Date: 20141018

File: 166-02-34751

Citation: 2006 PSLRB 114

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

JULIE LAROSE

Grievor

and

TREASURY BOARD
(Department of Public Works and Government Services)

Employer

and

LIBRARY OF PARLIAMENT

Intervenor

Indexed as
Larose v. Treasury Board (Department of Public Works and Government Services) v. Library of Parliament

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Barry Done, adjudicator

For the Grievor: Deborah Cooper, Association of Canadian Financial Officers

For the Employer: Simon Kamel, Treasury Board Secretariat, Legal Services

For the Intervenor: Paul Lalonde

Heard at Ottawa, Ontario
June 5 to 9, 2006.

Grievance referred to adjudication

[1] On March 3, 2004, the grievor, Julie Larose submitted her grievance (Exhibit G-17) stating: “I grieve the refusal of P.W.G.S.C. to remunerate me at the appropriate level upon my appointment to my current FI-03 position”.

[2] The redress she seeks is to be remunerated at the appropriate pay increment level retroactive to the day she was appointed. The grievor’s position is included in the Financial Management bargaining unit, and the collective agreement that applies (Exhibit G-1) is the one between Treasury Board and the Association of Public Service Financial Administrators, which has since changed its name to the Association of Canadian Financial Officers (ACFO). At the hearing, eight witnesses testified and 42 exhibits were filed. As well, the Library of Parliament (LoP) attended and made a submission as an intervenor.

[3] The grievor referred her grievance to the Public Service Staff Relations Board on August 13, 2004.

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force, and the Public Service Labour Relations Board (the PSLRB) was created. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[5] Just prior to the hearing of this matter, the LoP advised the PSLRB of its interest in the matter and formally requested intervenor status. This request was copied to the parties, and a decision was made by the PSLRB to deal with the request at the hearing. Following an explanation of the LoP’s interest and request for intervenor status as a quasi-party to call evidence, cross-examine witnesses, and make submissions, the parties were given an opportunity to respond. Neither party objected to the LoP’s request for intervenor status and indeed, the employer supported it. After a break to consider both the request and responses by the parties, I decided to grant the request, but limited the scope of the intervenor status to making final arguments only. The reasons for imposing this limit on the LoP’s participation were that:

1. although I understood that the LoP had an interest in the determination of the matter, I was unconvinced that that interest was a substantive one; and

2. I doubted that the impact on the LoP of any decision I might make was either as significant or as direct as their counsel, Mr. Lalonde, suggested.

Those reasons notwithstanding, I was mindful of the fact that the grievor did not object to the request and the employer supported it. Both parties appeared to agree with Mr. Lalonde that the LoP could potentially provide not only a different perspective but relevant information previously not made available to the parties when requested.

Summary of the evidence

[6] Following the above process, and prior to beginning to hear evidence, the parties asked for some time to discuss settlement, with my assistance. Despite everyone's best efforts, we were unable to settle the matter, and the grievor's representative called her first witness after opening statements were provided by both parties.

[7] Geoffrey Greenidge is currently a senior financial analyst at the LoP, classified as MPA-04. He applied for a position at the LoP at the suggestion of Monique Boutin, Director of Finance. This position was classified at the LAS-5 level. It should be noted at this time that the LoP has a classification system that is different from that utilized in the core public service. The grievor was advised that if he were the successful candidate, he would be paid the equivalent of the maximum rate of pay paid to an FI-03 in the core public service. In order to achieve this, he was told that the LoP would use a terminable allowance (TA) to make up the difference between the LoP LAS-5 rate of pay and an FI-03 public service rate of pay. This equivalency would be maintained during his tenure in the position, with adjustments to the TA as necessary. Although Mr. Greenidge could not recall being told that the TA was part of his salary, he clearly remembers being told that the TA did count for superannuation purposes. He acknowledged having been "kind of naive", but he thought it was just common sense that the TA was part of his salary and had he known otherwise he wouldn't have accepted the offer from the LoP.

[8] In cross-examination, Mr. Greenidge conceded he had neither human resources nor compensation expertise, and thought that the use of a TA was just a way to make up the difference between LAS-5 and FI-03 rates of pay and was nothing other than "mere semantics". When shown a letter addressed to him dated July 28, 2003, setting out the conditions of his acting appointment to an MPA-05 position, including the

payment of a TA (Exhibit E-1), he acknowledged that he was advised that the TA would not form part of his salary.

[9] Ms. Larose, the grievor, in response to a poster (Exhibit G-2) inviting applications for the position of Manager, Accounting Operations, at the LoP applied for and was offered the position. The salary was posted as "FI-03 equivalent". At the time of her application, the grievor worked in the core public service. The subsequent letter of offer dated October 31, 2001 (Exhibit G-3), which she ultimately accepted, stated that her salary would be at the minimum of the LAS-5 salary scale, and in addition would include a terminable allowance of $818 per month. The total of the LAS-5 salary and the TA brought her salary to the equivalent of the FI-03 rate of pay. Human resources specialist Paula Ghosh assured the grievor that the TA "was just a technical thing" and "not to worry". She accepted this advice and began work with the LoP on November 19, 2001.

[10] Her first pay stub, received six weeks after she began, caused the grievor to believe she should have worried, as the TA was shown as something separate from salary. There seemed little point in worrying now, however, as she had started her new job.

[11] In late 2002, Ms. Larose had even greater cause for concern, as she learned when she began applying for core public service positions. Discussions with Public Works and Government Services Canada (PWGSC) surrounding an offer for a position classified as FI-03 raised an issue that goes to the heart of the matter I am now asked to determine: must PWGSC, in calculating pay entitlements for the grievor, include as part of her LoP salary the TA formerly paid by the LoP? If so, the grievor would be placed at the maximum of the FI-03 rate of pay. If not, she would be placed two incremental steps below the maximum rate. The grievor acknowledged having seen a letter from the Director of Human Resources at the LoP (Exhibit G-4) to herself, dated January 27, 2003, concerning her TA. The closing sentence of that letter states that the TA does not form part of salary at the LoP, except for the purpose of pension calculations. The grievor testified that each time the TA was adjusted she would receive a letter similar to Exhibit G-4.

[12] Following two months of dialogue between representatives of the LoP, representatives of PWGSC and the grievor on this issue, the grievor signed the PWGSC

letter of offer (Exhibit G-7) on July 1, 2003, conditionally accepting the offer by including the words:

> *I am continuing my steps concerning my salary. The foreseen date of entry into my position will be August 18, 2003.*

[13] The letter of offer advised the grievor of the rates of pay for an FI-03 position at PWGSC, and indicated that her salary would be determined in accordance with the *Public Service Terms and Conditions of Employment Regulations*.

[14] In calculating her salary further to their offer of employment, PWGSC advised the grievor that they needed confirmation of her current salary at the LoP. A letter dated June 2, 2003 (Exhibit G-10), by the Chief of Labour Relations, LoP, was sent to PWGSC stating:

> *. . . For compensation-related purposes, her position is identified as being directly comparable to the Public Service's FI-3 level. As such, her total annual income is. . . .*

[15] When the grievor saw Exhibit G-10, the LoP letter concerning her income, she understood "it's a solved issue, a done deal" and that there was no longer a dispute over her salary. Given this understanding, together with perceived pressure from Joanne Potvin of PWGSC Human Resources — ". . . if you don't sign the letter of offer we will take it as a refusal" — and Corporate Officer William Yates' advice to "sign conditionally, come with us and have your union help you get the required directive from LoP", the grievor signed her acceptance believing that her risks were very low. PWGSC still needed confirmation from the LoP that the grievor was not given preferential treatment regarding her TA (Exhibit G-12, e-mail of June 19, 2003) and sought some formal bulletin or directive of the LoP to the effect that all LoP employees were treated in the same manner in that regard. The LoP advised PWGSC on November 18, 2003 (Exhibit G-13), that they were unwilling to provide an internal document concerning the TA. Believing such a document existed, the grievor determined to access it through an access to information request, with the assistance of a union representative (Exhibit G-3, e-mail of November 25, 2003).

[16] In cross-examination, the grievor conceded that she knew that PWGSC's position, as expressed by Mr. Yates (Exhibit G-12, e-mail of June 19, 2003), was that the TA would only be used to calculate her salary if there was proof that the arrangement

at the LoP was not an informal procedure. Further, she conceded that she knew from Exhibit G-4, the LoP letter concerning the TA, that the LoP did not consider the TA part of her salary, and that that understanding was consistent with a LoP letter dated June 6, 2003 (Exhibit E-2) addressed to her. On June 19, 2003, Monique Coté, PWGSC Compensation Advisor, advised the grievor (Exhibit E-4) that PWGSC could not consider the TA part of her salary, on the advice of Treasury Board, as the LoP could not provide a formal document showing it was, in fact, part of her salary at the LoP.

[17] Murielle Boucher, Business Project Director, PWGSC, Financial Systems Transformation Project, was seconded to the LoP from PWGSC, in the fall of 1997, as Chief of Financial Services. Although a classification process was expected to resolve the gap in pay between the LoP and equivalent public service positions, it didn't, so a TA was used to ensure equivalency. Ms. Boucher's pay was broken down into salary and the TA, but she believed the TA was part of salary, and communicated that to prospective employees when recruiting from the public service. When she left the LoP to rejoin the public service in April 2005, only her LoP basic salary, not including the TA, was used to calculate her new rate of pay. Ms. Boucher had never seen a directive on the TA, but confirmed she was told every year what the TA amount would be, except for one year when no TA was paid.

[18] When the grievor advised Ms. Boucher about her own pay calculation problems, Ms. Boucher was surprised and began to advise, when recruiting, that pay was split between salary and TA, which made it difficult to recruit from the public service.

[19] In cross-examination, Ms. Boucher said that she, although copied, had never read Exhibit G-4, the letter stating that the TA was not part of salary. Although she hadn't requested a directive on how the TA was to operate, she believed that if the TA was part of superannuation then it was part of her salary. She was aware that the amount of the TA varied, but believed it was a permanent fixture even though it was called a "terminable allowance".

[20] Ms. Boutin, currently Director of Finances and Material Management, began with the LoP in April 1997. Responsible for building a team to deliver all financial services, she had some responsibility for recruiting. In order to be in a position to attract people from the public service, the LoP came up with the TA idea ". . . as a tool for me to use to attract people with some knowledge, competence and experience".

[21] Ms. Boutin saw the TA as part of a "global remuneration", but, realizing the grievor's situation, felt that the use of the TA "was not the solution". Currently, she only recruits from either the private sector or from public service employees whose positions are vulnerable. The reason is that ". . . no one would accept knowing they'd be demoted when they leave". Although not involved with the grievor's salary negotiations, she felt that the TA solution was ". . . like a poison, making one a prisoner of the LoP, for if they left, their pay would go down". This was regrettable, as the grievor exceeded all expectations and was a very, very good employee.

[22] In cross-examination, Ms. Boutin said she didn't know when initially recruiting, whether the TA formed part of salary or not but came to realize "I was marketing something that wasn't true". As the LoP was a small organization, people didn't stay forever, and the LoP was like a stepping stone. It was not important to Ms. Boutin at the time whether the TA was part of salary, as it was just a tool to attract people and any distinction between global remuneration and salary was for her, merely semantics.

[23] Jennifer Sweet was called to testify by the employer. Initially hired by the LoP in April 2001 as a compensation advisor, she is currently Acting Chief of Compensation. She testified that the TA was never part of salary at the LoP, except for superannuation purposes, which was clear from its introduction in 2000 (Exhibit E-5, March 13, 2000). Ms. Sweet identified Exhibit E-6, rates of pay for the LAS group at the LoP, as well as Exhibits E-7 and E-8, the rates of pay for the MPA group from 2000 until 2004.

[24] Ms. Sweet identified Exhibit E-9, dated February 7, 2001, and signed by the Parliamentary Librarian. This document sets out the LoP's policy regarding the payment of the TA. It is the result of a request, made by the LoP in March of 2000 (Exhibit E-5), to introduce a TA for certain unrepresented employees. The policy states that the TA does not form part of salary, except for superannuation purposes, at the LoP. This fact is repeated in similar documents issued by the LoP, dated May 30, 2002 (Exhibit E-10), and March 31, 2003 (Exhibit E-11).

[25] As the LAS and MPA groups are not unionized, their terms and conditions of employment are found in a document dated October 4, 1999 (Exhibit E-12), which conditions remained in force until September 27, 2004. This document was provided to the grievor on November 19, 2001, her first day of employment at the LoP, as were 16 other documents.

[26] In cross-examination, Ms. Sweet acknowledged that, during the period in question, she was both the newest and lowest-level employee in Human Resources. Nor was she personally involved in Ms. Larose's competition or salary negotiations with PWGSC. When shown Exhibit G-3, the letter of offer from the LoP to the grievor, she acknowledged that there was no express mention that the TA was not part of salary, but she stated that there is currently language to that effect in LoP letters of offer. The TA amounts vary depending on FI negotiated rates and, unlike FI rates of pay, are not approved by either the House of Commons or the Senate, as the LoP is a distinct entity from the public service. Ms. Sweet had seen Exhibit G-10, the LoP's letter to PWGSC concerning the grievor's annual income, and acknowledged it does not refer to the TA.

[27] Beatrice Rogier is presently Manager of Compensation with Environment Canada, and formerly performed the same job with PWGSC. Concerning the grievor's file, Ms. Côté, as compensation advisor, was first to deal with it. Her involvement occurred once the grievor had left the LoP. As the request by the grievor to include her TA from the LoP as part of salary was unusual, Ms. Côté asked for Ms. Rogier's help. She also sought advice from Treasury Board. As the grievor was, at that time, on leave without pay from PWGSC, and had accepted a position in another department, she was in a dual-employment situation, which is covered in Exhibit E-15(a): "Specified Period Appointments During Extended Period of Leave with Pay (Dual Employment)" as modified December 19, 2003, and Exhibit E-15(b), which is Appendix A to Exhibit E-15(a), as modified December 19, 2003. The witness applied these policies to the grievor in order to calculate her rate of pay when she learned from a LoP letter that the grievor was indeterminate at the LoP. Ms. Rogier said she needed written confirmation of the grievor's LoP salary, which confirmation was never received.

[28] In cross-examination, the witness said that PWGSC didn't initially know the grievor was both on leave without pay and working for another department.

[29] Mr. Yates is currently a corporate officer in compensation with the Department of Justice. His former position was the same type of position at PWGSC. While at PWGSC, if there was a contentious issue on a file and neither the supervisor nor the compensation officer could resolve it the case was referred to him, as was the case with the grievor's file in March 2003. After consulting with Treasury Board, Mr. Yates determined that the TA was not part of salary.

[30] There was a question concerning which salary to use to calculate Ms. Larose's new salary: her FI-02 salary when she began leave without pay at PWGSC or her LoP salary. It was normal practice to consider the separate employer salary, but Mr. Yates requested clarification from Treasury Board. The advice received was that, in order to consider Ms. Larose's LoP salary, she must first resign from PWGSC. That option was rejected as unreasonable, and a decision was made to use the LoP salary for the purposes of calculation. Treasury Board's advice to Mr. Yates appears in Exhibit E-17, an e-mail dated June 16, 2003. Mr. Yates testified that, despite numerous attempts, he was unable to get the information from the LoP that Treasury Board required. As the LoP refused to provide the only document that would resolve the issue, a decision was made that, absent proof to the contrary, the TA was not part of salary.

[31] The only promise made to the grievor was that PWGSC would recalculate her salary if the LoP implemented a salary revision, and that if PWGSC was provided with proof that at the LoP the TA was part of salary, PWGSC would include it.

[32] In cross-examination. Mr. Yates was asked about his statement in Exhibit E-17, the e-mail dated June 16, 2003, confirming Treasury Board's advice: ". . . the Library of Parliament provided an e-mail stating that the retention allowance was part of salary but upon follow-up could not produce a directive or policy. . ." He explained that that e-mail was provided by Ghislaine Lacroix of the LoP. PWGSC's focus was to ensure the same treatment was applied to all. He recalled a weekend conversation with the grievor, when he advised her it was safe to sign the offer and that the *Public Service Terms and Conditions of Employment Regulations* would be applied, as would guidance received from Treasury Board.

[33] Ms. Côté is a compensation advisor and acting team leader at Environment Canada since February 7, 2005. She formerly did the same job at PWGSC, reporting to Ms. Rogier. Ms. Côté explained how one applies the pay rules outlined in the Public Service Terms and Conditions of Employment policy (Exhibit E-18). Applying the rules at paragraph 24, she determined that Ms. Larose's appointment constituted a promotion. Next, Ms. Côté calculated the grievor's new rate of pay, using her FI-02 salary at PWGSC when she began her leave without pay, as she didn't then know that the grievor was indeterminate at the LoP. When the grievor asked Ms. Côté to consider her LoP salary, Ms. Côté consulted her supervisor, Ms. Rogier, and recalculated Ms. Larose's salary (Exhibit G-9, e-mail of March 13, 2003). As this figure was less than

Ms. Larose requested, Ms. Côté obtained the LOP's pay screen (Exhibit G-19) and noted a base salary column and a code showing an allowance was also being paid. On June 19, 2003, Ms. Côté e-mailed Ms. Larose confirming the new salary, if she accepted the FI-03 position. Later, when the LoP confirmed a salary revision for the MPA group, Ms. Larose's salary was finally recalculated once again.

[34] In cross-examination Ms. Côté said she treated the grievor's situation as a leave without pay until February 2003, when she became aware the grievor's LoP position was indeterminate. She was told by Ms. Lacroix that the TA was not part of salary, so the LoP could not provide an official document saying it was.

Summary of the arguments

Bargaining agent submissions:

[35] The extra payment by the LoP was an equalization payment, or a top-up payment, not a TA. As such, it is part of salary. TA was not mentioned to the grievor nor was it included in the poster advertising the position applied for (Exhibit G-2). Nor is there a mention of the TA in either the letter of offer (Exhibit G-3) or the terms and conditions document (Exhibit G-12) given to the grievor on her first day. This is consistent with statements made by all four witnesses called by the grievor that they were not shown a document indicating the TA was not part of the salary. Indeed, Ms. Boucher and Ms. Boutin were unaware of that fact until they learned of the grievor's predicament.

[36] Witnesses Boucher and Greenidge believed the TA amounts were negotiated and fixed, and could only be taken away through negotiations, as they had never been shown Exhibits E-9, E-10 or E-11, the documents creating and preserving the TA. Even Tarik W. Lacene, Chief of Labour Relations at the LoP, in his letter to PWGSC (Exhibit G-10), used the term "total salary" and made no reference to the fact that salary was split, or to a TA. In Exhibit G-12, Ms. Lacroix said that the grievor's salary was total salary including the allowance and, despite Ms. Côté's recollection of being told the opposite by Ms. Lacroix, there is no written document to corroborate this.

[37] Ms. Cooper's research of the case law showed that cases concerning terminable allowances deal with a unionized environment with a collective agreement in place. I was referred to *Billett v. Treasury Board (Department of Veterans Affairs),* 2006 PSLRB 28; *Parker v. Treasury Board (National Archives of Canada),*

2004 PSSRB 13; and *Boudreau v. Treasury Board (Public Works and Government Services Canada)*, 2002 PSSRB 84. She argued that a terminable allowance did not exist with respect to unrepresented employees.

[38] In the altenative, Ms. Cooper believes that the employer should not be allowed to argue the strict application of the pay rules, as estoppel applies. The grievor believed that the matter would be resolved in her favour based on Mr. Lacene's letter to PWGSC (Exhibit G-10) and Mr. Yates' e-mail (Exhibit G-12) saying PWGSC could include the TA in her salary as long as there was evidence that the practice was not an informal procedure. These documents, together with e-mails (in Exhibit G-9) from Mr. Yates, meant that the only issue was whether she was receiving favourable treatment at the LoP and Mr. Yates thought PWGSC would get a document from the LoP that would suffice.

[39] For that reason, the grievor accepted Mr.Yates' advice to ". . . come on over, sign the offer indicating that pay was an ongoing issue", and that it was "safe to sign". Another contributing factor was Ms. Potvin's pressure: ". . . if you don't sign . . . we will take it as a refusal." The grievor is an intelligent, reasonable person, and it would be illogical for me to conclude, the grievor's representative argued, that she would sign acceptance if she believed there was a chance she wouldn't get the salary expected.

[40] The detriment was the loss of other opportunities at the LoP.

[41] To support her position on estoppel I was referred to four cases: *Molbak v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-2-26472 (1995)(QL); *Pacific Press Ltd. v. Vancouver-New Westminster Newspaper Guild, Local 115* (1987), 31 L.A.C. (3d) 411; *Lansey v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-25569 (1994)(QL); and *Webb v. Treasury Board (Foreign Affairs and International Trade),* PSSRB File No. 166-2-28379 (1998) (QL).

[42] In closing, Ms. Cooper asked that I find that the TA is included as part of salary and that promises were made to the grievor that she was meant to rely upon, which she did to her detriment. I was asked to remain seized concerning calculations, in the event the grievance is upheld.

Employer's submissions:

[43] Mr. Kamel chose first to respond to Ms. Cooper's submissions and then make the employer's main submissions.

Response to Ms. Cooper's submission:

[44] There is no dispute that Ms. Côté's arithmetical calculations are correct using the pay rules as she explained, only that the starting point was in error. It is the bargaining agent's burden in this matter, and the bargaining agent, if they wished, could have called Roland Bonaventure, Director, Human Resources and Ms. Lacroix. In any case, Exhibit G-4, Mr. Bonaventure's letter to the grievor concerning the TA, is clear that the TA is not part of salary. This is consistent with Exhibits E-9 through E-11, the documents creating and preserving the TA, and they are also clear.

[45] The fact that some employees misunderstood the LoP's policies does not change their true nature, that the TA is not part of salary.

[46] Contrary to Ms. Cooper's assertion, Exhibit G-10 by the LoP does not say "salary" but "total annual income", which could encompass a lot of things. Ms. Cooper's argument that the TA never ended, just ceased while not required, is only semantics. The grievor was not induced to join the LoP by PWGSC. She accepted another indeterminate position while on leave without pay, and without asking PWGSC what effect that might have if she were to return.

[47] The grievor's understanding that the only issue to be resolved is whether the TA is included for her as a result of a formal or informal arrangement is not an issue. Exhibit G-12, an e-mail by Mr. Yates, copied to the grievor, makes it clear what PWGSC required: that is, to know whether the TA being considered a part of salary applied to everyone.

[48] Regarding the grievor's reliance on Mr. Yates' comment that it was "safe to sign", what should have been clear to the grievor was that if the LoP revised its salary, as they did, she would get the benefit, which she did. If any further promise was made by Mr. Yates it was a conditional one: ". . . if we get a letter from the LoP that meets our requirements, then PWGSC will include the TA in your pay calculations." The grievor herself acknowledged that things were still in the air, and that she was hopeful it

would be favourably resolved. This shows that there was no unequivocal promise made.

[49] The fact that the LoP poster, Exhibit G-2, was silent on the TA is unimportant: no mention was made, either, of the bilingual bonus that was paid to the grievor.

Employer's main submission

[50] This matter is a LoP matter, and that's where it should have been resolved, perhaps through the grievance procedure provided for in Exhibit E-14, the terms and conditions document. In any case, the answer to the grievor's problem lies with the LoP, and their documents clearly show that the TA never was part of salary. I was referred to the initial document requesting the creation of the allowance (Exhibit E-5, of March 2000). Neither the grievor's belief nor the witnesses' collective understanding can alter what is black and white. Taken together, Exhibits E-5 and E-9 through E-11 prove the issue, that the TA is not part of salary, except for superannuation purposes.

[51] PWGSC was correct to be cautious in this matter, as the evidence demonstrates that, had they paid, they would have had to recover. Regardless how you characterize the additional payment, as TA or top-up equalization payment, the issue continues to be whether that payment is part of salary.

[52] Concerning estoppel, I was referred to the Brown and Beatty text *Canadian Labour Arbitration* 3rd ed. at para. 2:2211. The four essential components of estoppel are:

1. a clear and unequivocal representation;
2. that representation must be intended to be relied on;
3. reliance; and
4. detriment resulting from that reliance.

[53] Mr. Kamel asserted, as in *Roach v. Treasury Board (Department of National Defence)*, 2006 PSLRB 3, that the promise was not unequivocal but conditional. He reminded me of Mr. Yates' evidence that the word "if" was critical. His only promise was that if something happened then he would do something.

[54] Regarding detrimental reliance, Mr. Kamel referred me to the decision in *Ellement v. Treasury Board (Public Works and Government Services Canada)*, Board File

No. 166-2-27688 (1997) (QL). At paragraph 36, the adjudicator concluded that, absent detrimental reliance, estoppel cannot apply. The evidence is that the grievor refused an offer from Agriculture Canada before she received an offer at PWGSC, and that she was not that interested in that job anyway.

[55] Exhibit E-2, a LoP letter to the grievor, made it clear to the grievor, as early as June 6, 2002, that her TA was not part of her salary, except for superannuation purposes.

[56] Ms. Larose was never told that if she accepted the PWGSC offer her TA would be considered part of her salary. Her handwritten notes, made nearly two months after the PWGSC offer was made, show nothing was yet resolved in her mind (Exhibit G-7): "I am continuing my steps. . . ." Nor can it be fairly concluded that Ms. Larose was unduly pressured, given that she took from May 9, 2003, to July 1, 2003, to accept the offer of employment.

Intervenor's submissions'

[57] The LoP has no jurisdiction to pay an allowance as part of salary according to Exhibits E-5 and E-9 through E-11. Even if I were to find that, as part of the grievor's recruitment, LoP officials told her that the TA was part of her salary, there would be no impact on the result. Evidence shows that PWGSC would only include the TA in calculating the grievor's pay rate if the LoP provided some authority for that, which they didn't.

[58] PWGSC placed conditions on their agreement to include the TA as part of the salary, which where not met. Evidence at this hearing proves it was never part of salary, except for superannuation purposes (Exhibits E-5 and E-9 through E-11).

[59] Mr. Lalonde argued that even if I was to find that representations were made by the LoP that were contrary to the clear policy directives, then such representations would constitute a special arrangement not applicable to all employees and would, therefore, be unacceptable to PWGSC (Exhibit G-12) in any case. He urged me not to make a finding on whether any such representations were made, as it would not affect the issue at hand in any event. As well, any oral representations, if made, where corrected in writing (Exhibit E-2) in June 2002. This written communication was re-affirmed six months later, in Exhibit G-4.

[60] Soon after arriving at the LoP, the grievor recognized that the TA was separate from salary, but she continued to work there for two years. She could have grieved but did not. Mr. Lalonde suggested that staying at the LoP and not grieving amounts to condonation or acceptance of a new term in her contract. In this regard, I was referred to the decision in *Swanwick v. Desautels (1999)*, 141 Man. R. (2d) 138, [2000] 6 W.W.R. 496.

[61] Finally, the LoP has no obligation to either provide PWGSC with an internal document, such as Exhibits E-5 or E-11, concerning the TA, nor an obligation to help Ms. Larose leave its employ.

Grievor's reply

[62] In reply to the employer's submissions, Ms. Cooper believes she met the burden of proof. She said that Ms. Larose did not accept any change in her terms and conditions and, had PWGSC, through Mr. Yates, been more "hard-nosed" in this matter, Ms. Larose would not have relied on his words to her detriment.

[63] She referred to the decision in *Pacific Press* to the effect that, even when a promise is equivocal, if the message is clear, an estoppel is created. Ms. Cooper concluded by reminding me that the detriment in Ms. Larose's case is two-fold:

1.) the difference in salary between the increment she was appointed to and the maximum rate she should have been appointed to had PWGSC included the TA in salary; and

2.) The opportunity to move into Mr. Greenidge's LoP position, where she would have been exposed to a new set of skills.

Reasons

[64] As Mr. Kamel pointed out, the grievor bears the burden of proof in this matter. The grievance, Exhibit G-17, says that PWGSC refused to remunerate the grievor at the appropriate level upon her appointment. Exhibit G-7, the grievor's letter of offer from PWGSC, shows her appointment was effective August 18, 2003, and she wished to be paid at the appropriate level retroactive to that date.

[65] What, then, is the appropriate level? The parties agreed that Exhibit E-18, the Terms and Conditions of Employment policy, is the correct tool to use to determine an

employee's pay. Indeed, Exhibit G-1, the collective agreement, provides, at clause 55.01, "Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement". The parties also agree there was no fault to be found in Ms. Côté's arithmetical calculations using Exhibit E-18. Where the parties disagree is over what figure should be used as the grievor's salary at the LoP in order to apply the pay rules and determine her new salary at PWGSC. Any confusion that may exist results from the grievor's receipt of a TA at the LoP. The grievor believes that in order for PWGSC to pay the grievor at the appropriate increment level, the TA must be included in her LoP salary when her PWGSC salary is determined. PWGSC believes the TA cannot be considered as salary and chooses to use the grievor's basic pay only, exclusive of the TA.

[66] A determination of this disagreement will resolve the grievance.

[67] Turning first to Ms. Cooper's submission that, whatever you call the additional monies paid to Ms. Larose, it was not a TA, and so must be salary: I cannot agree. The weight of the evidence against this proposition is overwhelming. Exhibit G-3, the LoP letter of offer seems clear on that point. In the opening paragraph it says ". . . your salary will be at the minimum of the LAS-5 salary scale".

[68] So, obviously, at the LoP there is a salary scale, a fact confirmed by Exhibit E-6.

[69] Turning to Exhibit E-6, rates of pay for unrepresented employees, we find the salary scale for the LAS-05 classification. On November 19, 2001, when the grievor began, there were five increments, the minimum being precisely the amount quoted in the letter of offer. I note that the rates of pay do not include a terminable allowance, and that the document was signed by the Parliamentary Librarian as well as both the Speakers of the House of Commons and the Senate.

[70] Further, the LAS classification became MPA, whose salary scale appears in Exhibits E-7, E-8 and E-20, none of which includes a terminable allowance.

[71] The separation of salary and terminable allowance is also clear in the letter of offer. After stating what the grievor's annual salary would be, the letter goes on to say that the grievor would also receive a monthly allowance. The fact that the allowance is expressed as a monthly allowance suggests it is something apart from her salary, which is always expressed in annual terms.

[72] Also, what am I to make of the word *terminable* in English or as in Exhibit G-3, the letter of offer, the word *provisoire*. Surely I must make something of the fact that the letter of offer refers to the monthly allowance as temporary, or provisional and that in English, the word terminable means finite or not lasting. Evidence showed that not only could the allowance be ended, but that payment of the allowance was ended upon a unilateral decision by the employer (Exhibit G-4), which speaks strongly against it being a part of salary.

[73] The evidence is consistent between the grievor's witnesses and the employer's witnesses; the additional monies were consistently characterized and seen as a TA. That allowance was created as a result of a request by the LoP (Exhibit E-5), and is referred to throughout the exhibits, but most specifically in Exhibits E-9 through E-11. I note that in Exhibits G-4, E-9, E-10 and E-11, like many leave provisions, the terminable allowance is only paid in a month where an employee receives at least 10 days' pay. Exhibit E-12, the terms and conditions for unrepresented employees, uses similar if not identical language in clauses 16.01 (sick leave) and 13.02 (vacation leave). This being so, how can the allowance be a part of salary? The answer, of course, is that it cannot, as it is forfeited in any month in which an employee receives less than 10 days' pay.

[74] To find in the grievor's favour, I must disregard what Mr. Kamel correctly states is "black and white".

[75] Beginning with Exhibit E-2, dated June 6, 2002, and sent to the grievor less than seven months after she began at the LoP, the Director of Human Resources advised her, at paragraph 3, that: ". . . the terminable allowance is not part of your pay except for superannuation purposes".

[76] These same and unequivocal words appear in Exhibits E-5, E-9, E-10, E-11 and G-4, covering the years 2000 through 2003. Some of these documents predate the grievor's arrival at the LoP and others were issued during the course of her employment and up to the time of her departure. Indeed, when shown the letter advising her of the reinstatement of the TA (Exhibit G-4), the grievor explained that she received a similar letter every time there was a change in the allowance. Six weeks into her employment at the LoP, upon receiving her first pay stub, the grievor testified that it appeared to her that the allowance was something apart from salary.

[77] The cases I was referred to were not helpful in arriving at a conclusion on the first submission of Ms. Cooper, that the additional monies paid to the grievor were not a TA.

[78] I find that the additional monies paid to the grievor were in the form of a TA, and that that allowance was not part of the grievor's salary. This leaves Ms. Cooper's submission on estoppel.

[79] This argument must also fail. Ms. Larose testified that she believed the pay issue would be resolved in her favour. In addition to that faith, there were other factors at work that influenced her decision to accept PWGSC's offer:

1. Ms. Larose said that the risk was small. The fact that she recognized there was some risk, no matter how slight, suggests the matter was not concluded.

2. Ms. Larose said she felt pressured by Ms. Potvin's threat that if she did not sign the offer her failure to sign would be taken as a refusal. Ms. Larose delayed signing her acceptance for almost two months while she was given time to seriously weigh her options. While I accept that Ms. Larose felt some pressure, I don't accept that the pressure was so significant that it tipped the scales in arriving at her decision to accept the offer.

3. Ms. Larose said she took some comfort in reaching her decision from Exhibit G-10, the LoP letter to PWGSC. That exhibit does not use the term salary at all. What it does say is "total annual income". Clearly Ms. Larose took that to mean salary, but I don't believe that that conclusion was a logical one. Rather, it (Exhibit G-10) appears to me to be a craftily worded response to PWGSC's request for information on how the terminable allowance operates at the LoP. It was this precise information that Mr. Bonaventure refused to provide (Exhibit G-13) to Mr. Yates, and continued to refuse to provide until this adjudication hearing. As I pointed out to Mr. Lalonde at the hearing, this was, at the very least, less than helpful to the parties, and, at worst, perhaps obstructive. Although the documents that would have been most helpful in the spring of 2003 were eventually provided in the summer of 2006, it doesn't cast the LoP in the best light to state as an intervenor that they were not legally obligated to provide the documents at all. It was also hard to understand their position, as advanced by Mr. Lalonde, concerning the earlier refusal to provide these documents, which he put in these words: "Why help a great employee to leave".

4. Ms. Larose said that opportunities like the one at PWGSC didn't arise often. I find that this was a primary reason for which she accepted the offer of employment.

5. Ms. Larose felt assured by Mr. Yates' words "It's safe to sign". I accept Mr. Yates' testimony that his comment referred only to the fact that PWGSC would revise Ms. Larose's salary if there was a salary revision at the LoP. Ms. Larose said she thought Mr. Yates was very professional and doing his best to help her, and I don't doubt that was the case, nor do I attribute anything sinister to his motives. Good faith is presumed and the grievor has adduced no evidence to counter this presumption.

6. Finally, Ms. Larose testified that, had she known how the pay matter would turn out, she *probably* would have declined the offer. This candid statement reveals that Ms. Larose may have accepted the PWGSC offer even without a favorable resolution to her pay concern.

[80] I have looked at both the case law and the readings on promissory estoppel and conclude that there was no unequivocal promise made. Considering the test of the objective observer as set out in the *Pacific Press* decision, the facts in Ms. Larose's situation are clearly distinguishable. Unlike the grievor in *Pacific Press*, Ms. Larose was never told anything as definitive as that grievor was. The message in this case was always conditional.

[81] There cannot be detrimental reliance absent an unequivocal promise. That promise is the starting point. The grievor knew, understood and accepted a risk that, at the end of the day, she may not get the allowance considered as salary, and the consequences of that. Moreover, she was also aware of the LoP's often-repeated caution that her allowance only counted as salary for pension purposes, and no other. She also knew from Ms. Côté's last pay calculation precisely what her pay would be at PWGSC (Exhibit E-4) if she accepted the offer. With the knowledge of these crucial factors, the grievor accepted the offer as, in her own words, the risk was quite small.

[82] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[83] For these reasons, this grievance is dismissed.

October 18, 2006.

Barry Done,
adjudicator