



ONTARIO  
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE  
DE L'ONTARIO

GRIEVANCE  
SETTLEMENT  
BOARD

COMMISSION DE  
RÈGLEMENT  
DES GRIEFS

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GSB#0211/02  
UNION#02U010

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

**BETWEEN**

Ontario Public Service Employees Union  
(Union Grievance)

**Grievor**

**-and-**

The Crown in Right of Ontario  
(Ministry of Transportation)

**Employer**

**BEFORE**

Richard Brown

**Vice-Chair**

**FOR THE UNION**

David Wright  
Counsel  
Ryder, Wright, Blair & Doyle

**FOR THE EMPLOYER**

Christopher Jodhan  
Counsel  
Management Board Secretariat

**HEARING**

July 2, September 17, October 7, 2002.

## DECISION

The union grieves the employer's refusal to convert to classified status a number of unclassified driver examiners who have worked full-time for more than two years. The only issue between the parties is whether "the ministry has determined that there is a continuing need for that work to performed" within the meaning of the collective agreement.

### I

The grievance arises against the backdrop of the impending privatization of driver examination services. The process began in November of 2000 when the Ministry issued a Request for Qualifications and Expressions of Interest (RFQ) with the objective of identifying qualified bidders. The enabling legislation, *The Improving Customer Service for Road Users Act*, received Royal Assent on November 2, 2001. Also in November of 2001, the union received formal notification of the Ministry's intent to privatize driver examination services and classified employees were asked to elect whether they wished to follow their jobs to the receiving employer or to take an enhanced severance package under Appendix 18 of the collective agreement. The enabling legislation was proclaimed in force on December 14, 2001. On December 18, 2001, a Confidential Information Memorandum (CIM) was issued to qualified bidders. The CIM contains a timetable indicating the successful bidder would be selected on April 1, 2002 and would begin providing services sometime between August and October of that year.

Appendix F to the CIM lists the continuous service date, seniority, salary and location of each of the 31 classified employees who had elected to transfer to a new service provider.

The Ministry converted unclassified driver examiners who reached the two-year mark before the issuance of the CIM, but has refused to convert anyone who reached this mark at a later date. Requests for conversion in such circumstances were twice denied by Warren Blackmore, Regional Manager for the Southwest Region, first on January 14, 2002 and again on February 1, 2002. On both occasions, Mr. Blackmore wrote: “However it should be noted that if the date of the transfer were to shift significantly, the Ministry may reassess its position with respect to continuing need.” The grievance was filed on January 25, 2002. The remedy sought was “full redress” including “that the ministry convert all eligible employees.”

A revised CIM, dated June 25, 2001, indicates the successful bidder would be selected by October 31, 2002 and describes the anticipated transfer date as “end 2002”. An “update” issued to employees on June 26, 2002 states “a transfer of the business could happen *as early as* the end of 2002” (page 3; emphasis added). At the time of the hearing, the Ministry anticipated a bidder would be selected in December of 2002 and would begin providing services by the end of March, 2003.

Paul Dunseth is union chair of the Ministry Employee Relations Committee (MERC). He identified a job posting, dated November 16, 2001, for thirteen positions with contract terms of five-months and twenty-nine days. Mr. Dunseth testified the Ministry continued to hire unclassified employees after December of 2001. He also testified that in June of 2002 a number of unclassified employees had their contracts extended until

December of 2002. Two such employees are David Seebach in London and Stuart Cotterill in St. Catherines, both of whom reached the two-year mark on January 10, 2002. A letter dated June 19, 2002, from the Ministry to Mr. Seebach, states his contract was being extended until December 27, 2002. This represented an extension of five months and twenty-nine days, the standard term for Ministry contracts. On June 24, 2002, Mr. Cotterill signed a contract with a term running from July 1 to December 30, 2002. Paragraph 4 of the contract states: "As you know the Ministry of Transportation is seeking to outsource Driver Examination Services and as a result your contract will be extended for 5 months and 29 days." A summary prepared by the Ministry lists twenty-two employees, Mr. Seebach being one, who had reached the two-year mark before the grievance was filed and whose contracts have since been extended to December 27, 2002. In cross-examination, Mr. Dunseth conceded not all contract employees were renewed.

Blake Forrest is Executive Lead for the Driver Examination Project and has been involved in the privatization process since its inception. Asked in examination-in-chief why no employees have been converted since the issuance of the initial CIM, Mr. Forrest answered this was when the data room was opened to potential bidders and they hired lawyers and accountants and began making other investments in the preparation of a bid. He also noted that the number of employees listed in the CIM is one of the components factored into bid preparations. According to Mr. Forrest, the revised CIM changed only "secondary" factors, such as performance requirements and inventory to be transferred, and made no changes to the human resources part of the deal. In cross-examination, Mr. Forrest

conceded that it was still possible for the Ministry to change the CIM. He also admitted that the information refreshed in the data room, between January and June of 2002, affected the “costs and revenues” involved in providing services and, therefore, would “bear upon the pricing of a bid”. Asked in re-examination what type of amendment to the CIM would be possible today, Mr. Forrest replied “ones that did not significantly affect the scope of the deal as outlined in the RFQ.” He went on to say an amendment which increased the number of employees being transferred would “significantly change the deal.” Mr. Forest also testified two reasons why the process took longer than initially planned are the recent OPSEU strike and the unexpectedly large number of comments made by bidders about the draft transfer agreement.

Commencing in November of 2000, the ministry sent to employees a series of “updates” appraising them of the progress of the privatization process. The first, dated November 9, 2000 speaks of the “*possible transfer* of the MTO driver examination service to another service provider” (page 1; emphasis added). This update states that an RFP (request for proposals) would be issued “if qualified bidders are found” as the result of the issuance of an RFQ and that services would be transferred “if a successful bidder is found” as a result of the issuance of an RFP. Almost all subsequent updates also refer to a “possible transfer.” The most recent one, dated June 26, 2002, contains the following question and answer:

Q3 When will a service provider be selected?

A3 *If a successful bidder is found*, the recommended bidder’s proposal and a finalized business case will be presented for the government’s for consideration. (emphasis added)

## II

The grievance was filed under the 1999-2002 collective agreement. Article 31.15.1 of that agreement states:

31.15.1.1 Where the same work has been performed by an employee in the Unclassified Service for a period of at least two (2) consecutive years, except for situations where the unclassified employee is replacing a classified employee on leave of absence authorized by the Employer or as provided for under the Central Collective Agreement, and *where the ministry has determined that there is a continuing need for that work to be performed on a full-time basis*, the ministry shall establish a position within the Classified Service to perform that work. (emphasis added)

31.15.1.2 Where the ministry has determined that it will convert a position in accordance with 31.15.1.1, the status of the incumbent in the position will be converted from unclassified to classified, provided that the incumbent has been in the position in question for at least two (2) years.

The current agreement has reduced the time period required for conversion of both a position and an employee from twenty-four months to eighteen months.

I was referred to four decisions dealing with the subject of continuing need in the context of downsizing or privatization. In chronological order, they are: (1) *Ontario Public Service Employees' Union (Lynch-Burrus) and Ministry of Community and Social Services*, dated Feb. 8, 1995, GSB File No. 1078/92 (Dissanayake); (2) *Ontario Public Service Employees' Union (Burditt) and Ministry of Health*, dated May 16, 1997, GSB File No. 1179/96 (Briggs); (3) *Ontario Public Service Employees' Union (Mistry)*

and Ontario Human Rights Commission, dated Feb. 10, 1998, GSB File No. 0569/96 (Verity); (4) *Ontario Public Service Employees' Union and Ministry of Finance*, dated Dec. 11, 1998, GSB File No. 1237/98 (Briggs).

The *Lynch-Burros* case was decided under the 1992-93 collective agreement, whereas the latter three cases were decided under the 1994-98 agreement. Under both contracts, there were two criteria for the conversion of an unclassified position to a classified one: (1) that “the same work has been performed by an employee in the Unclassified Service for a period of at least two (2) consecutive years”; and (2) that “the ministry has determined that there is a continuing need for that work to be performed on a full-time basis.” Under the 1992-93 agreement, when an unclassified position was converted to a classified one, it was posted so that unclassified employees could compete for it. There was no provision for the direct conversion of an employee. In contrast, the 1994-98 agreement provided for the conversion of not only positions but also employees, as does the 1999-2001 agreement.

The grievor in *Lynch-Burros* worked at the Huronia Regional Centre, a residential facility for the developmentally handicapped, which had adopted a “downsizing” and “zero-admissions” policy in 1987, with the “ultimate goal” of closing by 2015 (page 8). Ms. Lynch-Burros was employed there as an unclassified employee from April 28, 1989 until May 30, 1992, a period of just over 37 months. In April of 1991, when she reached the two-year mark, she inquired about conversion and was told by her manager not to “rock the boat” because “her position was safe” (page 4). She grieved after being terminated some thirteen months later. Vice-Chair Dissanayake began with some general comments:

In the *Union Grievance (supra)* the Board had occasion to interpret the phrase “Where the Ministry has determined that there is a

continuing need for the work to be performed", in article 3.15. *The majority of the Board held that for that condition to be met the determining factor was not the employer's decision to not post a vacancy. In other words, the fact that an employer decides not to apply article 3.15 in a particular situation, is not necessarily conclusive proof that the employer had not determined that there was a continuing need. This condition rather must be assessed on the basis of the objective facts as to what the employer did with the work in question. We reiterate that reasoning.* To do otherwise would be to allow the employer to circumvent article 3.15 by merely avoiding making a formal decision or by stating that it had not decided that there was a continuing need for the work, when the objective facts point clearly to the contrary, that the employer continued to have that work performed in the regular course. That would be tantamount to allowing the employer to avoid its obligations by simply deciding that article 3.15 does not apply to, a particular situation. (page 6; emphasis added)

Turning to the facts at hand, the Vice-chair wrote:

Based on this evidence, the Board cannot reasonably conclude that as of May 1991, the employer had determined that there was a continuing need for the performance of the work the grievor was performing. The evidence indicates that at that time her contract was extended specifically for the purpose of doing a review to find out whether there has such a continuing need. Her contract was extended until the review was complete. At the end of the review, by deciding that the employer could manage without the grievor's services, in the capacity of an unclassified or classified employee, the employer in effect determined that there was no continued need for her work to be performed beyond that date. ...

Union counsel further argued that if the Board allows the employer to carry on performing regular work through the use of unclassified employees beyond two years under any circumstances, without triggering article 3.15, that would permit the employer to circumvent the conversion requirement by commencing a review at the end of two years and carrying on such review indefinitely. That would render the two year limit in article 3.15 meaningless. While we understand counsel's concern, we are satisfied that in those circumstances, if the Board finds that the review was not a bona fide

exercise but merely a pretext to get around the collective agreement, the Board would have the power to deal with that. In the present case there is no suggestion that the review was anything but a legitimate business undertaking resulting from a ministry wide operational review, which had been continuing for several years.

*In our view where the work in question continues to be performed by unclassified employees it is generally reasonable to presume that that work was continuing in that manner because the employer had determined that there was a need for the continued performance of that work. However, that would only be a rebuttable presumption. Once it is established that the work continued, the onus shifts to the employer to explain why that was happening, if it had not decided that there was a continuing need for the work to be performed. An explanation which is merely a scheme to circumvent the collective agreement obviously will not suffice to rebut the presumption.* In the case at hand the employer, has met that onus by leading specific evidence to explain legitimate reasons for extending the grievor's contract beyond the two year period. (pages 11 to 14; emphasis added)

Based upon this reasoning, the panel chaired by Mr. Dissanayake unanimously dismissed the grievance.

The grievor in *Burditt* was employed in the Adolescent Children's Unit, as an unclassified employee. On April 3, 1996, the grievor asked to be converted to the status of a classified employee. This request was made immediately after the strike resulting in the 1994-98 collective agreement which first provided for the conversion of employees and not just positions. Two weeks after her request, employees were informed that the Unit would be transferred to a community-based service provider. As of May of 1996, the employer expected the transfer to occur in April of 1997 and advised "people in the community" that "it was business as usual" until the transfer date (page 12). The grievor continued to work as an unclassified employee

until March 31, 1997, some eleven months after she had requested conversion. Allowing her grievance, Vice-Chair Briggs wrote:

[T]he Employer knew or thought it likely that there would be a continuing need for the work of the grievor to be done for at least the next eleven months. Indeed, the Employer conceded that the grievor's work had to be done during in the "transition period".

Unclassified employees must work for a two year period prior to requesting conversion. Two years is not an insignificant period of time. In this case, the grievor asked for conversion virtually upon returning to work after the public sector strike. Shortly after her request, the Employer informed staff that in approximately a year, the agency would probably be transferred to the broader public service. *The affect of the Employer's position in this case is that it can refuse to convert the grievor to classified status and yet continue to assign her to work as an unclassified employee for a period of time which is approximately equal to fifty percent of the time it took her to qualify for conversion in the first instance. I cannot agree that merely because there was a known date or an approximate date for the work to be privatized, that there is no "continuing need" for the work. In this case, it was thought that the work would be transferred to an outside service provider in the broader public service a full year after the grievor asked to be converted. In my view, a year is sufficient to find a "continuing need" for the work as considered in article 31.15.1.1 (page 12; emphasis added)*

In *Mistry*, the grievor was an unclassified employee at the Ontario Human Rights Commission which decided in 1995 to eliminate unclassified staff in stages. She too sought conversion immediately after the 1996 strike which produced the 1994-98 collective agreement introducing the right of employees to be converted. She was terminated approximately five weeks later. Vice-Chair Verity wrote:

Article 31.15.1.1 confers the power of determination regarding "a continuing need for that work" upon the employer. I do not read it as an intention to confer absolute power, but rather something in the nature of a discretion to be exercised in a bona fide manner in the

context of article 31.15.1.1. The determination is a question of fact and must be done with at least a show of reason related to the facts and the surrounding circumstances. (page 16)

The most recent decision cited by counsel is *Ministry of Finance* involving the transfer of work from the province to the Ontario Property Assessment Corporation effective December 31, 1998. The union filed a policy grievance seeking the conversion of 133 unclassified assessors. In September of 1997, they had been told that, “pending the passage of legislation”, the ministry would cease performing assessment work in 1998 (page 3). As of the transfer date, the length of time they had worked beyond the two-year mark ranged “from a matter of days to six months” (page 5). Dismissing the grievance, Vice-Chair Briggs wrote:

In *Re Burditt*, the Employer argued that it knew shortly after the grievor's request for conversion that there was no ongoing need for the work because all of the work of the bargaining unit was going to be transferred to a successful bidder in the broader public service. It was suggested that where privatization is a forgone conclusion, there is no continuing need for the work. I did not agree with that submission as it related to the facts in the *Re Burditt* matter. Indeed, I found that the fact that privatization would occur was not, in and of itself, determinative. However, the facts of this policy grievance are substantially different. *The Employer knew and informed the unclassified employees virtually from the beginning of their employment that the work would be transferred to the private sector.* Certainly the employees knew no later than September of 1997, that their time with the Ministry was limited. Indeed, many would have had that knowledge within months of the beginning of their employment. Similar to the fact situation in *Re Burditt*, the Employer's estimate of when the work would be transferred proved to be optimistic. However, unlike Ms. Burditt, none of the grievors had been unclassified for two or three years at the point when the fact that the work was about to be privatized was first mentioned. (pages 11; emphasis added)

In the italicized passage, Ms. Briggs finds that employees were told that their work “would be transferred” to a crown corporation, not that a transfer was possible. She appears to have treated as a forgone conclusion the passage of enabling legislation creating the new service provider.

Counsel for the employer urges me to conclude that the conversion of employees after the issuance of a CIM would be inconsistent with the “reasonable efforts” provisions found in Appendix 18 of the collective agreement. According to article 5.1 of that Appendix, before a request for proposals (RFP) is issued, the employees affected by it must be given “the opportunity to elect” whether or not they will be included in it. Article 5.2 states that an RFP must contain “the mandatory requirement” that bidders offer jobs to all employees included in the RFP on terms and conditions set out in the article. Counsel notes that time and money is spent preparing bids based upon the number of employees listed in the RFP. In short, counsel submits that article 31.15.1 does not require the conversion of an employee who reaches the two-year mark after the issuance of an RFP, or after the issuance of a CIM, which is the functional equivalent of an RFP.

Responding to this argument, union counsel notes that Appendix 18 explicitly states that transfers governed by it are not covered by certain provisions in the collective agreement, but this Appendix makes no mention of conversion. Contending the employer’s interpretation of the collective agreement negates entitlements under article 31.15.1, counsel for the union suggested there are two other interpretative paths open which would allow this article and Appendix 18 “to live together.” The union’s primary argument is that the employer should issue an RFP indicating the maximum number of employees who could be eligible for conversion before the

transfer date and that management should allow employees converted before this date to elect whether to be included in the RFP. In the alternative, counsel suggested Appendix 18 could be interpreted as not applying to employees converted after the issuance of an RFP. According to this argument, such employees would have the surplus rights set out in the main body of the collective agreement.

### III

I begin my analysis with the wording of article 31.15.1.1. It says “where *the ministry has determined* that there is a continuing need for that work to be performed on a full-time basis” (emphasis added.) What is meant by the italicized reference to a determination by the employer? Exactly what is it that management is permitted to determine? The most obvious answer is that a ministry is free either to decide to stop doing the work previously done by unclassified employees or to decide to carry on with the work but on some basis other than full-time. These types of determinations about continuing need are the sort of decisions typically reserved to management under a collective agreement.

What the employer actually has determined is a question of fact to be answered by an arbitrator weighing all of the relevant circumstances. The most important lesson to emerge from the cases reviewed above is that substance prevails over form in the conduct of such an inquiry. As Vice-Chair Dissanayake noted in *Lynch-Burrus*, what matters is the “objective facts” not whether the employer has formally acknowledged the existence of a continuing need. The same message is implicit in Vice-Chair Briggs’ determination in *Burditt* that the employment of the grievor for almost a year

after she had reached the two-year mark was “sufficient” to establish a continuing need” notwithstanding the employer’s contention to the contrary. Likewise, Vice-Chair Verity in *Mistry* stated the employer’s determination about continuing need must be made with “a show of reason related to the facts.”

Employer counsel argued an arbitrator reviewing a ministry’s determination about continuing need should not apply a standard of correctness but rather a more deferential one. In my view, this argument misses the point. The task of an arbitrator applying article 31.15.1.1 is not to review a determination made by the employer. The task is to decide what determination the employer has made. This arbitral decision must be made by weighing the facts, not by rubber stamping a ministry’s formal pronouncements, as has been repeatedly stated in earlier decisions of this board.

The awards reviewed above also demonstrate that the performance of work for a substantial period is an important factor in deciding what a ministry has determined. In *Lynch-Burrus*, Mr. Dissanayake stated that the extended performance of work created a “rebuttable presumption” that the employer had determined there was a continuing need for the work to be done. The presumption was rebutted in that case because, when the grievor applied for the conversion of her position, the employer embarked upon a review to determine whether her services were redundant and eventually decided they were. In other words, there was never a decision to continue employing her for any defined period. The scenario was different in *Burditt*, where the grievor sought conversion at a time when the employer’s plans called for her to work until her job was privatized eleven months in the

future, and Ms. Briggs concluded her continued employment for this long demonstrated that there was a continuing need for her services. The decision in *Mistry* shows that utilizing a person's services for a period as short as five weeks does not amount to a determination of continuing need.

The case law contains mixed messages about the relevance of what management tells employees about the security of their employment. In *Ministry of Finance*, Vice-Chair Briggs denied a claim for conversion by employees who had passed the two-year mark by between four and six months, because they had been told by the employer, soon after being hired, that that their work would be leaving the public service. This ruling appears to stand for the proposition that a claim for conversion can be defeated by management informing employees that their jobs in the public service will end in the not too distant future. A logical corollary of this proposition is that an employee being told by management that her job is secure would support a claim for conversion. Yet this corollary appears not to have been applied in *Lynch-Burrus*, where conversion was denied despite the grievor working for thirteen months after having been told by her manager that "her position was safe".

In the case at hand, the CIM issued in December of 2001 indicated that the ministry would continue to provide driver examination services until sometime between August and October of 2002. A significant number of driver examiners reached the two-year mark before the grievance was filed on January 25, 2002. As of that date, the employer planned to continue providing driver examination services for a period of between six months (ending in early August) to nine months (ending in late October).

Six months or more is longer than the comparable period in *Ministry of Finance* which was up to six months. There is another significant difference between that case and this one. There assessors were told their work “would be transferred” to another service provider in the near future. Here driver examiners were told a transfer was “possible” but contingent first on finding qualified bidders and then on finding a successful bidder.

Six months or more is a substantial length of time relative to the period of twenty-four months that unclassified employees always had to wait under the 1999-2001 agreement before being eligible for conversion. The ministry’s plans for the continued employment of unclassified employees lead me to conclude it had determined there was a continuing need for the services of driver examiners.

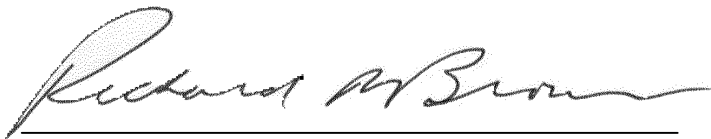
I have not overlooked Appendix 18 in coming to this conclusion. The criteria in article 31.15.1.1 for the conversion of a position have remained unchanged for at least a decade. These criteria predate Appendix 18 and its predecessor, Appendix 9. Neither of these appendices makes any mention of conversion. This silence probably indicates that negotiators did not turn their minds to the interaction of these appendices with article 31.15.1.1. Whatever the explanation for silence on this point, neither appendix explicitly limits the right to conversion. In the absence of any clear abridgement of this pre-existing right, I conclude it was not diminished by adding Appendix 9 and Appendix 18 to the collective agreement. It remains to be determined whether driver examiners converted after the issuance of the CIM have surplus rights under the two appendices or under the main body of the collective agreement.

Employer counsel submitted my ruling should be limited to the facts existing when the grievance was filed in January, whereas counsel for the union urged me to rule on the facts that existed when the evidence was heard on September 17. In my view, to do as suggested by the employer would be to adopt an unduly narrow construction of a policy grievance like the instant one. This approach would require the union to file a series of grievances in order to resolve all aspects of a single dispute as it developed over time. That would not serve any legitimate purpose.

How does article 31.15.1 apply to developments after the union grieved? There is a remarkable similarity between the situation in January of 2002 and the one that prevailed both in June, when the revised CIM was issued, and in September, when evidence was heard. Upon revising the CIM, the ministry told employees the transfer could occur “as early as the end of 2002”, indicating unclassified driver examiners would continue to be employed for a minimum of six months. At the hearing on September 17, counsel for ministry stated the transfer of services was expected to occur at the end of March of 2003, six and one-half months in the future. In short, the ministry in January, June and September of 2002 planned to provide services for at least six months. These plans amounted to a determination of continuing need.

The grievance is allowed. The employer is directed to convert all driver examiners who completed two years of service before September 17, 2002. I remain seized to address any issues arising in the implementation of this award.

Dated at Toronto this 24<sup>th</sup> day of October 2002.

A handwritten signature in cursive script, appearing to read "Richard Brown", written in black ink. The signature is positioned above a horizontal line.

Richard Brown

Vice-Chair