ACTING PAY

SOME PRINCIPLES

With the elimination of positions and staff cuts, employees may find themselves assigned additional duties. With financial constraints, managers may be under increased pressure to stay within existing budgets or cut costs. As employers meet their employment equity obligations, employees may receive a variety of developmental opportunities. In these kinds of circumstances, employees may be entitled to acting pay.

The conditions under which entitlement to acting pay exists are determined by collective bargaining. The following is from the collective agreement between PSAC and Treasury Board for the Program and Administrative Services Group (expiry date of 20 June 2003):

64.07

(a) When an employee is required by the Employer to 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 he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.

(b) When a day designated as a paid holiday occurs during the qualifying period, the holiday shall be considered as a day worked for purposes of the qualifying period.

When interpreting collective agreement language, it is important to break down the provision by ***conditions*** and ***obligations***. Then, it is easier to separate what the provision does say, from what it does not say.

For the entitlement to acting pay to take effect, there are 3 ***conditions*** to be satisfied:

1. the employee is required by the employer to substantially perform duties of a higher classification level in an acting capacity; and
2. the employee performs the duties; and
3. the employee performs the duties for at least the qualifying period of three consecutive working days or shifts.

If all 3 conditions are met, the employer has a contractual ***obligation*** to:

- pay acting pay; and
- calculate the acting pay from the date on which the employee commenced to act; and
- pay acting pay for the period in which the employee acts.

Once that has been done, it is then just as important to think of collective agreement language in terms of what is not there. For example, the clause does not speak of “position”. It does not refer to “replacing” another employee. It does not refer to the employee’s “performance” of those duties. It does not require an employee to possess the necessary “qualifications” to perform the duties. It does not speak of “developmental” or “training” initiatives. It does not refer to an “assignment”. It does not speak of a “formal appointment”. It does not speak to “employer-initiated” nor “employee-initiated” actions that led to the acting situation. It does not make the entitlement subject to the availability of funds. In other words, there are not additional requirements beyond the three conditions referred to above.

When differences arise with respect to collective agreement interpretation, the grievance procedure has been used to resolve those differences. As a result, “case law” has been created by adjudicators/arbitrators and the “courts”. This has been the experience with acting pay.

Here are “some principles” extracted from the case law. Consult the cases listed below for further information.

1. An employee doesn’t need to perform each and every job function of the higher classification level during the acting period. An employee doesn’t need be capable of performing each and every job function of the higher classification level. One interpretation of “substantially performs” has been likened to the situation when an employee “stands in the shoes” of another. For example, it may be that an employee “stands in the shoes” of an absent supervisor and deals with those functions that would have been dealt with by the supervisor had s/he not been absent. Or, an employee works alongside another employee of a higher classification level “co-performing” those duties that the other employee would normally perform during the period in question. Or, an employee performs his/her part of the duties assigned to a team and participates in team decisions and team activities where the positions of other members of the team are classified at a higher classification level. Or, as it was held in a specific case (Bégin et al), performs approximately 70% of the duties of the higher classification level.

2. A situation may exist where an employee believes her/his position is incorrectly classified. Normally, a classification review and/or classification grievance is the means to seek redress. An adjudicator cannot take on the role of a classification officer and determine whether or not a position is correctly classified. However, an adjudicator can determine an employee’s entitlement to acting pay. Depending on the circumstances, an adjudicator may or may not seize jurisdiction. The onus rests on the employee to demonstrate s/he substantially performed the duties of the higher classification level. An approved position description (e.g., for another position in the organization), outlining the duties of a higher classification level could be used as evidence.

3. For employees of Public Service Staff Relations Act (PSSRA) units, Section 7 of the PSSRA stipulates that the employer has exclusive jurisdiction with respect to classification. In departments such as DND and RCMP, where an employee might assume the duties of a military or RCMP member on an acting basis, the employer might “convert” a position to a public service classification (e.g., RCMP Sergeant to AS-02; Major to EG-06) and decide to pay acting pay based on the converted classification. There have been cases where employees have challenged the decision of the employer not to pay acting pay at the higher salaried level of the military or RCMP member. Despite some earlier conflicting judgements, it has now been determined that “higher classification level” in the acting pay provision refers to that of an employee within the meaning of the collective agreement. It does not apply to a hierarchy of classifications outside the collective agreement (e.g., military or RCMP).

4. The employer might remove certain duties from a job description and assign an “intermediate classification” and determine acting pay accordingly. The payment of acting pay at the intermediate classification level may or may not be a violation of the collective agreement. The test to be met is whether or not the employee is substantially performing the duties of the higher (original) classification level.

5. The fact that an employee volunteers for an assignment, such as asking to be considered for developmental opportunities for the purpose of enhancing training, career development or opportunity for promotion, does not necessarily affect an employee’s eligibility for acting pay.

6. “Required” is not synonymous with “requested”. Being “required” may be explicitly or implicitly communicated or understood. "Required" is capable of two meanings, one being the equivalent of "demand" and the other being the equivalent of "need". For example, an employee could be required by “circumstances”, as opposed to being formally required by express verbal or written instructions. However, if there is a request, when an employee is “asked” by the employer, the employer is, in reality, requiring the employee to do the thing requested.

7. During a period of training, an employee may or may not be entitled to acting pay. Entitlement would depend upon whether or not, during the period in question, the employee is substantially performing the duties of the higher classification level.

8. To “substantially perform the duties of a higher classification level” does not depend on reaching a certain level of proficiency; to require such a condition would likely have the effect of rendering the qualifying period meaningless. By the same token, being “qualified” to perform the duties of the higher classification on an acting basis is not a condition that needs to be satisfied.

9. An employee is entitled to acting pay even if s/he is absent from work or does not work for a number of days, provided s/he performs the duties of the higher classification level for the minimum period required by the collective agreement.

10. Benefits such as cash liquidation of leave, maternity allowance, and severance pay are to be based on the salary of the position the employee occupies at the time the employee claims the entitlement. An employee “… is entitled to enjoy the benefits accruing through his deemed appointment to the acting position, as though he were formally appointed to it, for the duration of the period of such employment” (Gowers). (However, for Treasury Board employees, for entitlement to the maternity allowance based on the acting rate, the employee must have been in the acting position for a continuous period of more than four months. This is as a result of a 1993 agreement between the employer and the PSAC during conciliation of human rights complaints on this issue.)

11. Negotiations with individual employees violate the principles of collective bargaining. Jurisprudence has made it clear that the presence of a collective bargaining relationship excludes "private" negotiations, thus depriving individual employees of their rights secured under a collective agreement. A signature of an employee on a signed agreement (e.g., an assignment agreement), or an employee’s acceptance of the understanding there will be “no acting pay”, does not

prevent an employee from claiming his/her rights under the collective agreement.

12. Retroactivity as a result of an acting pay grievance is limited to 25 days prior to the filing of the grievance, unless it can be demonstrated there had been ongoing communications with the employer concerning the acting pay prior to the filing of the grievance.

References:

1. Shanley (166-2-3044); Cuthill (166-2-12640 & 12641); Vanier (166-2-23562); Begin et al (166-2-18911 to 18917).
2. Begin et al (166-2-18911 to 18917); Charpentier & Trudeau (166-2-26197 & 26198); Macri (166-2-15319).
3. Francoeur (166-2-23158 and 23592), Cleary (166-2-26108; T1533-96)
4. Forster (166-2-16436).
5. Vanier (166-2-23562); Cuthill (166-2-12640 & 12641).
6. Leclerc (166-2-570); Shanley (166-2-3044); Reiner (166-2-13808); Cuthill (166-2-12640 & 12641).
7. Few (166-2-17441); Trempe (166-2-14978); Beauregard, Dupere and Bourgon (166-2-26956 to 26958).
8. Vanier (166-2-23562); Beauregard, Dupere and Bourgon (166-2-26956 to 26958).
9. Manseau (166-2-20722); Maskeri (166-2-16892); Bachewich and Prokopchuk (166-2-19101 and 19102); Parnham (166-2-13998).
10. Robert (166-2-17653); Allaire (166-2-19134); McLean (166-2-21049); Parent (166-2-27675); The Queen v. W. Gowers [1980] 2 F.C. 411; TB Circular dated December 14, 1993.
11. Maritime Telegraph Co. and IBEW, Local 1030, 12 LAC (3d) 90; Syndicat Catholique des Employes de Magasins de Quebec. Inc. v. Compagnie Paquet Ltee. 18 D.L.R. (2d) 346 at pp. 353-4 [1959] S.C.R. 206.
12. Coallier (FCA File A-405-83).