. This is similar to the situation in* Charpentier and Trudeau v. Treasury Board (Environment Canada) (supra)*, where the grievors looked at the duties being performed by others in a different work unit. This tends to support the view that the grievances relate to the reclassification of the positions.…*
>
> …

[54] The grievors submit that the analysis in *Bungay* was concerned with grievors making a comparison to a position in another unit, which might not have had the same approach as the grievors' workplace. That is not so in this case. Rather, the fact that the grievors compared their job description to one that existed in their reporting structure suggests that this is an acting pay rather than a classification issue.

[55] The bargaining agent's position is that when all the *Bungay* factors are weighed together, it is clear that these are acting pay grievances. As such, the employer's preliminary objection should be dismissed.

V. The employer's rebuttal

[56] The employer reiterates its position that the "pith and substance" of the grievances is classification, not acting pay. The criteria in *Bungay* are not exhaustive and there should be a commonsense, holistic, and flexible approach to determining whether a grievance relates to a question of classification. The grievors call for a rigid application of the *Bungay* test.

[57] The grievors' submissions demonstrate that the grievances are in relation to a retroactive claim for salary in a situation where there was a reclassification following the November 2018 restructuring. They seek increased salary for work that they had already performed in their own positions because specific duties were taken away from

them after the reorganization. This is a classification issue within the employer's managerial rights.

VI. Analysis and reasons

[58] Applying the criteria in *Bungay* and a commonsense approach, I find that the grievances relate to issues of classification, not acting pay and accept the employer's motion to dismiss based upon lack of jurisdiction.

[59] I find that the grievances present a close similarity to at least 3 of the *Bungay* criteria. The grievors made several comparative references to other positions in their submission, as quoted previously. While this is not determinative, it is one of the *Bungay* indica of classification disputes. The evidence also establishes that some of the grievors at bar pursued this matter by means of a classification grievance, which is another one of the *Bungay* indicia. And given the context of remedial claims of up to 14 years, I find it difficult not to consider the matter grieved to be of a continuing nature.

[60] I do not accept the grievors' submission that distinguishes *Bungay* from the facts in this case due to *Bungay* dealing with duties at separate geographical locations. I do not find that matter relevant to comparing the *ratio decidendi* from *Bungay* to the matters at bar.

[61] Consistent with the decisions of the Board's predecessor in *Bungay* and *Doiron*, the matter of a contested acting pay grievance usually presumes that the position is classified properly. It also necessarily presumes that the contested pay is for a finite period, defined by the acting assignment.

[62] The collective agreement clause relied upon in these grievances states that the pay shall be calculated from the date on which an employee began to act in a position as if they had been appointed to the higher classification level for the period in which they act.

[63] *Doiron* speaks to a common-sense approach and distinguishes acting pay from classification grievances by the fact that duties in a classification grievance are ongoing and are undervalued by the employer.

[64] In the grievances before me, the uncontested evidence sets out the durations of the alleged breaches of the proper pay range from over 14 years (Mr. Brown) to as few as 3 (Ms. Quigg). The parties did not agree to the requested remedy period for the grievances of Ms. Desender and Mr. Dipetta.

[65] Importantly, none of the periods at issue ended with a period of assignment to acting duties concluding, but rather, the grievors submitted that an organizational restructuring altered their duties and provided what they submitted was the end point for any claims of pay owing from the employer's alleged failure to provide acting pay.

[66] This submission strikes me as being incongruous with a common-sense interpretation of the text of the collective agreement at issue, namely, "… the employee shall be paid acting pay calculated from the date on which they commenced to act as if they had been appointed to that higher classification level for the period in which they act".

[67] Contrary to the grievors' assertion, I find that none of the periods at issue ended because a period of assignment to acting duties concluded. The period defining when the acting pay that each grievor claimed should be calculated was not chronologically defined by an end date as a part of an assignment. Rather, the end of the period was created only due to external events. The end date arose many years later (up to 14 years) due to a reorganization and reclassification of duties.

[68] Based upon the grievors' submissions, the end of any one period could have been defined by an external event, such as a retirement, death, or resignation. None of those events would have been related to an assignment to acting duties for a period.

[69] Therefore, consistent with the decision in *Fong* (at paragraph 218) as related to the period of acting pay for higher-level duties being limited, I conclude that on the facts, the grievors were not required to perform duties at a higher classification level for which they should be paid for a period in which they acted, per clause 63.07(a) of the collective agreement.

[70] For these reasons, these grievances were not properly referred to adjudication with the Board. They are dismissed due to the Board's lack of jurisdiction.

[71] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[72] I order the grievances dismissed due to lack of jurisdiction.

May 14, 2024.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board