

JUN 16 1989

File No.: 166-2-18289

No. 155

THE PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

KELLY JANE ARMSTRONG,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Muriel Korngold Wexler, Deputy Chairman.

For the Grievor: Catherine H. MacLean, Counsel.

For the Employer: John D. Leslie, Counsel.

Heard at Toronto, Ontario, May 9, 1989.

DECISION

Ms. Kelly Jane Armstrong has been employed as an air traffic controller (AI-04) at the Toronto Area Control Centre, Air Traffic Services, Transport Canada. On May 2, 1988, Ms. Armstrong presented a grievance requesting that her pay be adjusted pursuant to Pay Article 14 of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Code 402/85) (Exhibit 1) and the arbitral award with respect to this bargaining unit rendered on July 27, 1987 (Board File 185-2-312).

This case concerns a number of staffing transactions, serious and erroneous legal advice, and administrative foul-ups which led the employer to conclude that Ms. Armstrong had severed her employment with Transport Canada on October 23, 1987. The case involves two alleged resignations and a number of administrative appointments.

At the outset of the adjudication hearing of this grievance, Mr. John D. Leslie, Counsel for the employer objected to my jurisdiction to hear this matter. Mr. Leslie argued that this grievance raised an issue with respect to the legal validity of two "resignations" and I did not have jurisdiction to decide the validity of the "two letters of resignations" signed by Ms. Armstrong; resignations as envisaged by section 21 of the Public Service Employment Act.

Ms. Catherine MacLean, Counsel for the grievor, replied that the question of the validity of the

resignations was an incidental issue to the main issue raised by Ms. Armstrong, namely, that she be paid in accordance with the provisions of the relevant collective agreement. Ms. MacLean submitted that I have jurisdiction to interpret and apply the provisions of the collective agreement. Thus, I have the competence to determine where on the scale of rates of pay Ms. Armstrong was entitled to be paid. To make such a determination, an adjudicator must make findings of facts which may need the interpretation and application of various statutes and regulations.

At the adjudication hearing of this grievance, I took the jurisdictional objection under advisement and I directed the parties to present their evidence and submissions on the merits of this grievance.

Having now heard the grievance, I find that the jurisdictional issue is closely interwoven with the issue on the merits in this case. Thus, I will deal with both issues together later, in my reasons for determination.

FACTS

In September 1981 Ms. Armstrong joined Transport Canada as an air traffic controller in training (AI-OPR-00), position T-ACT-7404, at the Toronto Area Control Centre. She checked out in January 1983. Ms. Armstrong submitted a copy of a Report on Staffing Transaction (Exhibit-2) which indicates that as of January 29, 1983, the employer appointed her to position T-ACT-6546, classified AI-OPR-04.

The documentary evidence demonstrates that on February 7, 1983 a request for her promotion was made. She was retroactively promoted from AI-00 in position T-ACT-7404 to AI-OPR-AI-4 in position T-ACT-6546 (Exhibit 3). The position title was IFR Controller. As of January 29, 1983, Ms. Armstrong received her pay increments at the AI-4 level, annually, on the first Monday following January 29.

In the meantime, Ms. Armstrong had a serious interest in pursuing a career as a fighter pilot with the Canadian Forces. As early as June 1979, Ms. Armstrong inquired of her employer about the possibility of the granting of leave for that purpose (Exhibit 4). In this respect, Ms. Armstrong discovered that the Deputy Minister could grant leave without pay. Hence, on June 23, 1987, Ms. Armstrong requested a leave of absence from 6 months to 3 years because she had been accepted by the Canadian Forces for Pilot Training. (The training was to start in August, 1987 (Exhibit 5)).

Mr. Joseph Farrell, Manager Training and Human Resources, Chairman of Recruitment and Selection of Air Traffic Controllers Trainees, testified that he first met Ms. Armstrong in Cornwall in 1981 and, in June 1987, she came to him to inquire with respect to the employer's policy for the granting of leave without pay to train as a fighter pilot. Mr. Farrell went to the basement of the Transport building where the policy manuals were kept and provided her with a copy for her perusal. In addition, Mr. Farrell also gave a copy of the same

employer's policy (Personnel Management Manual, Exhibit 28) to Ms. Armstrong's immediate supervisor, Mr. E. Gauthier.

On July 27, 1987, Mr. L. Middlestadt, Acting Regional Manager, Air Traffic Services replied in the following terms:

The authority to approve or disapprove leave without pay for a period beyond twelve months rest with the Deputy Minister. I can not process this request to that level with [sic] actual dates being provided. I will retain your request, and return the leave form for future submission.

I can however advise you that once I have received actual dates, the recommendation of ANS to the Deputy Minister will be unfavourable in terms of granting leave. Section 3-2 of the PMM advises that "...leave without pay should normally be granted only when there are benefits to the employer, and reasonable expectation that the employee will return to duty...". Since the employee's request does not meet with policy conditions, it is unlikely that her request would be granted.

Notwithstanding the above, should she resign and take military training and subsequently be unsuccessful, the current situation which exists with regard to requirements for additional operational staff would likely dictate a favourable response to a request for employment.

Please resubmit the leave request when more information regarding actual dates is available.

From the content of this memorandum, Ms. Armstrong understood that it was unlikely that her request would be granted and she had only two and a half weeks to present herself at Chilliwack, B.C. for the training. She discussed the situation with Mr. D.R. Campbell, her immediate supervisor, who suggested that she write a letter of resignation with a proviso. As a result Ms. Armstrong wrote the following letter:

In the event that my Application for Leave With or Without Pay are not approved in sufficient time, you are advised that I wish to tender my resignation from Transport Canada with my last day of work being August 21, 1987.

Would you please direct any monies owed to me to the following RRSP account:

Name of Institution: Royal Trust

Address: 33 City Centre Drive
Mississauga, Ontario
L5B 2N5

Account #: AB 1311 490

My forwarding address for any further documentation or correspondence is as follows:

P.O. Box 44
R.R. # 4
Roseneath, Ontario
K0K 2X0

Telephone: 416-352-2525

I have enjoyed my career as an Air Traffic Controller and, should I be unsuccessful in my attempt with the Canadian Armed Forces, would very much be interested in regaining employment in this area. Thank you for your assistance in this regard.

On August 14, 1987, Mr. Campbell replied as follows:

This letter will acknowledge receipt and acceptance of your notice of resignation from Transport Canada. Your last day of work at this Unit will be August 21, 1987.

If you have any questions with respect to superannuation, severance pay, etc., it is suggested that you contact Mrs. J. Lawrence, Regional Personnel Services Officer at 224-3132. By way of copy of this memo, various offices will be aware of your notice of resignation and will commence the necessary processing of paper.

May I take this opportunity to wish you the best of luck in your new career.

On August 26, 1987, Ms. Armstrong discovered that her application for leave had been frustrated on August 21, 1987. The Region had for some reason decided not to forward her Application for Leave to the appropriate authorities. She was told that because she was no longer an employee, she could no longer benefit from the leave provisions and benefits. Ms. Armstrong decided to pursue

the matter and she made representations to Mr. Middlestadt to try to convince him to forward her Application for Leave to the Deputy Minister. As a result, she won her argument and, on August 27, 1987, Mr. Middlestadt sent her request for leave to the authorities in Ottawa. His memorandum reads as follows:

Following discussions with Regional Personnel staff, it is their advice that the employee's request must be directed to the DM as only he has the power to approve or deny the request. The approval denial process is not delegated.

Notwithstanding the fact the employee has since resigned, our process [sic] of her leave application has taken an inordinate period of time and to be fair to the employee the request should be processed to the final level.

A section from the current PMM is attached with respect to leave for service in the regular force.

The employee has asked that all avenues of leave or combinations of leave be explored as well, because her application is to take training in the regular force which carries a risk of failure in a non traditional role for women. In the event of that failure she would prefer to return to Transport Canada as an Air Traffic Controller.

In addition, on August 28, 1987, Ms. Armstrong decided to write directly to Mr. Ramsey Withers, Deputy Minister, in the following terms:

I formally request a leave of absence without pay for up to 3 year period commencing on August 21, 1987. I have been accepted by the Canadian Forces for Pilot Training and, if successful, subsequent service as a Pilot. I am requesting this job protection to cover the training period with the military since all courses must be passed before I become a Canadian Forces Pilot. I ask that all leave avenues (i.e. military, education, transfer, leave to work with other Public Service agencies, unrepresented groups, unspecified leave, personal leave, etc.) be looked at and pursued to ensure my position with Transport is protected. If my training should be unsuccessful, I would appreciate knowing my endeavours to serve this country in this capacity are recognized, encouraged and protected by this Government. Waiting your response.

(Underlining added)

On August 17, 1987, she was sworn into the Canadian Forces and as a result she went to Chilliwack, B.C. for basic training starting September 7, 1987. During her stay in Chilliwack, the employer (Ontario Region, Transport Canada) forwarded a number of documents treating her as having left the employ of Transport Canada. Under the signature of Mrs. J.R. Lawrence, Personnel Services Officer, Ontario Region, Transport Canada, a letter was sent to Ms. Armstrong with respect to her contributions under the Public Service Superannuation Act indicating that she had terminated her employment effective August 22, 1987 (Exhibit 11). In addition, Supply and Services

Canada asked her to complete some forms in this regard (Exhibit 12).

In early October 1987, Ms. Armstrong discovered that the pilot training was not for her and she decided to take an early withdrawal. This withdrawal took effect on October 5, 1987.

The next day, on October 6, 1987, she approached Transport Canada, Pacific Region, Vancouver office, for a position in the Vancouver area. Since she had received, from her employer, documents indicating that she had "resigned" (Exhibits 11 and 12) and she was no longer an employee of Transport Canada, Ms. Armstrong assumed that she was considered as having "resigned". Ms. Armstrong spoke to Mr. Vassarins, Superintendent, Vancouver Region, concerning an air traffic controller (AI-4) position in Vancouver. Mr. Vassarins welcomed her application for a position in Vancouver but he told her that he wanted her reassurance that she had resigned before he could offer her any position as an air traffic control in the Vancouver Area Control Centre. The employer (Transport Canada) had an "antiraiding" policy with respect to air controllers between one region and another because of the acute and serious shortage of air controllers in Canada. Mr. Joseph Farrell, (Manager, Training and Human Resources, Chairman of Recruitment and Selection of Air Traffic Controllers Trainees) learnt of Mr. Vassarins interest in hiring the grievor. Mr. Vassarins told Mr. Farrell in no uncertain terms to "leave her alone" because he wanted to hire her in the Vancouver Region.

Even though Mr. Farrell wanted her back in his region, he chose to respect Mr. Vassarins wishes.

Meantime, Ms. Armstrong actively pursued her endeavours to obtain employment with the Vancouver Region. She kept close contacts with Mr. Vassarins who had telephoned Mr. Middlestadt in the presence of the grievor, to confirm that she was no longer employed with the Ontario Region. The Ontario Region confirmed to Mr. Middlestadt that this was so. As a result she was promised a position in the Pacific Region, Vancouver Area Control Center.

On October 7, 1987, Ms. Armstrong formally applied for an air traffic control position in Vancouver. On October 22, 1987, she returned to the Ontario Region to pick up some personal effects and at the same time she went to the Pay and Benefits office to "settle the paperwork with respect to her superannuation". There she met Ms. Madeleine Cox (an employee supervised by Ms. Jasmine Lawrence, Personnel Services officer, Ontario Region, Pay and Benefits Unit) and she was advised to sign a form "Notice of Termination and/or Option for Benefit". Ms. Armstrong signed this document and indicated August 22, 1987 as the termination date (Exhibit 13). However, later on and without Ms. Armstrong's consent or knowledge, "someone" in the Pay and Benefits Section doctored this document and changed the effective date to read October 23, 1987 (Exhibit 34).

While Ms. Armstrong was in the Pay and Benefits Section, she was informed that on October 19, 1987,

Mr. Withers, Deputy Minister, had approved her leave of absence without pay to undertake flight training with the Canadian Forces (Exhibit 15). This letter also indicated that "no action has been taken with respect to your resignation and you remain an employee of Transport Canada on leave without pay". Ms. Armstrong testified that she became confused. She did not know what to do since she had applied for a position in Vancouver and she had been led to understand that she could not continue to be an employee of the Ontario Region to be considered for that position. Thus in the presence of the Pay and Benefits Officer, Ms. Armstrong telephoned the Pacific Region and spoke to Mr. Terry Gorman, Acting Superintendent, who indicated that the Pacific Region would not hire her (in the position she wanted) if she was an employee of the Ontario Region unless she "re-resigned". It is in these circumstances and with the assistance of Ms. Jasmine Lawrence, the Personnel Services Officer since 1970, that Ms. Armstrong wrote the following:

From: Kelly Armstrong
Toronto Centre
North Specialty

To: PTRDB

Subject: Resignation

This is to advise you I am resigning from my position with Transport Canada effective October 23, 1987. Please forward my superannuation refund to an R.R.S.P.

This memorandum is addressed to Ms. Lawrence. The employer admitted that Ms. Lawrence was not in any way a supervisor of Ms. Armstrong, nor was she a competent authority to receive such a resignation from Ms. Armstrong. Ms. Lawrence did not have delegated authority to receive or accept the resignation. Ms. Lawrence admitted that "resignations" did not normally fall under her purview and this was the first time anyone had given her a letter of resignation.

Ms. Lawrence explained that she met the grievor on October 22, 1987, to discuss the superannuation matter which resulted from her "resignation" of August 11, 1987 (effective August 21, 1987). She had the grievor sign these documents with respect to the superannuation matter (Exhibits 13, 29 and 30) and she "took" the letter of resignation of October 22, 1987, which she simply placed on the grievor's personnel file. She "accepted" the resignation by placing it on the file because in her opinion this was a simple "administrative procedure". She considered the August 11, 1987, resignation as the "original" resignation and for the purposes of Pay and Benefits she was required to fill the "gap" caused by the Deputy Minister's decision to approve the leave. In her view this second "resignation" covered the gap between August 21 and October 22, 1987, thus, the "paperwork" had to be changed to read October 22, 1987. In her opinion, these "administrative procedures" would expedite the superannuation process. Ms. Lawrence declared that she knew that "there was a requirement to accept the resignation".

In cross-examination, Ms. Lawrence suggested that this "second" resignation had already been accepted on August 14, 1987, by Mr. Cameron when he accepted the August 11, 1987, resignation. Ms. Lawrence added that the doctored document Exhibit 34 is the "correct" document and the grievor's employment terminated October 23, 1987. It is Ms. Lawrence who suggested to Ms. Armstrong that she write October 23, 1987 in her "letter of resignation". The parties admitted that the employer never accepted the resignation in writing or otherwise. The grievor never received any document in response to the letter of resignation introduced as Exhibit 14 and counsel for the employer acknowledged that the employer or Deputy Head did not accept the resignation in writing.

In early November 1987, Ms. Armstrong received a copy of Mr. Withers letter of October 19, 1987, approving her leave (Exhibit 15).

In early January 1988, Ms. Armstrong returned to the Vancouver office to inquire as to when she would be appointed to the position she had applied for. She was given a package to study; a "VR Eastside Conversion Course". On January 26, 1988, she received a letter where it was indicated that:

Although we are not yet in a position to issue a formal letter of offer concerning this course, and your employment with us, I would like to provide you with as much information as possible regarding our plans.

Upon acquisition of your security clearance, I anticipate you will receive an offer of employment from the Personnel Branch. The Superintendent, Training & Human Resources had indicated to me that you will be assigned to the VR ACC East specialty conversion course that is tentatively scheduled to commence February 22, 1988 in the Regional School.

In anticipation of the above, I am attaching a pre-course Study package.

Ms. Armstrong continued her contacts with the Pacific Region to ensure that she would get this position and she was told yes. Finally, during the second week of February 1988, she received a telephone call from the Training Superintendent who told her that he would appoint her as a IFR Controller in an AI-2 position at Prince George Center. He offered her the position at the AI-01 sixth increment level in the Tower indicating that it would facilitate her "security clearance". She refused such an offer. The position she had applied for in Vancouver was classified VFR-AI-4 (Ms. Armstrong was not an IFR controller).

Ms. Armstrong testified that she was "totally flabbergasted by such an offer". She knew that she had a 3 months grace period from the day her employment was terminated to re-enter the Public Service and she kept after the employer to re-employ her.

Ms. Armstrong discussed this matter with B.A. Shattock, Manager, Air Traffic Services School,

who informed her that he believed that this Prince George position had been offered to her for political reasons and as a result of her resignation from the Ontario Region (and the Toronto Office). The employer wanted to set an example for other Air Traffic Controllers who wanted to transfer out of the Ontario Region.

Ms. Armstrong found herself out on the street and unemployed. Hence, she forthwith returned to Toronto and asked for "a job". Mr. Farrell met her and explained that she "could only re-enter at the AI-00 level and once she checked-out, she would be promoted to the minimum step of AI-4".

Ms. Armstrong did not challenge this job offer. Mr. Farrell had the authority to hire her and she was appointed to the AI-00 position effective March 22, 1988. The letter of offer is dated March 18, 1988 (Exhibit 17). Her starting salary was \$16,922.00. Mr. Farrell candidly testified that since the grievor did not challenge this offer, he assumed that "everything was O.K." However, Ms. Armstrong was not "happy". She testified that she accepted this offer because she had no choice. She was unemployed. On March 22, 1988 she received a Report on Staffing Transaction (Exhibit 18) where it is indicated that her salary was \$16,922, effective March 22 and that she was appointed to position T-ACT-7605, classified AI-OPR-00.

Ms. Armstrong started training on the floor at the Toronto Area Control Center and she "refamiliarized"

herself with her duties. On 21 April 1988, she was certified as an Air Traffic Controller for Toronto (Exhibit 19). On September 9, 1988 the employer issued another report on Staffing Transaction appointing her, effective April 21, 1988, to the level AI-OPR-04, position T-ACT-6546, at the salary of \$41,623. This had been the identical position she had occupied until August 22, 1987. The position had remained vacant all along. To complicate matters, on February 12, 1988, the employer had issued a policy concerning special procedures for hiring Canadian candidates with previous Air Traffic Controller experience (Exhibit 31). As a result, the employer had to amend the report on staffing transaction to conform to the Policy and Ms. Armstrong was retroactively appointed to position ACT 7976, level AI-OPR-03, at a salary of \$37,642 effective March 22, 1988, (Exhibits 26 and 27).

On September 1, 1988, Ms. Armstrong was officially offered the permanent position T-ACT-6546, AI-OPR-04, (Exhibit 25). Ms. Armstrong had been given her old position back.

Ms. Armstrong explained why she did not challenge Mr. Farrell's job offer at the AI-00 level in March 1988. She explained that she did not want to frustrate the "check out" by making waves. However, when Ms. Armstrong checked out, she no longer feared losing her job and making waves; so, she decided to take some action to rectify the situation. She studied the situation and examined her personnel file and the Employer's policies.

On 28 April 1988, Mr. Farrell informed her that she was only entitled to the AI-OPR-04 first increment pay level (Exhibit 22). She realized that she was at the bottom of the salary scale for AI-04 and she was not satisfied with this situation. On May 1, 1988, Ms. Armstrong wrote to Ms. Josie Ciebien, Regional Manager, Personnel Administration, Transport Canada, and the grievor requested that she be paid at the fifth increment of AI-04. She chose the fifth increment because that was the level she was at on August 22, 1987. She was trying to find arguments to fight the employer's actions. She did not remember receiving an acknowledgment or acceptance with respect to the resignation she had tendered on October 22, 1987. She studied the personnel file, Manuals and the law, and, she found that the October 22, 1987 resignation had never been accepted. On April 21, 1988, she wrote to Mr. Campbell with respect to this matter (Exhibit 23). In addition, Ms. Armstrong argued this matter with Ms. Ciebien to no avail (Exhibits 23 and 24). Having discussed the matter with Ms. Cibien she realized that the employer stuck to its guns. Hence, on May 21, 1988, she presented the grievance which is the subject of this decision.

Mr. Farrell explained that the transfer of Air Traffic Controllers was not allowed between Regions. He wrote Ms. Armstrong advising her that she had resigned. This was based on on the information provided by the Personnel Branch, Ms. Lawrence and a review of Ms. Armstrong's file. "Resignations" were not in his domain of expertise. In addition, the employer admitted

that the "resignation of August 11, 1987" was not a valid and accepted resignation. Ms. Armstrong was on leave of absence until October 23, 1987. The employer (Ms. Lawrence) took October 23, 1987 as the effective date of termination of her employment. From October 22, 1987 to March 1988, Ms. Armstrong did not challenge the resignation because she did not know that the Deputy Head had to accept it. Even when Mr. Farrell offered her the AI-00 position she thought that the resignation was valid and she needed a job. Ms. Armstrong declared that she questioned it within herself but decided not to contest it until her job was secure and she had "checked out". She researched to see how she could return to the AI-04, fifth increment level, and, that is how she found out that the resignation had not been accepted and was not legally valid. Ms. Armstrong declared that as soon as she withdrew from the pilot training, she tried to obtain a job with Transport. She did not want to "re-cross the country" from Vancouver to Toronto so she applied for a job in Vancouver.

Ms. Armstrong declared that had she known that Vancouver would not give her the position she had applied for, she would not have tendered her resignation from the Ontario Region. She only did this because the "Vancouver Office" led her to believe that she would get the AI04 position.

In 1988 Mr. Carl Fisher was the Vice-President, Labour Relations, Canadian Air Traffic Controllers Association. He introduced the employer's policy with

respect to the hiring of Canadian Air Traffic Controllers (Exhibit 31). Mr. Fisher explained the various salary levels for AI-03 and AI-04 (Exhibits 32 and 33). He confirmed that the Personnel Directorate did not have the delegated authority to accept resignations.

ARGUMENTS

Ms. Catherine MacLean, counsel for the grievor, submitted that an adjudicator has jurisdiction to hear this grievance because the issue concerns the rate of pay to which the grievor is entitled to be paid. The grievance refers to Article 14, namely clauses 14.02, 14.07 and Appendix A of the collective agreement and arbitral award. In addition, clause 14.01 refers to the Public Service Terms and Conditions of Employment Regulations.

Ms. MacLean argued that Ms. Armstrong was covered by the collective agreement and, pursuant to the collective agreement, she is entitled to be paid in accordance to Article 14 and Appendix A. Since clause 14.01 refers to the Public Service Terms and Conditions of Employment Regulations, the adjudicator has the jurisdiction to apply and interpret them. In addition, an adjudicator must look at the facts of the case and one of the "facts" in this grievance concerns the "validity" of a resignation. Thus, to determine the rate of pay, the adjudicator must make a finding with respect to the resignation.

Ms. MacLean distinguished the Board's decisions concerning resignations because the issue here is not

whether the resignation was voluntary or whether discipline was involved. Here the issue is pay and although the grievance does not raise a disciplinary issue it does raise the question of an interpretation of a contract provision. Ms. MacLean concluded that I have jurisdiction to determine the facts and law of this grievance and to decide the interpretation and application of the collective agreement. To determine my jurisdiction I must go beyond the collective agreement. To decide the pay level, I have to make a determination on the facts including but not limited to whether the grievor had resigned. To resolve this main issue it is necessary that I consider the application of the Public Service Employment Act. In this regard, Ms. MacLean referred me to the Macri decision (Board file 166-2-15319) wherein Board Member Mr. R. Young had to make a determination as to a classification level in order to decide compensation. Ms. MacLean made an analogy to this decision explaining that I have to determine the "validity" of the resignation in order to decide Ms. Armstrong's rate of pay.

Ms. MacLean reviewed, in detail, the facts in this case. She highlighted the various staffing appointments and transactions. On 29 January 1983, Ms. Armstrong was appointed AI-04 to the position T-ATC-OPR-6546. Pursuant to clause 14.07, Ms. Armstrong's incremental period is 12 months, thus, she moved along the various incremental steps and on August 22, 1987, Ms. Armstrong was at the fifth increment step of AI-04. Since Ms. Armstrong wanted to pursue a career in the Canadian Forces, she applied for leave. She did not

get a reply from the employer and, as the date was approaching for her to start her training, she conditionally resigned (Exhibit 7) and Mr. Campbell accepted it (Exhibit 8). She nevertheless pursued the request for leave and on October 19, 1987, this request was accepted by the Deputy Minister. The grievor learnt of the granting of her request for leave when she went to Ms. Lawrence's office to sign some documents. On October 22, 1987, she found herself in a "pickle". She had applied for an AI-04 position in Vancouver and she was advised that to be considered for this position she had to resign from the Ontario Region. Thus, she tendered her resignation and, at the suggestion of Ms. L. Lawrence, addressed the memorandum of resignation to Ms. Lawrence indicating the effective date of October 23, 1987. The "resignation" was never acknowledged and the memorandum was simply placed on her personnel file.

Ms. MacLean referred me to Section 26 of the Public Service Employment Act. She argued that an employee's employment ceases when the Deputy Head accepts the resignation in writing. In this regard, Ms. MacLean cited the Friesen decision (Board file 166-2-6159) where it was decided that the acceptance of the resignation had to be communicated to the grievor.

Ms. Lawrence knew that the "resignation" had to be accepted but she did not bother with this "technicality" because she was solely concerned with the superannuation matter. The grievor, on the other hand, did not know it had to be accepted and when she

received a return of her contributions she thought that she had resigned.

It is only later that the error was noticed; but, the error is a legal one. Thus, she never severed her employment. Ms. MacLean submitted that the grievor was the incumbent of position T-ACT-6546 when she went on leave of absence without pay. Section 27(2) of the Public Service Employment Regulations allows for her replacement under defined circumstances and Section 30 of the Public Service Employment Act applied with respect to the statutory priority. But since in fact, the position remained vacant, logically and legally, when she returned from leave, she was entitled to be appointed to that position. However, the employer acted differently. Ms. MacLean argued that Ms. Armstrong went on leave pursuant to Section 58 of the Public Service Terms and Conditions of Employment Regulations which provides:

58. A deputy head may grant leave of absence without pay to an employee (TB 780408, 17 December 1981)

Hence, by operation of Section 82 of these Regulations Sections 69 to 80 apply. Sections 69 to 80 of the Regulations provides for entitlement to pay increments during the period of leave. Pursuant to these provisions, Ms. Armstrong continued receiving her increments while she was on leave. The leave granted by Mr. Withers (Exhibit 15) fell under the purview of Section 58 of the Regulations. Therefore, Ms. Armstrong moved to the 6th increment while she was on leave.

Then, when the promised position AI-04 in Vancouver did not materialize Ms. Armstrong returned to the Ontario Region. Mr. Farrell offered her an AI-00 position ATC-7605 which she accepted because she was unemployed and in her view, she had no choice but to take this job. As a result of an employer policy, the job offer was amended and she was retroactively appointed to position ACT 7976, AI-03. When she "checked out" she was promoted back to her old position; but, she was paid at the first increment on the grounds that she had "resigned". The employer treated her as an employee who had been hired from the outside of the Public Service. Ms. Armstrong was dissatisfied and she contested the rate of pay. Ms. MacLean argued that legally Ms. Armstrong had not resigned and the employer made a mistake in treating her as though she had.

Ms. MacLean submitted that by virtue of section 64 of the Public Service Terms and Conditions of Employment Regulations, Ms. Armstrong is entitled to be paid at the ninth increment. The rules of transfer apply. In March, she was appointed to AI-03 and she had to be placed at the increment nearest to and not less than the rate of pay she was receiving on August 22, 1987, (when she went on leave) plus one increment. Thus, in March 1988, she was entitled to be paid \$50,671. Then, in April 1988, she was promoted to AI-04 and under the provisions of the Regulations she should have moved to the \$53,026 level. As of April 1989, she is entitled to be paid \$57,058. Ms. MacLean pointed out that had the employer continued to consider her "appointed" to the AI-04 level

when she returned on March 1988, she would have been be entitled to the seventh increment. Ms. MacLean argued that her request to be paid at the fifth (increment) step is an error and the amendment to her grievance so that she be paid at the ninth (increment) step does not change the guts of her case. Ms. Armstrong complained about her pay and the amendment does not change the grievance because Ms. Armstrong had argued all along that she be treated as though she had never left the employ of Transport Canada.

Mr. John D. Leslie raised a jurisdictional objection. He submitted that it is trite law to argue that I have no jurisdiction to entertain a resignation issue if there is no discipline involved. To this effect, Mr. Leslie referred to the Vétro decision (Board file 166-2-8131). Mr. Leslie argued that the grievor is trying to get in through the back door. Mr. Leslie added that Ms. Armstrong was paid correctly and this is based on the collective agreement. I cannot look at the resignation and I cannot look at the issue any further back than March 22, 1988.

In the alternative, Mr. Leslie argued that if I decide that I have jurisdiction to decide the legality of the resignation of October 22, 1987, I have to examine the intention of the parties involved in the resignation and the grievor's conduct which viciated the need for the Deputy Head to accept the resignation. Mr. Leslie argued that the Section 26 of the Public Service Employment Act must be interpreted in a reasonable manner. Absurdity

would result if the resignation was never accepted and years later the employee returned claiming that the employment relationship had never been severed.

Mr. Leslie reviewed the facts and argued that the October 22 resignation was tendered to facilitate the "transfer" to the Vancouver office. Ms. Armstrong voluntarily resigned and when she did not get the job, she returned to the Ontario Region and asked for a job. Mr. Farrell offered the AI-00 position and Ms. Armstrong accepted it. She did not question the rate of pay. Mr. Leslie questioned Ms. Armstrong failure to raise the salary issue with Mr. Farrell who was "happy" to hire her. Then, in April 1988, she started looking for a way to get her salary level back. According to Mr. Leslie, Ms. Armstrong should have known that acceptance of this second resignation would have been forthcoming in view of the fact that she had received Mr. Cameron's prompt acceptance of her first notice of resignation in August 1987.

In support of his position, Mr. Leslie quoted the decisions in McNab (Board file 166-2-14343) and Re Parking Authority of Toronto and Canadian Union of Public Employees, local 43 (1974) 5 L.A.C. 2d 150, where the doctrine of laches was invoked. Mr. Leslie argued that Ms. Armstrong took an inordinate amount of time to contest the October 23, 1987, resignation and the employer suffered an administrative prejudice. Hence, in the name of equity, I must look at the conduct of the parties.

Mr. Leslie added that if I found that the resignation was not valid, I should decide that the employer had granted Ms. Armstrong leave under clause 10.07 of the collective agreement. Thus, she was not entitled to any increments because clause 10.07 is silent with respect to the entitlement to increments. Mr. Leslie concluded that this would bring her, in 1989, to the sixth increment. Furthermore, added Mr. Leslie, even if she is entitled to the ninth step, I could not grant it because she only requested the fifth step.

Ms. MacLean replied that the Vetro decision (supra) does not apply because Ms. Armstrong's grievance was referred to adjudication pursuant to section 92(1)(b) of the Act. Ms. MacLean added that Section 26 of the Public Service Employment Act is clear and I am not required to look at the intention of the parties. She cited Brown and Beatty Canadian Labour Arbitration, Third edition, pages 2.10 and 2.11 and the decision in Re Gray Forging and Stampings Ltd. and International Union of Electrical Radio and Machine Workers, Local 5578 (1978), 20 L.A.C. (2d) 278. Ms. Armstrong is, therefore, entitled to be paid according to the provisions of the collective agreement and she cannot accept anything less.

Ms. MacLean submitted that the doctrine of laches does not apply to this grievance and, furthermore, the employer did not suffer any prejudice. The grievor was expeditious. When she learnt of her salary level when reclassified as an AI-04, she immediately contested it

and filed a grievance. The only detriment that the employer could have shown is that, if it had been obliged to hire her at the AI-04 level, it would not have offered her the position. But in view of the facts and the extreme shortage of Air Traffic Controllers, Mr. Farrell would have hired her anyway. The employer simply applied the wrong procedures and now it finds itself in the position of having to rectify the problem and pay the grievor more. Thus, there are no administrative difficulties.

With respect to the argument concerning the application of clause 10.07, Ms. MacLean submitted that the evidence shows that the leave was granted pursuant to the Personnel Management Manual (Exhibit 4) and even Mr. Middlestadt referred to this Manual in his reply of July 1987 (Exhibit 6). Ms. MacLean concluded that the leave was granted under the Personnel Management Manual (Exhibit 4) and Ms. Armstrong went on "Deputy Head Leave" as envisaged by section 58 of the Public Service Terms and Conditions of Employment Regulations. Ms. MacLean added, however, that even if clause 10.07 applies, Ms. Armstrong would still have been entitled to the increments during her leave of absence.

Ms. MacLean concluded that I must exercise my jurisdiction on the facts as they happened and not on what should have happened. The employer made appointments and I must decide the pay issue based on those appointments. Thus, I have no option but to apply the collective agreement and the statutes and, as a result, find that Ms. Armstrong is entitled to be paid the ninth step of the AI-04 classification.

DETERMINATION

The basic facts in this case are not in dispute. The evidence disclosed that Ms. Armstrong was an employee of Transport Canada, in position T-ACT-6546, remunerated at the fifth step of AI-04 when she requested leave without pay. Ms. Armstrong requested leave pursuant to the provisions of the Personnel Management Manual (Exhibit 4). Mr. Farrell confirmed that he had provided the information on this leave to Ms. Armstrong and her supervisor Mr. Gauthier. Thus, on June 23, 1987, Ms. Armstrong formally requested the leave of absence for a period of six months to three years (Exhibit 5). On July 27, 1987, Mr. L. Middlestadt replied that the Deputy Minister had the sole authority to approve or not such leave and that the recommendation to the Deputy Minister will be unfavourable in terms of granting leave. Mr. Middlestadt in no unclear words referred to Section 3-2 of the Personnel Management Manual (Exhibit 6). It is therefore obvious that the request was dealt with pursuant to the provisions of the Personnel Management Manual. The collective agreement did not come into play here except for the fact that clause 14.01 incorporates the Personnel Management Manual.

As a result, on August 11, 1987, Ms. Armstrong tendered a resignation in light of the fact that the date was approaching for her to present herself for the training at Chilliwack, B.C. and the request for leave had not been answered by that date (Exhibit 7). Immediately after, on August 14, 1987, the resignation

was accepted by Mr. Campbell (Exhibit 8). The evidence demonstrated that for some unknown reason the request for leave was not forwarded to the Deputy Minister until Ms. Armstrong pleaded her case in very strong terms. She had "resigned" but her "resignation" was conditional on the request for leave being refused. Here, the local management had decided not to respect her wishes and simply frustrated the process by not forwarding the request to Mr. Withers. Thus, when Ms. Armstrong stated her case, Mr. Middlestadt referred the request for leave up the bureaucratic ladder (Exhibit 9). At the same time on August 28, 1987, Ms. Armstrong wrote a memorandum (with an attachment) directly to Mr. Withers requesting the leave of absence without pay.

In the meantime, Pay and Benefits concluded that Ms. Armstrong had resigned and sent her the required documents for her signature (Exhibits 11 and 12). They considered her "terminated" as of August 22, 1987. On October 5, 1987, Ms. Armstrong decided to withdraw from the Canadian Forces and on October 6, 1987, she applied for a position AI-04 in Vancouver. The Vancouver office replied in a positive manner and led her to believe that as long as she was no longer an employee of the Ontario Region, she would be appointed to the position in question. Mr. Farrell confirmed the employer's policy in not permitting the transfer of air traffic controllers between regions so as to avoid Toronto Air Traffic Controllers being transferred out of Toronto. The evidence was to the effect that the shortage of air traffic controllers is serious.

On October 22, 1987, Ms. Armstrong learnt that her resignation had not been accepted and that Mr. Withers granted the leave. She was informed that she would not be hired for the Vancouver position unless she "re-resigned". Therefore, and with the assistance of Ms. Lawrence, she tendered a second resignation effective October 23, 1987.

Counsel for the employer argued that I cannot determine the validity of this resignation for want of jurisdiction. However, how can an adjudicator interpret and apply a collective agreement in a vacuum and with total disregard of the facts of the case? The issue of the "resignation" is part and parcel of the pay issue. Ms. Armstrong claimed that she had been wrongly paid because the resignation was invalid, that is, she was returning from leave rather than applying from outside the Public Service. I must therefore interpret and apply the Pay provisions of the collective agreement and, to do so, I have to take into consideration the facts of the case, namely, whether this "re-resignation" had any legal validity, i.e., whether it was in conformity with Section 26 of The Public Service Employment Act.

The determination of the validity of the resignation is a matter of fact and law. I have jurisdiction to interpret the collective agreement and statutes which are directly related to the collective agreement such as the Public Service Employment Act. Thus, when I have to decide the salary, pay entitlements or rate of pay of a grievor, his or her classification

and matters with respect to his or her appointment to the position, or status in a position, giving him or her the entitlement to pay, come into play. Classification and staffing are closely related matters to pay. I cannot decide the pay issue without making a determination as to the classification of the position and whether the grievor has been appointed to the position pursuant to which he or she is making a claim. Similarly, I cannot decide whether Ms. Armstrong is being properly remunerated pursuant to the relevant collective agreement without determining the position level to which she had been appointed. To do this I must examine her employment history and make certain determinations of fact. In addition, I am also bound to respect and observe the Public Service Employment Act. I cannot make findings of fact disregarding the law. If a statute dictates conditions precedent for an action to be legal, I cannot intentionally disregard such a statute. I am obliged to respect the obvious and clear provisions of a statute, if that statute bears on the question before me (see McLeod v Egan (1974), 46 D.L.R. (3d) 150 (S.C.C.)).

For these reasons, I have jurisdiction to make a determination with respect to the validity of the "resignation" of October 22, 1987. The pay to which Ms. Armstrong is entitled pursuant to the collective agreement is closely related to what kind of appointment was made in March 1988.

The parties admitted that the resignation tendered October 22, 1987, was never accepted by the Deputy Head.

and it did not conform with Section 26 of the Public Service Employment Act. The statute is clear and provides:

Resignation

Sec. 26. An employee may resign from the Public Service by giving to the deputy head notice in writing of the intention to resign and the employee ceases to be an employee on the day as of which the deputy head accepts in writing the resignation.

It is therefore obvious that legally and statutorily, Ms. Armstrong's employment relationship was never severed.

Ms. Lawrence placed the resignation on the grievor's personnel file for administrative purposes. The "Notice of Termination and/or Option for Benefit" (Exhibit 13) was changed to read October 23, 1987 as the termination date for the same reason: administrative purposes. Ms. Lawrence was only concerned with the superannuation matters and she was not involved in Ms. Armstrong's staffing problems or pay problems. It is in this context that I must look at the resignation of October 22, 1987. Ms. Lawrence explained clearly that this "resignation" was required to fill a gap. As far as "Pay and Benefits" were concerned, they had already treated Ms. Armstrong as having "resigned" as of August 22, 1987. The Deputy Minister's granting of the leave, and indicating that the department still considered Ms. Armstrong an employee, complicated the

problem so personnel required Ms. Armstrong to "resign" again. When Ms. Armstrong signed the Notice of Termination (Exhibit 13), on October 22, 1987, the effective date of termination was inscribed August 22, 1987. Ms. Lawrence interpreted Mr. Cameron's earlier acceptance of her resignation as final and she went so far as to indicate that it would cover the second, hand written, October 22, 1987, resignation (Exhibit 14). However, legally this could not be so. The October 22, 1987, resignation was addressed to Ms. Lawrence who had no authority in this matter. In addition the Deputy Head (or his delegated authority if this authority could be delegated) never replied to the resignation (there is no evidence as to whether Mr. Withers even knew that the grievor had resigned on October 22, 1987).

Having found that the resignation of October 22, 1987, did not conform to Section 26 of the Public Service Employment Act, as admitted by the employer, I can only conclude that this resignation is invalid and it did not sever Ms. Armstrong's employment with Transport Canada.

It follows that when Mr. Farrell offered Ms. Armstrong the AI-00 position which was later retroactively amended to an AI-03 position, Mr. Farrell was hiring Ms. Armstrong from within the Public Service, and the provisions of the Public Service Terms and Conditions of Employment Regulations with respect to a transfer applied to her.

The conduct of the parties can not, generally, excuse or repair an error in law. In this case, Ms. Armstrong did not acquiesce in the error in law or act in such a fashion to lead the employer to believe that she had. From October 6, 1987 to March 1988, she actively tried to re-claim her position, or a comparable position in the Public Service. She wanted to pursue her career as an Air traffic controller. She was promised an AI-04 position in Vancouver if she resigned from the "Ontario Region". She did so only to facilitate her "transfer" to Vancouver. She wanted to return from her leave within a three month period so as not to sever her employment and to benefit from the provisions granting her continuous employment. It is the employer who frustrated her wishes. The promised job did not materialize because of some political in-fighting between Regions designed to set an example for all air traffic controllers. It is the employer who delayed the re-hiring of Ms. Armstrong.

The evidence showed that Ms. Armstrong took every reasonable action to "continue" her employment within three months. When Mr. Farrell finally re-hired the grievor at the AI-00 level, it was March 1988, and Ms. Armstrong had tried since October 6 to be "re-hired". She was wrongly advised that she had "resigned" when the employer knew very well this was not so. Ms. Lawrence admitted that she knew that the resignation had to be accepted. Then, Ms. Armstrong was offered an AI-00 position when the employer had a policy to hire experienced Canadian Air Traffic Controllers at the AI-03 level

(Exhibit 31). This policy was issued on February 12, 1988. Thus, the appointment was amended to retroactively reflect that she had been appointed effective March 22, 1988, at the AI-OPR-03 level (Exhibit 26). Finally on April 21, 1988, she was promoted to AI-OPR-04 (Exhibit 25). When she was finally confirmed in her permanent position of AI-OPR-04, she felt safe enough to contest the employer's decision with respect to her pay. She wrote to Mr. Cameron, discussed the matter with Ms. Ciebien and finally, on May 2, 1988, she presented this grievance.

The evidence demonstrates that Ms. Armstrong did not sit on her rights. She acted reasonably. Furthermore, the employer did not show that it had suffered any prejudice in this matter. Ms. Armstrong is entitled to be paid in accordance with the collective agreement and the employer knowingly took actions which prejudiced the grievor. It is the employer who did not respect section 26 of the Public Service Employment Act. It is the employer who claimed that the resignation was legal even though it had not been accepted or acknowledged. It is also the employer who appointed the grievor at the AI-00 level when it had issued a policy which dictated that, even if she had been hired from outside the Public Service, the grievor should have been hired at the AI-03 level (Exhibit 31).

In view of my finding that Ms. Armstrong continued to be an employee and that she was an employee when Mr. Farrell hired her one March 22, 1988, I must now study the provisions of the collective agreement to find the rate of pay to which she is entitled.

Clause 14.01 of the collective agreement incorporates the Public Service Terms and Conditions of Employment Regulations. Ms. Armstrong was not demoted and she was not promoted pursuant to the provisions of these Regulations. In addition, pursuant to section 82 of the Regulations, she was entitled to the pay increments during her leave of absence. The evidence clearly shows that Ms. Armstrong was granted leave under section 58 of the Regulations.

58. "A deputy head may grant leave of absence without pay to an employee."

Thus, when Mr. Farrell "hired" Ms. Armstrong effective March 22, 1988, she was entitled to be paid at the third step of the AI-03 classification (\$50,671). This would constitute a transfer in conformity with Section 64.(4.2) of the Regulations. She was entitled to be paid the rate of pay that is nearest to but not less than the rate of pay she was receiving immediately before the appointment.

In August 1987, Mr. Armstrong was receiving \$46,555. In February 1988 (her anniversary date) she was entitled to be paid at the sixth step namely, \$48,131. Hence, the "nearest to" is \$50,671. In April 1988, she was promoted to AI-04. Section 64(2.1) of the Regulations provide that she was entitled to be paid the rate of pay nearest to \$50,671 plus an amount equal to at least the lowest pay increment for the AI-4 position. This

would have brought her to \$53,026 (in April 1988). In April 1989, she was entitled to a further increment bringing the rate of pay to \$57,058.

Ms. Armstrong requested that she be paid at the fifth step but she added "as per TB/CATCA 402/85, Article 14.02". A reading of these two sentences lead to a contradiction because the collective agreement entitles her to be paid at the ninth increment. In these circumstances and because of the ambiguity of her request, I have to interpret the corrective action requested. It is clear that Ms. Armstrong complained that the employer was not paying her as provided for in the collective agreement. She referred to the collective agreement and Article 14.02. Clause 14.02 must be read in context and interpreted with the other clauses under Article 14. An application of the Pay Article 14 leads to the conclusion that Ms. Armstrong's correct rate of pay as of April 1988 was \$53,026. Ms. Armstrong is entitled to be paid as per the collective agreement. As of April 1988, she was entitled to be paid at the eighth step of AI-04.

For these reasons, I grant the grievance presented by Ms. Kelly Jane Armstrong and Ms. Armstrong is entitled to be paid as of April 1988, at the eight step of the AI-04 level.

Muriel Korngold Wexler,
Deputy Chairman

OTTAWA, June 13, 1989.