Date: 20070831

File: 566-02-17

Citation: 2007 PSLRB 93

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

LISETTE PRONOVOST

Grievor

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Pronovost v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievor: Laurent Trudeau, counsel

For the Employer: Sean F. Kelly, counsel

Heard at Montréal, Quebec,
September 26 and 27 and December 14, 2006.
(P.S.L.R.B. Translation)

I. Individual grievance referred to adjudication

[1] Lisette Pronovost ("the grievor") was an officer II at the Repentigny employment insurance office when she filed a grievance on May 31, 2005. The grievance reads as follows:

> [Translation]
>
> . . .
>
> *I disagree with your decision to deny me the week of vacation from July 4 to 9, 2005 of the four weeks requested covering the period from July 4 to 30, 2005. I believe that you are interpreting clauses 34.05 and 34.06 of the collective agreement in a restrictive manner.*
>
> *I request that the week of vacation from July 4 to 9, 2005 be added to those that I have already requested and that have been approved . . .*
>
> . . .

[2] The grievance was sent to adjudication on September 13, 2005 under subparagraph 89(1)(*a*)(i) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22.

II. Summary of the evidence

[3] The collective agreement reached between the Treasury Board ("the employer") and the Public Service Alliance of Canada (PSAC) on March 14, 2005 ("the collective agreement") for the Program and Administrative Services Group (expiry date: June 20, 2007) applies to this case (Exhibit F-1). Clause 34.05(b) of the collective agreement reads as follows:

> ***34.05***
>
> . . .
>
> *(b) Subject to the following subparagraphs, the Employer reserves the right to schedule an employee's vacation leave but shall make every reasonable effort:*
>
> *(i) to provide an employee's vacation leave in an amount and at such time as the employee may request;*
>
> . . .

[4] Clause 34.06 of the collective agreement reads as follows:

> ***34.06*** *The Employer shall give an employee as much notice as is practicable and reasonable of approval, denial, alteration or cancellation of a request for vacation or furlough leave. In the case of denial, alteration or cancellation of such leave, the Employer shall give the written reason therefore, upon written request from the employee.*

[5] Danielle Lambert has been Director of Benefit Services at the Repentigny office since January 31, 2005. She handled vacation leave requests for the first time for the 2005 summer period. She testified that the director of the Repentigny office, Denis Leroux, informed employees about the vacation leave policy during group meetings on May 12, 2005. She understood that the policy stated that a maximum of three consecutive weeks of vacation leave would be allowed during July and August and that 70% of personnel must be present. According to Ms. Lambert, the policy did not apply for June and September. Ms. Lambert was familiar with the guidelines on administration of leave requests at the time that she finalized the vacation leave requests for the 2005 summer period (Exhibit F-12).

[6] The Assistant Deputy Minister for the Quebec Region, Nicole Barbeau, asked managers of operations to limit their vacation leave to three weeks during the summer period, like the Department asked of its employees. Ms. Barbeau limited her vacation leave to three weeks during June, July and August, as she explained in her May 18, 2005 email (Exhibit F-9).

[7] The grievor presented a vacation leave request in April 2005 for four consecutive weeks from July 4 to 30, 2005. Ms. Lambert denied her request on May 16, 2005. Ms. Lambert informed her at a meeting that same day that she could approve only three consecutive weeks in July and August. Ms. Lambert offered her the option of taking four consecutive weeks of vacation leave beginning the last week of June and excluding the last week of July. According to Ms. Lambert, the offer respected the policy that set a maximum of three consecutive weeks in July and August, while allowing the grievor to take four consecutive weeks of vacation leave.

[8] The grievor rejected the offer and reiterated her request by email on May 17, 2005, citing her age and accumulated fatigue because of the travelling distance between her home in Joliette and the Repentigny office (Exhibit F-10). The grievor requested as a priority the last two weeks of July so that her leave would coincide with

that of her spouse, who works in construction, with the other weeks being taken before or after that period.

[9] Ms. Lambert replied to the grievor on May 20, 2005 that the policy limited vacation leave to three consecutive weeks in July and August to enable employees to take a reasonable period of leave while taking into consideration the volume of work during that period (Exhibit F-10). While again denying the request, Ms. Lambert stated that she was open to considering other leave options for other weeks during that period (Exhibit F-10). The grievor did not make any other requests for vacation leave for that period, and she took the last three weeks of July 2005 as vacation leave (Exhibit F-8).

[10] According to Ms. Lambert, it would have been unfair to the other officer IIs to approve four consecutive weeks of vacation leave for the grievor when the reasons for her request did not indicate any exceptional circumstances. Ms. Lambert did not verify the grievor's vacation history before making her decision on the summer 2005 vacation leave.

[11] Ms. Lambert planned the summer holidays for the Repentigny office's team of officer IIs and calculated the percentage of employees present. Her calculations indicated an acceptable average of 69% for July and August 2005. The percentage ranged between 16% and 93% depending on the week (Exhibit E-5). The calculation did not take into account the ongoing absence of Denise Michel (Officer II), who was using up her sick leave and vacation leave credits before retiring in September 2005. Josée Roberge's (Officer II at the Repentigny office) attendance was considered when calculating the percentage.

[12] Ms. Roberge used compensatory and vacation leave to take holidays on Mondays and Fridays during the first three weeks of July and the last four weeks of August. Those periods are not considered consecutive to her July 25 and August 1, 2005 weeks of vacation leave.

[13] Ginette Des Groseillers (Public Liaison Officer with the Montréal Island West office) was assigned to officer II tasks at the Repentigny office for the week of July 25, 2005. Her presence was not included in the calculation of the percentage of employees present. To lessen the workload during the summer, 180 applications for benefits files from the Repentigny office were processed by another office. Officer IIs

performed approximately 250 hours of overtime during the 2005 summer period to ensure that client service objectives were met. The grievor worked overtime during that period.

[14] Ms. Lambert presented the table of 2005 summer vacation time to the officer II team at a meeting on May 26, 2005 (Exhibit F-8).

[15] Ms. Lambert did not calculate the impact on the percentage of employees present if she approved the grievor's fourth week of leave. She believes it likely that the percentage would have been 67% if the first week of July had been approved.

[16] In performing her officer II duties, the grievor must determine whether claimants are entitled to the employment insurance benefits for which they have applied. Based on the standard set by the Department, claimants must receive payment of benefits within 28 days of applying.

[17] During peak periods (holiday and summer periods), the number of initial applications filed by claimants is greater than at other times. For the purposes of this grievance, the number of initial applications filed by claimants at the Repentigny Employment Insurance Office in summer 2004 was as follows: 1784 application in May; 2635 applications in June; 4001 applications in July; 2192 applications in August; and 2033 applications in September (Exhibit E-2). In summer 2005, the number of applications was as follows: 1897 applications in May; 2416 applications in June; 4599 applications in July; 2575 applications in August; and 2143 applications in September (Exhibit E-3).

[18] According to the grievor, the end of the school year, which occurs the week before June 24, marks the beginning of the summer peak period. It runs until August, after the construction holiday period.

[19] Jacques Gagnon, Regional Director, Lanaudière Region, set the peak summer period as beginning the week before June 24 until the end of August. During this period, the employer uses a variety of means to handle the increased number of applications for benefits filed by claimants: quality control and employee training are reduced; the benefit application verification processes are lightened by specializing certain functions, by grouping application processing by file type and by providing assistance during claimant interviews; other branches lend employees able to assist in

processing applications (employees assigned to other duties and/or in other divisions who have experience in benefit application processing are released to provide assistance); other offices that are less busy take over some files; meetings are held with certain large employers to speed up the issuing of termination of employment certificates; and overtime is encouraged. All were used by the Repentigny office to ensure services to claimants during summer 2005.

[20] Mr. Gagnon stated that claimants are informed that they will receive payment of their benefits within 28 days of applying. This standard must be met for 80% of applications. To ensure client service and to enable employees to take three consecutive weeks of vacation leave during the summer, a 30/70 ratio (30% off and 70% at work) is applied to Benefit Services employees for the entire summer period.

[21] According to Mr. Gagnon, the measures taken ensured that the established client service objectives were almost met. For the 2005 summer period as a whole, the standard of 80% of benefit claims being paid within the 28-day period was met. However, the standard was not met, but only by a small percentage, during the weeks of August 20 and 27 and September 3, 2005 (Exhibit E-4). The 80% standard was exceeded for all other weeks from July to September 2005. The effectiveness of the employer's measures enabled employees to take three consecutive weeks of vacation leave in 2005.

[22] Lucie Isabel, Assistant, Human Resources, adduced the individual reports on the leave taken by the grievor from April 7, 1995 to September 23, 2005 (Exhibit E-6). The annual vacation leave history shows that the grievor took four consecutive weeks of summer vacation each year from 1995 to 2004, with the exception of 1996, 1998 and 2002. The grievor explained that she divided her vacation leave in 1998 to take a trip to Europe and that she had to change the period of four consecutive weeks of vacation leave approved in 2002 because she was ill from July 20 to 28, 2002.

[23] André Julien is a permanent employee of the Canada Employment and Immigration Union of Canada (CEIU), which is a component of the PSAC. His inquiries to the PSAC show that the policy of a maximum of three consecutive weeks of leave during the summer period is unique to the Quebec Region and does not exist elsewhere. About a dozen grievances relating to it have been filed in the Quebec Region alone. Claude Deschênes, Officer II at the Québec Employment Insurance Office, filed a grievance contesting the employer's denial of a vacation leave request in summer 2005

on June 13, 2005. In Mr. Deschênes' case, the employer denied him the week of August 15, 2005, which was requested in conjunction with the weeks of August 1 and 19, 2005. The grievance was allowed in part by the employer at the final level of the grievance process on the grounds that more effort could have been made to determine if the entire leave request could have been approved (Exhibit F-11).

[24] Counsel for the employer objected to this evidence's admissibility because it is not relevant to this case, since it contains different elements. According to the grievor's representative, Mr. Deschênes' grievance is similar to the grievor's, and the evidence is relevant to this case. The objection was taken under consideration and was dealt with in the reasons for this decision.

III. Summary of the arguments

A. For the grievor

[25] Clause 34.05 of the collective agreement requires that the employer make every reasonable effort to provide vacation leave in an amount and at such time as the employee may request. Vacation leave is essential for employees' recuperation and is necessary to maintain work/family balance. The collective agreement recognizes the parties' desire to improve the quality of the Public Service of Canada, to promote the well-being of its employees and to increase their efficiency.

[26] Vacation leave is no longer subject to service requirements but it must be approved taking into account each individual's need for rest. The grievor had always taken four consecutive weeks of vacation leave during the summer period, with two exceptions (for a trip to Europe and for a period of illness). She has seniority, which gives her the maximum amount of vacation leave. It is normal to give more importance to her request than to the requests of her younger colleagues. Ms. Lambert decided to eliminate any distinction and to apply three consecutive weeks to all employees during the nine weeks of July and August.

[27] Mr. Gagnon explained that a policy is applied with flexibility and allows circumstances to be taken into account, unlike a directive that provides no margin of flexibility. The guidelines on administration of leave requests (Exhibit F-12) must be applied with flexibility. In this case, the policy became a directive by not allowing any exception to the maximum of three consecutive weeks of vacation leave during the summer. Moreover, the calculation of the percentage of resources does not take into

consideration the resources from other offices (180 files handled by the Montréal Island West office). Ms. Lambert did not take into account the vacation leave taken by Ms. Michel and Ms. Roberge because she was trying to avoid considering other reasons for absences such as compensatory leave.

[28] The period covered by the policy differs according to Mr. Gagnon's understanding (from the end of June to the beginning of September) and Ms. Lambert's (July and August only). Although the employer's response at the first level of the grievance process is based on the May 12, 2005 (Exhibit F-4) policy, the responses at the second and final level do not mention it and refer to the manager's reasonable efforts. At the second level of the grievance process, the fourth week did not appear to create a problem, but the difficulty seems to be having the fourth week consecutive to the last three weeks.

[29] The employer's decision to set specific standards (a maximum number of consecutive weeks of vacation leave during the summer and a minimum number of employees present) is not reasonable and restricts the employer in its efforts to approve leave based on employees' requests. The policy contravenes the collective agreement.

[30] In Mr. Deschênes' grievance, the employer recognized that more effort could have been made to approve the leave that the employee requested. That decision at the final level of the grievance process took into consideration all of the circumstances (seniority, age, etc.). In this instance, the employer did not consider all of the circumstances, which shows that it did not make every reasonable effort to approve the grievor's leave request. The decision *Brown v. Treasury Board (Fisheries and Oceans Canada)*, 2002 PSSRB 59, reiterated the principle set out in *Morhart v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 36, by which the application of a vacation leave policy must be evaluated in the context of all activities to determine the reasonableness of the employer's efforts.

[31] In this case, the employer did not take into account the grievor's vacation leave history or the specific circumstances of her request. The productivity standard would not have been affected if the employer had approved the consecutive weeks requested by the grievor, who allegedly would have processed the same number of benefits request files during the summer period.

[32] The doctrine of estoppel must apply in this case, since the grievor's requests for four consecutive weeks of leave during the summer had been approved since 1998.

[33] The conditions for applying the doctrine of estoppel are defined as follows by Louise Verschelden in *La preuve et la procédure en arbitrage de griefs*, Wilson and Lafleur (1994), at pages 62-63:

> [Translation]
>
> . . .
>
> *Four conditions must be met for* estoppel by conduct *to apply:*
>
> *(1) the existence of conduct or words* (representations on existing facts) *showing intent not to comply with the terms of the contract;*
>
> *(2) that the conduct or representations were believed by the other party and led it to act accordingly;*
>
> *(3) the party complaining about these representations must have changed its own conduct to its detriment;*
>
> *(4) the evidence against the conduct adopted by one party would have been prejudicial to the other party during proceedings.*
>
> *For* promissory estoppel*, the conditions are similar except that the "conduct" in question is a simple implicit or explicit promise . . . .*
>
> . . .

[34] Those conditions are met in this grievance. The employer, which established a practice, cannot change it unilaterally. Ms. Verschelden explains this point at page 65:

> [Translation]
>
> . . .
>
> *An employer that establishes a practice contrary to the strict terms of the collective agreement may not change it unilaterally if the union had been led to believe that the practice would continue to apply and if it altered its legal position as a result. Changing a past practice is often regarded as an indication of bad faith and fairness rejects favouring a party that has shown bad faith in exercising its rights.*

. . .

[35] A practice can be used as a means of interpretation when the clauses of the collective agreement are not clear and unambiguous. The conduct of the parties can influence the meaning and scope of these clauses (Blouin and Morin, *Droit de l'arbitrage de grief*, 5th edition (2000)).

[36] This principle has been recognized in the following decisions: *Coopérative des techniciens ambulanciers de l'Outaouais c. Syndicat québécois des employées et employés de service, section locale* 298 *(F.T.Q.)*, (20010620), AZ-01141225 (Soquij), 1019-3144 (T.A. Québec); *Laval (Ville de) c. Alliance du personnel professionnel et administratif de Ville de Laval*, (20030320), AZ-03142062 (Soquij), A01-16 et A01-17 (T.A. Québec); *Canadian Pacific Limited c. Fraternité des préposés à l'entretien des voies/Brotherhood of Maintenance of Way Employees*, [2003] R.J.D.T. 649; and *Acme Signalisation Inc. c. Métallurgistes Unis D'Amérique, Local 7625*, (19910708).

[37] When the wording of the collective agreement states that the employee may take leave as service requirements allow, it is up to the employer to demonstrate that services cannot be provided if it approves the employee's request. This principle is recognized in *Syndicat des policiers de Chicoutimi Inc. c. Corporation municipale de la ville de Chicoutimi*, (19970505), AZ-97142076 (Soquij), 960604-003, (T.A. Québec), and *Ville de Montréal c. Syndicat des fonctionnaires municipaux de Montréal*, (20000621), AZ-00142121 (Soquij), V-AP-2000-0116 (T.A. Québec).

[38] The grievor asked the adjudicator to find that the employer did not have sufficient grounds not to apply the collective agreement when it denied the leave as requested.

B. <u>For the employer</u>

[39] The employer used a variety of means to ensure service during the peak summer period, while respecting the commitment to claimants to deliver their benefits within 28 days of applying. To ensure that this service standard was met, it ensured that 70% of its employees were present from the end of June to the end of August. The policy applying to employees providing services to claimants allows them to take three consecutive weeks of vacation leave. For the 2005 summer period, the employer's forecasts were realistic and ensured that the service standard (Exhibits E-3 and E-4) was met. The grievor admitted the existence of a peak summer period.

[40] The employees concerned were informed of the policy during group meetings. Individual meetings were held with those employees whose leave requests did not comply with the policy. A meeting was held with the grievor, and her request was denied because she did not present exceptional circumstances that warranted setting aside the policy. She rejected the employer's offer of four consecutive weeks of vacation leave partially within the requested period. She did not respond to the employer's request to suggest other options.

[41] The employer's decision at the final level of the grievance process in Mr. Deschênes' case cannot be applied in this case, since the facts are different and they occurred in a different institution.

[42] Under the collective agreement, the employer has the right to schedule vacation leave but the collective agreement requires the employer to make every reasonable effort to approve what employees request. It is up to the grievor to show that the employer did not make every reasonable effort to approve her request.

[43] The doctrine of estoppel may not be applied to this matter because the employer has not contravened a specific provision of the collective agreement. The employer, by its conduct, did not demonstrate that it was in agreement with an interpretation given by the bargaining agent to a clause of the collective agreement.

[44] According to *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, [1984] 1 F.C. 1081 (C.A.), the doctrine of estoppel may not be applied in the absence of a promise, implicit or explicit, that has clear and unambiguous effects. Such a promise must also have led the other party to act differently that it would have otherwise. The Public Service Staff Relations Board cited this position in *Bartolf v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-22274 (19920811). The Federal Court reiterated this principle in *Dubé v. Canada (Attorney General)*, 2006 FC 796. *Royal City Bingo v. Canadian Union of Pacific Employees, Local 3999-12* (1999), 82 L.A.C. (4th) 235, also states that these three elements must be present for the doctrine of estoppel to apply.

[45] In *Jefferies et al. v. Canadian Food Inspection Agency*, 2003 PSSRB 55, the adjudicator states that to create entitlement to a right through the doctrine of estoppel, it must be shown that the employer knew its rights and made a promise with

the full knowledge that it was giving up one of its rights. These elements were not demonstrated in *Hickling v. Canadian Food Inspection Agency*, 2006 PSLRB 39.

[46] In *Halifax (City) v. International Association of Firefighters, Local 268* (1992), 19 L.A.C. (4th) 392, the system established by the employer to allocate vacation time is not part of the collective agreement and is at its discretion. There was no promise on the employer's part that the system would not be changed. In those circumstances, the adjudicator found that the doctrine of estoppel did not apply. In this case, we find the same elements: the vacation leave allocation system is part of the employer's right to manage; the system does not contravene any specific clause of the collective agreement; and there was no promise by the employer not to change the system.

[47] According to *Cold Metal Products Co. Ltd. v. United Steelworkers of America, Local 4444* (1989), 14 C.L.A.S. 70, a common practice does not create entitlement to estoppel in the absence of a clear right in the collective agreement. In *Russelsteel Inc. v. United Steelworkers of America, Local 5958* (1989), 18 C.L.A.S. 416, the adjudicator came to the same conclusion.

[48] By exercising its right to manage, the employer may set out policies and subsequently amend them. The grievor had to show that the employer made a promise not to apply the clear wording of the collective agreement and that that promise led her to act differently. In this case, the employer had applied its policy of 70% of employees being present since 2001. It did not promise to continue to apply the same policies in assigning vacation leave or to renounce its right to manage set out in clause 34.05 of the collective agreement. The employer, by approving the grievor's requests for four consecutive weeks of vacation leave in the past, did not promise her that she could take them in the future. In these circumstances, the doctrine of estoppel may not be applied.

[49] Clause 34.05 of the collective agreement states that the employer commits to make every reasonable effort to provide vacation leave in an amount and at such time as the employee may request. That clause does not create an obligation to approve all vacation leave requests, but it does require the employer to make every reasonable effort to provide that leave in accordance with the employee's request.

[50] In *Morhart*, cited by the employer, the adjudicator adopts the reasoning used in *Whyte v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17992 (19891010),

which found that making every reasonable effort to approve vacation leave does not oblige the employer to grant every leave request or to alter systems or policies that meet needs and satisfy obligations to do so. The adjudicator points out in *Morhart* that the reasonableness of the employer's efforts could be demonstrated by it showing flexibility in applying its policies by making exceptions to respond to the needs of its employees in special circumstances.

[51] A number of decisions refer to the wording of collective agreements in which the employer's reasonable efforts to schedule vacation leave are subject to operational requirements: *Payette v. Treasury Board (Employment and Immigration Commission)*, PSSRB File No. 166-02-13824 (19840703); *Dufresne v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-14582 (19860310); and *Bouffard v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-21327 (19910813). Those decisions recognize the priority given to client service.

[52] Clause 34.05 of the collective agreement, which is applicable to this grievance, does not mention operational requirements. The employer's right to schedule employees' vacation leave is recognized subject to making every reasonable effort to approve it in accordance with the terms of the requests. Thus, the employer does not have to justify its decision by operational requirements, but it satisfies the provisions of clause 34.05 if it shows that reasonable efforts were made.

[53] In *Higgs v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 32, the adjudicator emphasizes that the employer must ensure that the assignment of vacation leave to an employee based on the criteria set out in the collective agreement is reasonable. In that case, the collective agreement did not subject the granting of leave to operational requirements, but the adjudicator pointed out that operational requirements may mean that the criteria for approval may not be met.

[54] In this instance, the employer relied on operational requirements to show that it made every reasonable effort to satisfy the grievor's request. In its efforts, the employer met first with groups and then with the grievor individually to determine if she presented special circumstances and to express its willingness to consider other options. This shows that the employer made every reasonable effort to schedule the vacation leave.

C. Rebuttal for the grievor

[55] The grievor responded to the employer's refusal to grant her annual leave as requested by filing a grievance. This does not indicate a refusal to cooperate on her part.

[56] Other clauses state that approval of leave for volunteering, unpaid parental leave, personal leave and paid or unpaid leave for purposes other than those set out in the collective agreement is subject to operational requirements. Vacation leave not being subject to operational requirements means that the employer must make a more significant effort than for other types of leave.

[57] The employer's argument, based on operational requirements, is not convincing since operating with only 16% of employees present in the last week of July was not problematic. Furthermore, the peak period's definition varies among the employer's spokespersons. The grievor allegedly would have processed the same number of files during the entire summer period if the employer had approved her initial vacation leave request, without any change to services to claimants.

IV. Reasons

[58] The grievor alleges that the employer is interpreting clauses 34.05 and 34.06 of the collective agreement in a restrictive manner.

[59] Clause 34.05 of the collective agreement reserves for the employer the right to schedule an employee's vacation leave. It restricts its right to manage by imposing on it, in this regard, the obligation to make every reasonable effort to provide vacation leave in an amount and at such time as the employee requests.

[60] Clause 34.06 of the collective agreement states that the employer must inform the employee of its decision to approve, deny, alter or cancel annual or furlough leave. In addition, if the employee so requests, the employer must give its reasons in writing.

A. With respect to clause 34.06 of the collective agreement

[61] The grievor did not provide any argument related to the employer's interpretation of clause 34.06 of the collective agreement being restrictive.

[62] Mr. Leroux informed the employees in group meetings on May 12, 2005 of the policy restricting vacation leave during the summer period to three consecutive weeks.

Ms. Lambert informed the grievor at a meeting on May 16, 2005 that her vacation leave request (four consecutive weeks, from July 4 to 30, 2005) was denied. At that time, she proposed to the grievor four consecutive weeks of vacation leave beginning the last week of June. The grievor rejected the offer and reiterated her request in writing on May 17, 2005, giving the reasons for making an exception to the terms of the policy. Ms. Lambert explained her denial in writing on May 20, 2005 and offered the grievor the possibility of considering other weeks of leave.

[63] It was shown that the grievor received three consecutive weeks of vacation leave from July 11 to 30, 2005. The evidence does not show when and how the employer informed the grievor that it was authorizing vacation leave for this period.

[64] Ms. Lambert's procedure to inform the grievor that her vacation leave request was denied appears, in my view, to satisfy the provisions of clause 34.06 of the collective agreement, the grievor having been informed of the denial of her vacation leave request at the meeting on May 16, 2005. The reply on May 20, 2005 to the renewed request meets the requirement to provide a written reply at the employee's request. I believe that the employer informed the grievor of the denial of her initial request and the approval of vacation leave for part of the period requested as soon as it was practical, no evidence or argument having been adduced alleging otherwise.

B. With respect to clause 34.05 of the collective agreement

[65] The grievor's arguments regarding the interpretation or application of clause 34.05 of the collective agreement are based on two elements:

(1) the employer must approve requested leave based on applying the doctrine of promissory estoppel;

(2) the employer did not make every reasonable effort to provide vacation leave in an amount and at such time as the employee requested.

C. With respect to promissory estoppel

[66] According to the grievor, by approving her requests for four consecutive weeks of summer vacation leave each year from 1998 to 2004, the employer allegedly acted in a manner that opened the door to the application of the doctrine of promissory estoppel. The grievor argued that she could base her grievance on that doctrine because the employer had established a practice by approving vacation leave in the

amount and at the time that she had requested. She added that the employer may not change this practice and impose restrictions on her in terms of the amount and time of the vacation leave that she wanted to take in 2005.

[67] The doctrine of estoppel is described as follows in Brown and Beatty, *Canadian Labour Arbitration*, 3rd Edition, as cited in *Bartolf*:

. . .

> *The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.*

. . .

[68] The Federal Court of Appeal commented on that doctrine as follows in *Canadian Air Traffic Control Association*:

. . .

> *While the doctrine of promissory estoppel is far from clear, it seems established that there cannot be such an estoppel in the absence of a promise, by words or by conduct, the effect of which is clear and unambiguous. . . . Moreover, it seems established, also, that the doctrine of promissory estoppel, in addition to a clear and unambiguous promise, requires that such a promise must have led the promisee to act differently from what he would otherwise have done.*

. . .

[69] The Federal Court stated as follows in *Dubé*:

. . .

> *Evidence of a commitment is critical in establishing the validity of an allegation based on the principle of promissory estoppel.*

. . .

[70] Clause 34.05(b) of the collective agreement states that the employer may reserve the right to schedule vacation leave but imposes on the employer the obligation to make every reasonable effort to provide vacation leave in the amount and at the time that the employee requests.

[71] The grievor challenges the employer's decision to deny her four consecutive weeks of vacation leave for the period from July 4 to 30, 2005. Those specific terms, related to the number of consecutive weeks of vacation leave in a specific period, are not covered by the collective agreement.

[72] The evidence shows that, between 1998 and 2004, the employer effectively scheduled the grievor's vacation leave for the summer period in accordance with the terms of her requests, which were for four consecutive weeks including the two weeks of the construction holiday. That decision by the employer stems from its right to manage set out in clause 34.05(b) of the collective agreement. The amount and time of vacation leave are benefits not specifically provided for in the collective agreement applicable to the grievance; nor were they provided in the previous agreement.

[73] Nothing in the evidence indicates that the employer committed or promised, at any time, to approve future vacation leave for the grievor of the same amount and time. Nothing in the evidence demonstrates that the employer renounced its right to manage vacation leave scheduling in the future by approving the grievor's requests.

[74] In the absence of a promise, implicit or explicit, the effect of which is clear and unambiguous, the doctrine of estoppel cannot be applied and used as grounds for a grievance. The Federal Court of Appeal made that decision in *Canadian Air Traffic Control Association,* and the Federal Court reiterated that position in *Dubé*.

[75] Even if the employer had made such a promise to the grievor, the doctrine of estoppel could not be applied because this case involves a grievance of interpretation and application of the collective agreement. For estoppel to apply, there must have been a promise between the parties to the collective agreement, as stipulated by Brown and Beatty and Ms. Verschelden (see previous extracts). The parties to the collective agreement are the employer and the bargaining agent and only they can validly commit to interpreting or applying the collective agreement in a certain manner. Although she is a union member, Ms. Pronovost is still not a party to the collective agreement, and

therefore she may not base her grievance on a promise by the employer in terms of the interpretation or application, toward her, of article 34 of the collective agreement.

[76] In this case, it was not alleged that the employer apparently promised the bargaining agent that it would apply clause 34.05 of the collective agreement in a certain manner or that it renounced its right to schedule vacation leave. No evidence of such a promise was adduced. Under these circumstances, it is necessary to determine if the doctrine of estoppel can be applied.

[77] I agree with Ms. Verschelden's conclusions in *La preuve et la procédure en arbitrage de griefs*:

> [Translation]
>
> . . .
>
> *In the absence of wording in the collective agreement reinstating the benefit that the union is requesting, adjudicators believe that they do not have jurisdiction because the request is not a grievance; it is not related to the collective agreement. Moreover, it is questionable whether estoppel can apply in the absence of a clear right in the terms of a contract, the first condition of estoppel being conduct that implies renunciation of the strict application of the terms of a contract. A grievance may not rely on past practice alone because it does not generate rights.*
>
> . . .

[78] I share the opinion of the adjudicators who concluded in *Cold Metal Products Co. Ltd.* and *Russelsteel Inc.* that, in the absence of a clear right in the collective agreement, past practice alone is not grounds for a grievance through applying the doctrine of promissory estoppel.

[79] I arrive at the same conclusion in this case. The grievor did not show that the employer, by approving her requests for summer leave each year from 1998 to 2004, promised her implicitly or explicitly that it would approve the same requests in the future or that it renounced its right to schedule vacation leave as set out in clause 34.05(b) of the collective agreement. I might have reached a different conclusion if the grievor had provided evidence of words or conduct by the employer that would indicate, beyond simply approving her requests, such a renunciation or commitment to the bargaining agent.

D. With respect to every reasonable effort

[80] The grievor has the burden of showing that the employer did not respect the obligation imposed on it by clause 34.05 of the collective agreement.

[81] Clause 34.05(b)(i) of the collective agreement imposes on the employer the obligation to make every reasonable effort to provide vacation leave in an amount and at such time as the employee may request; it clearly limits the employer's right to manage. To determine whether the employer assumed its obligation to make every reasonable effort, I must evaluate the procedure that it used to make a decision on the grievor's vacation leave request for the 2005 summer period.

[82] The employer's obligation applies to each individual vacation leave request made by an employee. Evaluating the specific circumstances of each request will show whether the employer assumed its obligation in each case. While some circumstances may be common to several requests, the employer must assume its obligation on a case-by-case basis. Accordingly, I do not see how the employer's decision, in the specific circumstances of the grievance by Mr. Deschênes, who works in another employment insurance office, can be relevant to Ms. Pronovost's grievance.

[83] In this case, the evidence shows that Mr. Leroux informed the Benefits Services employees at the May 12, 2005 meetings that a new policy restricted vacation leave during the summer period to three consecutive weeks. The policy resulted from the employer's evaluation of the requirements for claimant services during the summer.

[84] The number of benefit applications that officer IIs at the Repentigny office must process substantially increases in the summer and holiday periods. The employer evaluated the peak period for the 2005 summer period based on data from previous years. The grievor acknowledged in her testimony the existence and length of the 2005 summer peak period.

[85] A service standard that has existed for several years requires that benefits be paid within 28 days of claimants' applications in 80% of cases. Employees are aware of this standard, and it continues to apply during peak periods.

[86] The employer used a variety of means to ensure that this standard was met during the 2005 summer period. According to the employer, the presence of 70% of its staff is required to ensure claimant services. That service standard has been applied

for several years, and there is no evidence that shows that the bargaining agent objected to it. The percentage of employees who must be present restricts the number of employees who may be absent to 30%. To help Benefit Services, the employer used employees from other divisions to fill in for employees on vacation leave. Ms. Des Groseillers, Public Liaison Officer with the Montréal Island West office, was assigned officer II duties at the Repentigny office for the week of July 25, 2005. Certain specific tasks, like claimant interviews, were assigned to employees in other divisions. Files were regrouped and processed by file type to accelerate processing. Meetings were held with certain employers to ensure faster file processing. One hundred eighty benefit application files were processed by another office to reduce the workload on the officer IIs at the Repentigny office during this period. A total of 250 overtime hours were authorized during the 2005 summer period.

[87] Ms. Lambert handled the vacation leave requests for the 2005 summer period from the Repentigny office's Benefit Services employees. During her testimony, she explained how she managed vacation leave requests from the officer IIs. Ms. Lambert calculated the percentage of employees that had to be present in July and August, which, in her view, covers the summer peak period affected by the policy. In the calculation, she did not take into account the help Ms. Des Groseillers provided nor Ms. Michel's absences, who was using up her sick leave and vacation leave credits before retiring in September 2005. The days that Ms. Roberge worked were included in the calculation, although some of her absences were compensatory leave and others were vacation leave.

[88] According to Ms. Lambert, the maximum of three consecutive weeks of vacation leave set out in the policy makes it possible to ensure claimant services in July and August. Ms. Lambert has to apply the policy fairly to all Benefit Services employees, and only exceptional reasons would allow her to deviate from it.

[89] Ms. Lambert did not consider the grievor's fatigue, due to the distance she travelled from her home to her work, or the grievor's age to be exceptional circumstances justifying setting aside the policy. The grievor submitted that Ms. Lambert did not consider Ms. Pronovost's seniority when making her decision. The collective agreement does not require seniority to be considered when scheduling vacation leave, and the griever did not ask Ms. Lambert to consider it as an exceptional circumstance. Ms. Michel's retirement appears to have been considered as an

exceptional circumstance, since her continuous absence from July 4 to August 29 was approved (Exhibit F-8). Ms. Roberge was able to accumulate absences using compensatory leave and vacation leave for those two months. However, Ms. Lambert explained in her testimony that Ms. Roberge's leave was not consecutive weeks of vacation leave.

[90] In defining a policy, the employer is acting reasonably by setting the criteria that enables it to avoid acting arbitrarily in scheduling vacation leave. The policy sets the maximum number of consecutive weeks of vacation leave that can be taken during the summer period. Ms. Lambert's interpretation of the policy's application period, limited to July and August, is based on her own understanding of the information Mr. Leroux provided at the May 12, 2005 group meetings. Nothing indicates to me that this interpretation differs from that which Mr. Leroux gave to the employees. In her May 18, 2005 correspondence, Ms. Barbeau shows that she has a different understanding, extending the policy's application to June, July and August. For his part, Mr. Gagnon situates the period from the week prior to June 24 until the end of August.

[91] I do not believe that these different understandings of the policy's application period affect this grievance, since the grievor did not demonstrate any prejudicial impact as a result. The evidence shows that the policy was applied to July and August 2005 for all officer IIs of Benefit Services at the Repentigny office. It is to the employees' benefit to apply the policy to a short two-month period, giving them the possibility of obtaining more consecutive weeks of vacation leave situated in whole or in part in June and September.

[92] The fact that clause 34.05 of the collective agreement does not subject vacation leave scheduling to operational requirements does not mean that the employer cannot consider them. In clause 1.02, the collective agreement recognizes that the parties share a common desire to promote the well-being of employees of the Public Service of Canada to the end that the people of Canada will be well and effectively served. The employer, by considering services to claimants in developing its policy, assumes that concern in accordance with the collective agreement. Operational requirements are one of many elements that the employer may consider when choosing a procedure to schedule vacation leave. The choice and assessment of the elements fall within the employer's right to schedule vacation leave as set out in clause 34.05.

[93] The employer must consider all of the circumstances, including operational requirements, as I pointed out at paragraph 57 in *Brown*, when citing the following passage from *Morhart*:

. . .

> *The vacation leave policy and other formal or informal policies in place should then be considered in the context of the entire operation to assess the reasonableness of the employer's efforts.*

. . .

[94] The wording of clause 34.05(b)(i) of the collective agreement at issue in *Higgs* contains the same elements as this case in terms of vacation leave approval. That decision recognizes that operational requirements could affect vacation leave scheduling or its alteration. My reasoning in this case is along the same lines.

[95] The evidence did not reveal the specific circumstances of approval of the grievor's requests for summer vacation leave from 1998 to 2004. I cannot see how those circumstances might be relevant to the present matter other than in the context of the allegation of estoppel, which I have already rejected. I do not see how Ms. Lambert not checking the history of that leave would show that she did not make every reasonable effort when scheduling the grievor's summer vacation leave.

[96] The evidence shows that the employer applied its policy with flexibility by taking into account exceptional circumstances for Ms. Michel and Ms. Roberge. I agree with Ms. Lambert's position that fatigue due to travel between one's home and the workplace, or age, does not constitute exceptional circumstances justifying a different application of the policy for the grievor. The power to schedule vacation leave, reserved for the employer by clause 34.05 of the collective agreement, allows Ms. Lambert to decide under what circumstances she will deviate from the policy. The fact that she considered exceptional circumstances shows a flexible application of the policy and a reasonable effort to satisfy employee requests. Although such evidence was not provided in *Morhart*, the adjudicator pointed out that evidence that the employer makes exceptions to its policies to respond to the needs of its employees under special circumstances would tip the balance in its favour. I agree with that finding, which applies to this case.

[97] The employer may set policies and procedures to exercise its right to schedule vacation leave. It may also change those policies and procedures arising from the right it reserves under the collective agreement. The principle set out in *Halifax (City)*, whereby a practice not specifically covered by the terms of a collective agreement exists at the employer's discretion, who may change it accordingly, may be applied to this case.

[98] The grievor did not prove that the employer acted in contravention of the doctrine of estoppel or that no reasonable effort was made when it scheduled her leave for the 2005 summer period.

[99] In acting as it did, the employer respected the provisions of clauses 34.05 and 34.06 of the collective agreement.

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

(The Order appears on the next page)

V. Order

[101] The grievance is denied.

August 31, 2007.

P.S.L.R.B. Translation

Léo-Paul Guindon,
adjudicator