

Federal Court



Cour fédérale

Date: 20091230

Docket: T-1454-08

Citation: 2009 FC 1314

Ottawa, Ontario, December 30, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**GLEN CURRIE, TERRY V. WILLISKO and
HEATHER MARGARET WILSON**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 18.1 of the *Federal Courts Act*, R.S.C., 2002, c.8, s. 14, in the matter of a decision of an Adjudicator from the Public Service Labour Relations Board, 2008 PSLRB 69, dated August 22, 2008. The decision allowed in part a reference to adjudication brought by the Respondents herein concerning an unsuccessful grievance against the refusal by Canada Customs and Revenue Agency (CCRA), now the Canada Revenue Agency (CRA), their employer, to comply with their request for a "complete and current statement of the duties and responsibilities" of their positions. The Adjudicator ordered that the Respondents' job descriptions be amended in accordance with the decision.

[2] For the reasons set out below the application should be dismissed.

I. Background

[3] The Respondents, Mr. Glen Currie, Mr. Terry Willisko and Ms. Heather Wilson, were employed as Investigators/Auditors by the Canada Customs and Revenue Agency (CCRA), which has since been renamed to Canada Revenue Agency (CRA) in various locations across the country. The Investigator/Auditor function is divided into two classifications, PM-03 and PM-04, described in work descriptions PM-0286 and PM-0677 respectively. The two work descriptions are largely the same except for the complexity of the files to be handled. The Respondents were classified as PM-03.

[4] The Respondents performed duties outside of their PM-0286 job description for which they received acting pay in the PM-04 classification. Mr. Currie received acting pay from September 1996 to early 1999 and from June 18, 2001 to September 28, 2001. Mr. Willisko received acting pay from January 1, 1993 to December 31 1997. Ms. Wilson received acting pay from October 8, 1997 to February 5, 1998, February 16, 1999 to December 19, 1999, and April 1, 2001 to December 31, 2001.

[5] The Respondents grieved their job descriptions. They submitted to their employer that the work they were performing was beyond the scope of their job description since it was more difficult

or complex than as described in their PM-0286 job description. The Respondents demanded “a complete and current statement of the duties and responsibilities” of their positions in accordance with their prescribed rights under Article 56.01 of the Collective Agreement which states:

56.01 Upon written request, an employee shall be provided with a complete and current statement of the duties and responsibilities of his or her position, including the classification level and, where applicable, the point rating allotted by factor to his or her position, and an organization chart depicting the position’s place in the organization.

[6] The Respondents requested that their respective job descriptions be amended to include the additional duties and responsibilities performed outside the PM-0286 job description.

[7] The employer responded by furnishing the Respondents with a copy of the PM-03 classification, the accompanying PM-0286 job description and an organizational chart showing the Respondents’ respective position within the CRA. However, the Respondents’ employer denied their request for an amendment to the generic job description and accordingly the grievance was referred to an adjudicator.

A. *First Adjudication*

[8] The grievance was initially heard by Adjudicator Kuttner of the Public Service Staff Relations Board. Adjudicator Kuttner determined that a grievance adjudicator lacked the jurisdiction to require the employer to provide position-specific work descriptions upon individual requests pursuant to Article 56.01 of the Collective Agreement because such a requirement would

lead to the “balkanization of the employer’s generic work descriptions”. Therefore, the only remedies open to the Respondents were to request acting pay or a reclassification of their work classification. Adjudicator Kuttner further determined that the PM-0286 description was able to encompass the additional duties performed by the Respondents. The Respondents’ grievance was therefore dismissed.

B. *Justice Strayer’s Decision*

[9] On judicial review, Justice Barrie Strayer held that while Adjudicator Kuttner may have considered jurisdictional issues relating to the remedy proposed by the Respondents, those issues did not govern the final decision: *Currie v. Canada (Customs and Revenue Agency)*, 2005 FC 733, 36 Admin. L.R. (4th) 138, per Justice Strayer at paragraph 11. Justice Strayer held that the Adjudicator reasonably concluded that the Respondents’ job description was sufficiently capacious to include the duties and responsibilities which the Respondents raised. The application for judicial review was therefore dismissed.

C. *The Court of Appeal’s Decision*

[10] The Respondents successfully appealed Justice Strayer’s decision: *Currie v. Canada (Customs and Revenue Agency)*, 2006 FCA 194, [2007] 1 F.C.R. 471.

[11] The majority, led by Justice Pelletier held that Adjudicator Kuttner was guided by his view that he lacked jurisdiction to require the employer to provide the Respondents with a position-specific work description and that where “an employee is required on an ongoing and permanent basis to do work which is substantially outside the job description applicable to his or her position, the employee’s remedy is to apply for reclassification.”

[12] The majority held at paragraph 25 that the Adjudicator’s interpretation of Article 56.01 of the Collective Agreement was too rigid and could not be allowed to stand. The majority held at paragraph 26 that the correct interpretation was that a job description “is a document which must reflect the realities of the employee's work situation”. [emphasis added]

[13] The majority addressed the Adjudicator’s determination that the only remedy open to the Respondents was a reclassification grievance at paragraphs 27-28:

27 The adjudicator's suggestion that reclassification is the appropriate remedy for an employee regularly engaged in doing work beyond the scope of his or her job description is a particularly relevant example of this point. In argument before us, counsel for the appellants, without contradiction from opposing counsel, advised that a reclassification grievance will not proceed unless the employee agrees that his or her [page 486] job description is accurate. Consequently, a person whose position is classified at the PM-03 level but who is regularly working on files of complexity 20 or greater cannot apply for reclassification unless he or she agrees that job description PM-0286 accurately describes their duties and responsibilities. As we have seen, the distinguishing characteristic of job description PM-0286 is the fact that the incumbent is assigned to work on files of complexity 10. Consequently, the applicant who seeks reclassification from PM-03 to PM-04 must agree that their job consists of working on files of complexity 10, which effectively undercuts the basis of their request for reclassification.

28 As a result, the only way in which individual employees can access the reclassification process is by means of a revised job description which accurately describes the duties and responsibilities of their position. Clause 56.01 of the Collective Agreement is the mechanism by which the employee is able to demand such a job description. An interpretation of clause 56.01 which forecloses its use in the very circumstances which give it a purpose cannot withstand even the most deferential review by this Court.

[emphasis added]

[14] The majority therefore allowed the appeal with costs and remitted the matter back to a different adjudicator to be decided in accordance with its reasons.

[15] Justice Létourneau dissented. He agreed with the trial judge's reasoning that Adjudicator Kuttner did not allow the jurisdictional discussion of the Respondent's requested remedy to influence its ultimate decision, and even it did, the interpretation of Article 56.01 of the Collective Agreement was reasonable.

D. *Second Adjudication*

[16] Adjudicator Mackenzie of the Public Service Labour Relations Board presided over the remitted adjudication of the Respondents' job description grievance. He allowed the Respondents'

grievances in part and ordered that the employer insert the following two amendments into the

PM-0286 job description:

187 The PM-03 job descriptions of Mr. Currie, Ms. Wilson and Mr. Willisko are amended by adding the following to the first activity:

Working on investigation files at higher complexity ratings than 10 when the investigator is a member of a team that reports to a lead investigator.

188 The PM-03 job descriptions of Mr. Currie, Ms. Wilson and Mr. Willisko are further amended under “Key Activities” by adding the following, after the first key activity:

On an episodic basis, and over an extended period, investigating difficult domestic and international tax fraud schemes, complexity 20, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the Statutes administered by the Agency.

[emphasis added]

[17] The Adjudicator based his decision on the following reasoning found at paragraph 170 of the decision:

170 The evidence showed that three of the grievors (Mr. Currie, Ms. Wilson and Mr. Willisko) did perform duties outside of the revised PM-03 job description (as lead investigators of files complexity rated at 20) on a regular and ongoing basis. That they have received acting pay for this work does not change the fact that the revised PM-03 job description did not accurately reflect the work being performed. The nature of the investigation work means that once a file is assigned the investigator follows it through to its conclusion -- and this means that the work on the file will continue over an extended period of time. This period of time cannot be

described as “temporary”. Work as a lead investigator on files rated at complexity level 20 was performed on a regular and ongoing basis. However, it could not be described as “permanent” since it was performed on an episodic basis. There were periods when these three grievors worked exclusively on files rated at complexity level 10 and performed no work (as lead investigators) on files complexity rated at level 20 [...]

[emphasis added]

[18] The Adjudicator found that the Respondents were not given a choice of continuing to work higher complexity 20 rated files or were directed to refer those files to colleagues of a higher classification. This fact was sufficient to distinguish the case of *Batiot et al. v. Canada Customs and Revenue Agency*, 2005 PSLRB 114, 86 C.L.A.S. 132, from the circumstances at bar.

[19] The Adjudicator concluded at paragraph 172 that “in order to reflect the regular and episodic performance of duties as lead investigators of files complexity rated at 20, the PM-03 job descriptions of Mr. Currie, Ms. Wilson and Mr. Willisko must be amended.”

II. The Statutory Framework

[20] On April 1, 2005, the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force.

Pursuant to section 61 of the *Public Service Modernization Act*, the reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act (the former Act)*.

[21] Subsection 92(1) of the *former Act* reads as follows:

- | | |
|--|---|
| <p>92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to</p> | <p>92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur:</p> |
| <p>(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,</p> | <p>a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;</p> |
| <p>(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),</p> | <p>b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la <i>Loi sur la gestion des finances publiques</i>;</p> |
| <p style="padding-left: 40px;">(i) disciplinary action resulting in suspension or a financial penalty, or</p> <p style="padding-left: 40px;">(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the <i>Financial Administration Act</i>, or</p> | <p style="padding-left: 40px;">soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la <i>Loi sur la gestion des finances publiques</i>;</p> |
| <p>(c) in the case of an employee not describing in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,</p> | <p>c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.</p> |

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to section (2), refer the grievance to adjudication.

[22] Section 7 of the *former Act* ousts the jurisdiction of an adjudicator from determining the classification of employees:

7. Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.

7. La présente loi n'a pas pour effet de porter atteinte au droit ou à l'autorité de l'employeur quant à l'organisation de la fonction publique, à l'attribution des fonctions aux postes et à la classification de ces derniers.

III. Standard of Review

[23] The standard of review for questions of law is correctness while other issues are reviewable on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 59). At paragraph 59 of *Khosa*, above, reasonableness has been articulated as follows:

[...] Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47).

There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. The standard of review in this matter is reasonableness for the questions of fact or mixed fact and law and correctness for questions of law.

[24] In *Currie*, above, the Federal Court of Appeal held that the standard of review applicable to the case at bar was patent unreasonableness since the question at stake touches upon the interpretation of a collective agreement, a function well within the expertise of the adjudicator. However, since *Dunsmuir*, above, it is clear that the standard of patent unreasonableness has been replaced with the standard of reasonableness. Accordingly, the standard of review in this case is reasonableness.

IV. Issues

[25] Apart from the question of the applicable standard of review, the Applicant raises the following issues:

- (a) Was it unreasonable in the circumstances, for the Adjudicator to order that the job description for the Respondents be amended?
- (b) Was it reasonable, in the circumstances, for the Adjudicator to preclude the use of acting pay for situations when the Respondents acted outside their job descriptions?

[26] The Respondents raise the following issues:

- (c) Did the Adjudicator commit a reviewable error by ordering that the Respondents' job description be amended?
- (d) Did the Adjudicator commit a reviewable error in determining that the receipt of acting pay was an acknowledgement of the fact that the PM-03 job description did not accurately reflect the work being performed by the Respondents?

V. Analysis

A. *Was It Unreasonable in the Circumstances, for the Adjudicator to Order That the Job Description for the Respondents Be Amended?*

(1) Parties' Representations

[27] The Applicant does not take issue with the first amendment to the Respondents' PM-0286 work description. The second and lengthier amendment which I reproduce again for convenience is the one under consideration:

188 The PM-03 job descriptions of Mr. Currie, Ms. Wilson, and Mr. Willisko are further amended under "key activities" by adding the following, after the first key activity:

On an episodic basis, and over an extended period, investigating difficult domestic and international tax fraud schemes, complexity 20, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the statutes administered by the Agency.

[emphasis added]

[28] Both parties agreed that the Adjudicator complied with the Federal Court of Appeals direction to decide whether the Respondents worked on files of complexity 20 and if answered in the affirmative then “to what extent” the Respondents worked on higher complexity files: *Currie* (Federal Court of Appeal), above, at paragraph 29.

[29] The Applicant takes issue with the extent to which the Respondents performed work of complexity 20 or higher, specifically by describing the period during which the Respondents worked on complexity 20 files or higher as “episodic”. The Applicant points out that the word “episodic” stands in contrast to the phrase “ongoing and permanent” (Adjudicator’s decision, paragraph 169). The Applicant produced a dictionary definition of the word “episodic” in support of its argument.

[30] The Applicant therefore submits at paragraph 31 of its memo that the Adjudicator found as a matter of fact that “the performance of complexity rating files 20 by the Respondents was not a regular or permanent part of their job function. Instead it was episodic.” [emphasis in original]

[31] The Applicant submits that the evidence before the Adjudicator indicated that employees in the PM-03 classification may work on higher complexity rating files when they are part of a team. The evidence further demonstrated that the key distinguishing feature between the PM-03 and PM-04 classifications was the requirement to work as lead investigator on complexity 20 files. The Applicant takes the positing that the first amendment was within the Adjudicator's jurisdiction because it is in keeping with the pre-existing content of the PM-0286 job description which allows PM-03 classified employees to work on higher complexity files as part of a team.

[32] The Applicant submits that the amendment in this issue equates to the work of a lead investigator which is prescribed to a PM-04 classified employee. By ordering the impugned amendment, the Adjudicator was attempting to indirectly order the employer to "reclassify the PM-03 job description to a PM-04 job" by using the exact wording found in the PM-0677 work description. The Applicant submits that the Adjudicator cannot do indirectly what he or she acknowledged cannot be done directly, which is to declare that the PM-0677 job description is the appropriate one for the Respondents: Adjudicator's decision, at paragraph 167. It is submitted that this position is consistent with the predominant case law which recognizes management's prerogative to assign duties to specific positions: *Batlot*, above, at paragraph 51; *Beaudry et al. v. Treasury Board (Department of Human Resources and Skills Development)*, 2006 PSLRB 75, 86 C.L.A.S. 142; *Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40, 85 C.L.A.S. 137, at paragraph 57.

[33] On a separate note, the Applicant briefly challenges the Adjudicator's decision with respect to Mr. Willisko's grievance at paragraphs 21-24 of the memo. The Applicant submits that the Mr. Willisko was specifically advised that during his secondment at the Integrated Proceeds of Crime (IPOC) Unit of the RCMP that he was not expected to perform any duties beyond those described in the PM-0286 job description and if any complexity 20 files arose, they should be reported to the team leader. The Applicant submits that the decision of the Adjudicator to allow Mr. Willisko's grievance in part and amend his job description was unreasonable in light of the above evidence.

[34] The Respondents submit that the Adjudicator found that the Respondents worked on complexity 20 files on "a regular and ongoing basis" and by the very nature of its work the Respondents would be working on such files "over an extended period of time": Adjudicator's decision, at paragraph 170. However, the extent of the Respondents work on complexity 20 files was not "permanent" or "temporary". It was evident that the work on complexity 20 files was "regular and ongoing" in that over lengthy periods of time the Respondents dealt "exclusively" with such files. Therefore, the Adjudicator found as a matter of fact that the Respondents worked on complexity 20 files on "a regular and episodic basis". The Respondents contend that the descriptive phrase "regular and episodic" is a reasonable and rational way of describing the work performed by the respondents.

[35] The Respondents submit that the Adjudicator fulfilled what was required of him in this job description grievance, which was to determine whether the job description in issue complies with

the Collective Agreement by representing a complete and current statement of the grievor's duties and responsibilities, and if incomplete, require the employer to amend the employee's job description: *Hymander v. Treasury Board (National Parole Board)*, [2002] C.P.S.S.R.B. No. 56 (QL), 2002 PSSRB 71, at paragraph 36; *Temmerman v. Treasury Board (Department of Human Resources Development)*, [2005] C.P.S.S.R.B. No. 10 (QL), 2005 PSSRB 8, at paragraph 90.

[36] The Respondents note that the Adjudicator determined that the PM-0677 job description is a convenient point of comparison to determine whether the Respondents' work description accurately reflects the duties being performed: Adjudicator's decision, at paragraph 166. The Applicant notes that the Federal Court of Appeal recognized in *Currie*, above, at paragraphs 7-9, that the wording between the PM-0286 and PM-0677 work descriptions is reflected in the higher complexity rating of the files.

(2) Analysis

[37] I agree with the Respondents that using words borrowed from the PM-0677 job description is a reasonable response to resolve a job description grievance and does not amount to reclassification of the Respondents' job from the PM-03 to the PM-04 classification.

[38] It is important to understand the difference between a job description and job classification. The first can be referred to adjudication while the second is the prerogative of the employer.

[39] It is important to note that the Applicant does not challenge the jurisdiction of the Adjudicator *per se* to amend the Respondents' job description. I have no doubt that the Adjudicator possesses the requisite jurisdiction in a job grievance to order the employer to add to the employee's job description any duties and responsibilities which the employee performed "during a specific period of time": *Temmerman*, above, at paragraph 90. The Applicant's quibble is with the Adjudicator's use of words found in the PM-0677 job description to amend the PM-0286 job description. The issue is therefore with the appropriateness of the remedy, an area which the Adjudicator is entitled to considerable deference.

[40] Since the Supreme Court Canada's decision in *Re Polymer Corporation and Oil, Chemical, and Atomic Workers International Union, Local 16-14* [(1959), 10 L.A.C. 51; (1961), 26 D.L.R. (2d) 609 (Ont. H.C.) affirmed (1961), 28 D.L.R. (2d) 81 (Ont. C.A.) affirmed [1962] S.C.R. 338 (Sub nom *Imbleau v. Laskin*), it is trite law that arbitrators or adjudicators have remedial powers flowing from the terms of the Collective Agreement such that they can require the parties to act in accordance with it.

[41] The Federal Court of Appeal has issued strong guidelines to the Adjudicator and this Court to interpret Article 56.01 of the Collective Agreement in a manner that does not foreclose its use in the very circumstances which give it purpose: *Currie*, above, at paragraph 28. In my view, the Court of Appeal instructed the Adjudicator to interpret Article 56.01 in a remedial manner.

[42] When one considers Article 56.01 through a remedial lens, it is difficult to see why an Adjudicator's decision to use words from a higher classified job description to amend a lower classified inaccurate job description is unreasonable. This Court has previously held in *Chadwick v. Canada (Attorney General)*, 2004 FC 503, 249 F.T.R. 293, per Justice Richard Mosely at paragraph 24, that comparing job classifications was a necessary exercise which did not transform acting pay grievances into classification grievances. The same logic applies to the situation at hand.

[43] At any rate, the suggestion that the Adjudicator simply copied the words found in job description PM-0677 is untenable. A comparison of job descriptions PM-0286 and PM-0677 reveals they are virtually identical, save for the level of complexity:

PM-04:

Investigating difficult domestic and international tax fraud schemes, complexity 20, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the statutes administered by the Agency.

PM-03:

Investigating routine domestic and international tax fraud schemes, complexity 10, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the statutes administered by the Agency.

Amendment:

On an episodic basis, and over an extended period, investigating difficult domestic and international tax fraud schemes, complexity 20, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from

numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the statutes administered by the Agency.

[emphasis added]

[44] The only changes consist of the qualification “on an episodic basis, and over an extended period”, and upgrading the lower complexity markers. The fact that the Adjudicator used words that are common to both the PM-0286 and PM-0677 job descriptions only indicates the desire of the Adjudicator to work within the employer’s language. Such a course of reasoning was reasonably open for the Adjudicator to take.

[45] The Applicant further submits the Adjudicator erred when it amended the Respondents’ job description on the basis of an “episodic” performance of higher complexity duties, as opposed to an “ongoing and permanent basis”. In my view, the Applicant is attempting to narrow the remedial interpretation of Article 56.01 of the Collective Agreement in the similar manner which was rejected by the Federal Court of Appeal in *Currie*, above. Past adjudicators have acknowledged that a job description modification order can include temporal caveats or limitations: *Temmerman*, above, at paragraph 90. I cannot accede to the Applicant’s submission that an Adjudicator cannot amend a job description unless the duties and responsibilities performed by the employees occurred on a permanent and ongoing basis. This may be evidentiary standard for a classification grievance, but I am not convinced the Respondents need to reach it in a job description grievance. As Justice Pelletier stated in *Currie*, above, at paragraph 26, the job description is “a document which must reflect the realities of the employee's work situation”. The reality of the Respondents’ work

situation was that they worked on an “episodic basis, and over an extended period” on complexity 20 files. The order of the Adjudicator was reasonably open to him on the evidence before him.

[46] With respect to Mr. Willisko’s grievance, it is evident that the Adjudicator did not provide individual reasons for allowing his grievance in part. Nevertheless, the Adjudicator considered evidence upon which Mr. Willisko’s grievance was based, including Mr. Poon’s letter dated November 20, 2000, which allegedly demonstrates that Mr. Willisko was not expected to perform duties beyond his job description. It was also evident that Mr. Willisko performed some duties at the AU2 job classification level, for which he was granted acting pay between 1993 and 1997. The evidence with respect to Mr. Willisko’s claim goes both ways. It could reasonably lead to the dismissal of the grievance in accordance with *Batiot*, above, or it can lead to its allowance. The Court will not intervene and set aside the Adjudicator’s decision simply because it comes to the opposite decision. In my view, the decision to allow Mr. Willisko’s grievance was reasonably open to the Adjudicator on the evidence before him.

B. *Was It Reasonable, in the Circumstances, for the Adjudicator to Preclude the Use of Acting Pay for Situations when the Respondents Acted Outside Their Job Descriptions?*

[47] The Applicant submits that the Adjudicator reached an illogical conclusion in refusing to dispense acting pay as a remedy for “episodic” performance of complex duties. The Applicant submits that it is trite law that an employee who substantially performs duties at a higher level is entitled to acting pay in accordance with the collective agreement: *Stagg v. Canada*, [1993] F.C.J.

No. 1393, 71 F.T.R. 307; *Beaulieu v. Treasury Board (Federal Court of Canada)*, 2000 PSSRB 76, [2000] C.P.S.S.R.B. No. 50 (QL); *Beauregard v. Treasury Board (Transport Canada)*, [1996] C.P.S.S.R.B. No. 53 (QL), PSSRB File Nos. 166-2-26956, 26957 and 26958.

[48] The Applicant submits that remedying “episodic” performance of higher complexity duties with an amendment to a job description effectively precludes the use of acting pay on those episodic occasions. Once a duty is included in the PM-0286 level, there is no entitlement to acting pay.

[49] The Respondents submit that the fact that employees receive acting pay over prolonged periods of time is only relevant as acknowledgement that the work they were performing was not contained in their PM-0286 job description.

[50] The Respondents address the Applicant’s argument with respect to the logic of the remedy by noting that the Adjudicator found that the Respondents worked on complexity 20 files on a regular and ongoing basis. The Respondents submit that the fact that the Respondents worked on these files on an “episodic” basis does not alter the first finding. The Respondents submit the Applicant’s submissions ignore the purpose and effect of Article 56.01, which requires the employer to provide employees with a current, accurate, and complete statement of their duties. When a job description is incomplete, the employer can be required to provide an employee with a job description where the omissions are rectified: *Breckenridge and the Library of Canada*, [1996] C.P.S.S.R.B. No. 69, PSSRB File Nos. 466-L-225 to 233 and 466-L-241 to 245, at paragraph 76.

(1) Analysis

[51] The Applicant's submissions run squarely against the Federal Court of Appeal's decision in *Currie*, above. The Court rejected an interpretive approach that forecloses the use of Article 56.01 to obtain an accurate job description. The Applicant correctly states that Court expressed concerns about acting pay being used in situations where work was performed outside the job description "on an ongoing and permanent" basis, but made no mention of "temporary" performance. Temporary performance of high complexity duties may not require a job description amendment, however it would be erroneous to suppose that the Court held that only "permanent" performance of such duties would require an amendment. The reasons of the Federal Court of Appeal stress the need for a flexible remedial interpretation of Article 56.01. In my view, Article 56.01 is capable of accommodating other temporal standards apart from permanence. "Episodic", is a reasonable temporal standard for which an adjudicator could award the remedy of a job description amendment.

[52] The submissions of the Applicant assume that acting pay, classification, and job description grievances are interconnected with each other. This is simply not the case. More than one kind of grievance may be initiated on the same set of facts but the result and analysis of each of those grievances is guided by different articles of the Collective Agreement and legislation. Each type of grievance contains a discreet range of remedies that is designed to bring the employer into compliance with the Collective Agreement. There is no conflict or inconsistency when an adjudicator or the employer decides to award acting pay and the employee later succeeds in

requiring the employer to amend a generic job description, or vice versa. The acting pay and the job description amendment are separate remedies that are designed to ameliorate different deficiencies, inadequate remuneration and an inaccurate job description respectively.

[53] Would an amendment of a job description preclude acting pay? This is a hypothetical question best left to a future proceeding. In my view, an entitlement for acting pay arises regardless of the retroactive amendment of a job description. Future work caught under the amended job description is another matter which should best be left to another day.

[54] The Adjudicator came to the reasonable conclusion that the Respondents' PM-0286 job description was incomplete and found that amending their job description was appropriate in the circumstances. The decision was consistent with the reasons of the Federal Court of Appeal, in *Currie*, above. I can detect no reviewable error in the final determination.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed with costs to the Respondents.

“ D. G. Near ”
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1454-08

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v.
GLEN CURRIE ET AL.

PLACE OF HEARING: OTTAWA

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: DECEMBER 30, 2009

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