Date: 20080218

File: 566-02-450

Citation: 2008 PSLRB 11

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JAMIE MATEAR

Grievor

and

TREASURY BOARD
(Department of Industry)

Employer

Indexed as
Matear v. Treasury Board (Department of Industry)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Crystal Stewart, Professional Institute of the Public Service of Canada

For the Employer: Karen Clifford, counsel

Decided on the basis of written submissions
filed November 28 and December 6 and 14, 2007.

I. Individual grievance referred to adjudication

[1] This decision addresses a preliminary objection to jurisdiction raised by the employer regarding an individual grievance referred to adjudication.

[2] In 2003, the Department of Industry (Industry Canada) hired Jamie Matear ("the grievor") from outside the public service to a position in the Aboriginal Business Canada section located in Toronto and classified at the CO-02 level.

[3] On March 30, 2006, the grievor filed a grievance as follows:

. . .

(Details of grievance)

I grieve my Employer's refusal to continue to honour our agreement, upon hiring, that I would be remunerated at the middle level of the pay scale for CO-02s. I relied on this agreement and promise by my Employer that I would be remunerated at the middle level of the pay scale to my detriment. As a result, the Employer is estopped from resiling from this agreement.

I request the opportunity for a hearing at each step of the grievance procedure.

(Corrective action requested)

I request that my salary be adjusted retroactively to the middle level of the restructured pay scale for CO-02s, in accordance with the above noted agreement. I request immediate payment for all lost wages in that regard, together with interest on such wages.

. . .

[4] Following Industry Canada's final level reply dated June 23, 2006, denying his grievance, the grievor referred the matter to the Public Service Labour Relations Board ("the Board") for adjudication with the support of his bargaining agent, the Professional Institute of the Public Service of Canada ("the bargaining agent"). His notice of reference to adjudication cited Article 45 (Pay Administration) and Appendix A (Annual Rates of Pay) as the provisions in dispute from the collective agreement between Treasury Board ("the employer") and the bargaining agent for the

Audit, Commerce and Purchasing Group (AV). The expiry date of the collective agreement was June 21, 2007.

[5] In an email to Board staff dated August 1, 2006, the employer's representative gave notice that the employer would be submitting an objection to an adjudicator's jurisdiction to hear the grievance. In a subsequent letter dated November 14, 2007, the employer's representative took the position that the subject matter of the grievance did not, in fact, relate to the interpretation of the provisions of a collective agreement. Instead, its subject was the application of a Treasury Board policy governing pay on initial appointment from outside the public service. As such, the grievance fell outside the jurisdiction of an adjudicator under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*").

[6] The employer's representative requested that the grievance be dismissed without a hearing for lack of jurisdiction. In the alternative, the employer's representative asked that the matter proceed by way of written submissions on the jurisdictional issue.

[7] The grievor's representative replied on November 20, 2007. She criticized the tardiness of the employer's objection to jurisdiction and disputed its merits. She nonetheless agreed that the jurisdictional issue could be dealt with by way of written submissions as ". . . a question of law and interpretation and not one of fact. . . ."

[8] The Board's Chairperson ordered that the parties submit their arguments in writing on the jurisdictional issue as a preliminary matter. He has appointed me to hear and determine the objection to jurisdiction as an adjudicator on the basis of the written submissions that have been received.

II. Summary of the written submissions

A. For the employer

[9] The employer's written submissions are on file at the Board with accompanying documents. The excerpts that follow summarize the arguments made by counsel for the employer in support of her objection to jurisdiction:

. . .

2. The grievor was appointed on December 4, 2003 as a CO-02 Development Officer with the Aboriginal Business Section of Industry Canada. The grievor was hired from outside the public service. As a result of his experience and the pay offered to others in the group, he was placed at the middle of the salary scale upon hire. The applicable policy is Treasury Board policy, Pay above the minimum on appointment from outside the Public Service.

3. The grievor's salary upon hire; namely, $ 65,086 per annum, is set out in the letter of offer dated November 21, 2003. The grievor signed the letter of offer on December 3, 2003. Upon commencement of his employment, the grievor accepted and was paid the salary of $ 65,086 per annum.

4. As indicated on the face of the grievance, the grievor seeks enforcement of an alleged agreement and promise for payment that was made to him upon hire[2]*. This would require the interpretation and application of the Treasury Board policy on* Pay above the minimum on appointment from outside the Public Service, *a matter lying outside an adjudicator's jurisdiction.*

5. In essence, an adjudicator is without jurisdiction to interpret and apply a policy that is not specifically referenced in the collective agreement.

Issue #1: The Policy Issue

6. The analysis developed by the Supreme Court of Canada in Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929, is of assistance in this matter. As explained in* Weber, *it is important to ascertain the essential character of the dispute:*

. . .

7. Similarly, in Cherrier v. Treasury Board (Solicitor General – Correctional Services) *PSSRB File Nos 149-02-236 & 166-02-31767 the adjudicator relied on the Federal Court decision in* Canada (Attorney General) v. Boutilier, *[1999] 1 F.C. 459 to determine the real intent behind the grievance . . . .*

. . .

8. It is important to therefore seek the intent behind the present grievance filed before the Adjudicator.

9. The intent of the grievance is clear. The grievor makes reference to an alleged agreement for payment that was

made upon hire, which agreement is not referenced in the collective agreement.

10. The Public Service Labour Relations Board has indicated that negotiation of a salary on appointment occurs prior to the confirmation of that appointment. Further, the applicable policies are outside the scope of the collective agreement.

11. The instant case parallels that discussed in Glowinski *in that the grievor has essentially grieved a policy that is not part of the collective agreement. As in that case, the essential character of the dispute is the interpretation of a policy of the employer that is not part of the collective agreement. The grievance is therefore not adjudicable and the PSLRB is without jurisdiction to hear the matter.*

12. What the grievor is seeking; namely, the interpretation and application of an extrinsic document, would result in amending the collective agreement which would run afoul of section 229 of the Public Service Labour Relations Act *("*PSLRA*"). Section 229 reads: "An adjudicator's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award".*

. . .

14. In the situation at hand, the grievor is trying to create a substantive right that cannot be found in the collective agreement. The collective agreement is a binding contract between the parties. An adjudicator's jurisdiction extends to the interpretation and application of the collective agreement . . . .

. . .

Issue #2: Alleged Agreement

19. It is the employer's submission that a grievance relating to an alleged promise of payment is not a grievance that is referable to adjudication under s. 209 of the Public Service labour [*sic*] Relations Act *("*PSLRA*"). Specifically, s. 209(1)(a) refers to: "the interpretation or application in respect of the employee of a provision of a collective agreement or arbitral award."*

20. There is no dispute that the grievor's wages fell within the pay rate prescribed by the collective agreement; nor is there any dispute that he received the retroactive increases provided for under the collective agreement. Rather, the grievor seeks to have the Board determine an issue related to a promise of payment that is <u>not</u> *part of the collective agreement. Accordingly, the grievance is not one that can be referred to the Board under s. 209 of the* PSLRA.

> *21. The decision of the PSSRB in* Evans v. Treasury Board (Transport Canada)*, is of assistance. In* Evans*, the grievors were grieving the fact that new recruits were being hired from outside the public service at more than the minimum rates of pay. Adjudicator Chodos reviewed the provisions of the collective agreement dealing with pay, and the Appendix to the collective agreement which contained pay scales. He stated at paragraph 8 of the decision:*
>
> > *It is readily apparent that neither these provisions, nor indeed any other provisions of this collective agreement, address the question as to the rate of pay to be paid to employees upon their initial appointment to positions within the bargaining unit.*
>
> *22. In the Evans case, the adjudicator denied the grievance for want of jurisdiction, both because of the finding that the grievance did not relate to a violation of the collective agreement, and because of a second, unrelated, issue.*
>
> *23. The decision in* Evans *is on point for the case at hand because there is nothing in the collective agreement or the rates of pay that relate to the matters raised in the grievance; namely, a promise or agreement for the individual grievor to be paid at a certain wage.*
>
> . . .
>
> *25. In the same way that a grievance relating to a policy that is extrinsic to the collective agreement cannot be referred to adjudication, the employer submits that a promise or alleged agreement cannot be deemed to be part of the collective agreement . . . .*
>
> . . .
>
> [Emphasis in the original]
>
> [Footnotes from the original omitted]

[10] In the course of her submissions, counsel for the employer also cited *Gregory v. Treasury Board (Transport Canada)*, 2001 PSSRB 51, *Brunelle and Shanks v. Treasury Board (Transport Canada)*, 2003 PSSRB 108, Brown & Beatty, *Canadian Labour Arbitration,* 4th ed. (Aurora: Canada Law Book, 2007), at 4:0000 and 4:2000, *Foreman v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 73, *Ewen v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 113, *Toronto District School Board v. O.S.S.T.F.*, (2004), 126 L.A.C. (4th) 406, and *Kenora Police Services Board v. Kenora Police Assn.*, (2001), 102 L.A.C. (4th) 439.

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

[11] The following excerpts summarize the written submissions on behalf of the grievor. The full text and attachments are on file with the Board.

. . .

> *We disagree with the Employer's assertion that this grievance requires the interpretation or application of the "Pay Above the Minimum" policy. The Employer made a decision, based on that policy, to offer Mr. Matear a starting salary that was above the minimum in the pay scale. That decision is not in question and therefore, the policy need not be applied or interpreted in order to resolve this grievance. Mr. Matear is not arguing that he should have been paid at a higher level. He is simply requesting that the Employer live up to their promise that he would be paid at the middle of the pay scale for CO-02s.*
>
> *These essential elements of the dispute were clear throughout the grievance proceedings. At no time was any discussion had nor argument made regarding the "Pay Above the Minimum" policy. Therefore, it is not necessary for the Grievor to respond to these arguments made by the Employer in their submission.*
>
> *The Grievor has a substantive right to pay in the Collective Agreement. The promise to him described what his right to pay would be, should he accept the offer of employment. He was promised to be paid the middle. This grievance has no parallels whatsoever to the* Glowinski *decision referenced by the Employer. That grievance did in fact relate to the policy and arguments* [*sic*] *were made by the Grievor that the policy was in fact incorporated into the Agreement. These arguments are not necessary in this case as the policy will not assist in determining this dispute. Also in contrast to the* Evans *decision, this grievance has nothing to do with determining the rate of pay to be paid to a person upon initial appointment. The rate itself is not in question. It is the exact monetary sum that is in question.*
>
> *The interpretation that must be made by the adjudicator in this case relates to how the salary offer was conveyed to the Grievor and whether that offer constituted a promise that the Employer did not uphold when the salary rates in the Collective Agreement were re-negotiated. This is the crux of the dispute, which will also then go on to involve an assessment of whether or not this promise created an estoppel.*
>
> *. . . a decision had been made that the appropriate salary offer would be in the* ***middle*** *of the pay scale. This is how the*

offer was conveyed to the Grievor. "Middle" was the specific wording used by Mr. Jones. Although the written offer letter indicated the salary amount, the clear intention was to pay the Grievor whatever amount was at the middle of the pay scale.

The Employer has admitted to the use of the word "middle" with the Grievor in their second level grievance response . . . . This statement . . .does indicate that the Employer agrees that the Grievor was told that he would be paid the middle of the pay scale.

At the time, since the salary range for the CO-02 position in the Collective Agreement was $53, 865 to $76, 311, the monetary offer made to the Grievor was a starting salary of $65, 086, the fifth step in a nine step pay scale: the middle of the scale.

At the time that the salary offer was made, however, the Collective Agreement had been expired since June 21, 2003. Therefore, the pay scale was a moving target. Due to the Grievor's education and experience, the Employer felt that he warranted a higher salary than the minimum, but not the maximum. The reasonable offer was to pay him the middle of the pay scale. This was how the offer was characterized and it was on this basis that it was accepted by the Grievor.

Collective bargaining concluded some time later. In fact, the new Collective Agreement was not signed until May 24, 2005. The pay scale was restructured as a result of bargaining, resulting in the elimination of the first step in the pay scale and the addition of another step at the maximum. This restructuring meant that the middle of the pay scale had moved. In order for the Employer to continue to honour the promise to pay the Grievor at the middle of the pay scale, his salary ought to have been adjusted, retroactively, to fit the middle of the new pay scale: $67, 894. In addition to the restructuring, there were increases to the existing rates as well. Therefore, retroactively, the Grievor's starting salary ought to have been $69, 591. However, the Employer simply applied the new scale to the Grievor's specific salary amount. While he did receive a retroactive increase, it was to the salary amount that now reflected the step below the middle of the scale.

While the centre of the dispute is based on the verbal offer and acceptance between Mr. Jones and the Grievor, the Collective Agreement does come into play. A proper application of the Collective Agreement, and in particular, the pay scale, to the Grievor's situation, ought to have resulted in his salary being increased by one level to reflect the fact that the middle of the range had moved.

> *It is submitted that this grievance is one that may be referred to adjudication under s. 209(1)(a) of the PSLRA. Application of the Collective Agreement was necessary in determining the pay of the Grievor in May 2005 and it is submitted that a proper application of the restructured pay scale would have resulted in Mr. Matear remaining at the middle of that scale. He ought to have been retroactively placed at what became the fifth step in the scale, instead of being essentially, downgraded to the new fourth step in the scale.*
>
> *Specifically, Article 45.02 provides that an employee is entitled to be paid for services rendered at "the pay specified in Appendix "A" for the classification of the position to which the employee is appointed..." It is submitted that the Employer has not paid the Grievor for services rendered, in accordance with the Agreement. Once the rates were restructured, the employer applied the Collective Agreement and rates of pay provisions therein, to the Grievor's salary level at the time, based on the initial starting salary of $65, 086, instead of the new restructured "middle" salary of $69, 591. There is no question that this grievance relates to a provision of the Collective Agreement and that an adjudicator has jurisdiction to hear this grievance and make a determination on the facts.*
>
> *The estoppel argument applies to prevent the Employer from relying on the strict terms of the Agreement, which, if starting with the base salary as monetary figure, would result in the reality of what occurred here; the Grievor was downgraded to one step below the middle of the scale. The Grievor is claiming that due to the promise to pay him at the middle, that was relied upon by him, to his detriment, the Employer is estopped from making this interpretation of the Collective Agreement. The estoppel argument necessarily implies that the Collective Agreement is involved.*
>
> . . .
>
> [Emphasis in the original]

C. <u>Employer's rebuttal</u>

[12] The following are the employer's rebuttal arguments:

> . . .
>
> <u>*Point #1: Whether the policy*, Pay above the minimum on appointment from outside the Public Service, *is applicable:*</u>
>
> *The grievor maintains that the above-noted policy ("the policy") is not applicable to the issues at hand, and states that:*

"the grievor has a substantive right to pay in the collective agreement". While it is correct that, in general, employees do have substantive rights to pay pursuant to the collective agreement, what happened in the case of the grievor is that he was in fact hired from outside the public service and he was in fact paid greater than the minimum amount that would have applied. The reason that he was paid greater than the minimum was precisely ***because*** *of the application of the policy, not the collective agreement.*

Therefore, for the grievor to state that the policy is not at issue is somewhat illogical. Its application to the hiring of the grievor is a given, on the facts. It was not necessary for the employer to specifically refer to the policy at the prior stages of the grievance, particularly since the specific issue of the PSLRB's jurisdiction re: the grievance was not being addressed at any prior stage. However, in the final level response to this grievance, the grievor was indeed reminded of the fact that the terms of his hire had fallen under the policy[1]*.*

. . .

Point #2: Applicability of the collective agreement:

The grievor states that the issue in this case "relates to how the salary offer was conveyed to the grievor and whether that offer constituted a promise that the Employer did not uphold when the salary rates in the collective agreement were re-negotiated".

The issue of promissory estoppel is discussed in further detail below. Please note, however, that it is the employer's submission that the grievor's own framing of the issue essentially concedes that the point of contention relates to the interpretation of an alleged agreement, not to any "interpretation or application …of a provision of a collective agreement…" such as would bring this matter under s. 209(1)(a) of the **PSLRA***.*

Further, the Federal Court of Appeal decision in **Dubé v. Canada (Attorney General)**[2] *does not support the grievor's argument on this point. On the facts in* Dubé*, the grievors alleged that the employer failed to carry out a commitment allegedly made on hire to give them recall priority in off seasons. The Court ruled that the grievances could properly be addressed by the department as relating to subsection 91(1) of the* Public Service Staff Relations Act *(***"PSSRA"***) because they dealt with the terms and conditions of employment. However, such grievances were found not to be referable to adjudication under the category covered by subsection 92(1) of the* **PSSRA.**

Similarly, in the case at hand, the grievance was properly before the employer at the internal grievance procedure under s. 208 of the **PSLRA,** *but is not referable to adjudication under s. 209 of the* **PSLRA.**

. . .

Point #3: Whether the doctrine of promissory estoppel is applicable

In labour relations, parties generally rely upon the doctrine of promissory estoppel to support a deviation from the collective agreement (such as arguments of "past practice"). In the case at hand, the grievor seems to suggest that there was an agreement in place that the grievor would be paid "the middle of the pay scale" beyond *the time of his initial hire, and that the "pay scale was a moving target". With respect, this argument does not reflect a proper application of the doctrine of promissory estoppel, nor does it reflect common sense regarding employment relationships.*

The basic elements to establish the existence of promissory estoppel are:

1. A clear and unambiguous promise, by words or by conduct, which was intended to affect the legal relationship between the parties; and

2. the promise must have led the promisee to act differently from what he would otherwise have done.

Canada (Treasury Board) v. Canadian Air Traffic Control Association, *[1984] F.C.J. No. 79 (C.A.); and* Dubé v. Canada (Attorney General), *[2006] F.C.J. No. 1014 (F.C.).*

In the facts of this case, the grievor was offered, in his letter of hire, the dollar amount at the middle of the pay scale. There is no dispute that he accepted to be paid that dollar amount, and was in fact paid that dollar amount.

The letter of offer (Tab 1 of the Attachments previously provided by the employer) contains no reference to future payment arrangements between the parties. Therefore, there is no evidence of a clear and unambiguous promise to pay the grievor "in the middle of the pay scale" for any point beyond his initial hire. Without such evidence of a clear and unambiguous promise, the estoppel argument must fail.

Further, the suggestion that there could be any agreement for pay beyond that which transpired at the date of hire defies logic. It is not normal or standard practice for parties to agree, in perpetuity, that one's pay rate would be forever pegged at the "middle of the pay scale". Indeed, such an

> *arrangement would have precluded the grievor from advancement or promotional pay raises that would, possibly, place him at the highest end of the scale. Lastly, the facts are clear that the collective agreement had expired in June 2003 and the new one was not signed until May 24, 2005. Therefore, given that the new pay scales and rates were not known to the parties at the date of the negotiation and signing of the grievor's letter of offer, there is no way that the parties could have agreed to them. This would also preclude an estoppel argument because, in order to establish a case based on estoppel, the grievor must prove that the employer knew what rights it was giving up when it made the promise upon which the estoppel was based*[6]*. Clearly, since the terms of the new collective agreement were not known at the time of the letter of offer, there is no way that the employer could have "given up" a right.*
>
> *Therefore, the doctrine of promissory estoppel is not applicable in this case.*
>
> . . .
>
> [Emphasis in the original]
>
> [Footnotes from the original omitted]

III. <u>Reasons</u>

[13] Subsection 209(1) of the *Act* defines the subject matter of a reference to adjudication. In the context of the individual grievance at issue in this decision, the relevant portions of subsection 209(1) read as follows:

> . . .
>
> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> . . .

[14] To decide the objection to jurisdiction before me, I must determine whether the subject matter of the grievance referred to adjudication by the grievor is related to ". . . the interpretation or application in respect of the employee of a provision of a

collective agreement or an arbitral award . . .” within the meaning of paragraph 209(1)(*a*) of the *Act*. Should I find that it is not, then I am without jurisdiction to proceed.

[15] The grievor stated the essence of his claim in the first sentence of his grievance: “I grieve my Employer’s refusal to continue to honour our agreement, upon hiring, that I would be remunerated at the middle level of the pay scale for CO-02s.” Notably, the grievor did not allege in his grievance that the employer violated a provision of the collective agreement. He did not explicitly associate his pay problem with any misapplication or misinterpretation of a right owed to him by the employer under the terms of the collective agreement.

[16] To the contrary, the grievor identified the source of the problem as the failure of the employer to honour “our agreement.” The written submissions make it clear that that term refers to an agreement concluded by the grievor and the hiring representative of the employer prior to the date that the grievor became an employee. The effect of the agreement was that the grievor was to be paid upon hiring at the “middle” of the pay scale for the CO-02 classification level. The employer’s representative does not dispute that such an agreement existed.

[17] Subsection 2(1) of the *Act* defines the term “collective agreement” as follows:

. . .

> *"collective agreement" means an agreement in writing, entered into under Part 1 between the employer and a bargaining agent, containing provisions respecting terms and conditions of employment and related matters.*

. . .

[18] The agreement that the grievor seeks to enforce was clearly not a “collective agreement” within the meaning given that term by the *Act*. Although the agreement did involve a term and condition of employment, the record does not reveal that it was ever reduced to writing. Even more critically, the bargaining agent was not a party to the agreement, nor is there any evidence that the employer and the bargaining agent ever supplemented, altered or varied the collective agreement that was in place for purposes related to the hiring of the grievor. The commitment to pay the grievor at the middle rate of the CO-02 pay scale was incontestably a private agreement.

[19] On its own, a violation of a private agreement cannot form the basis for a valid reference to adjudication under paragraph 209(1)(*a*) of the *Act*. To establish a basis for jurisdiction under paragraph 209(1)(*a*), the grievor must at minimum establish a *prima facie* case that the grievance relates to the interpretation or application of a provision of a collective agreement or arbitral award.

[20] On that point, the grievor's representative asserts the following:

. . .

> *While the centre of the dispute is based on the verbal offer and acceptance between Mr. Jones and the Grievor, the Collective Agreement does come into play. A proper application of the Collective Agreement, and in particular, the pay scale, to the Grievor's situation, ought to have resulted in his salary being increased by one level to reflect the fact that the middle of the range had moved . . . .*
>
> *Application of the Collective Agreement was necessary in determining the pay of the Grievor in May 2005 and it is submitted that a proper application of the restructured pay scale would have resulted in Mr. Matear remaining at the middle of that scale. He ought to have been retroactively placed at what became the fifth step in the scale, instead of being essentially, downgraded to the new fourth step in the scale.*
>
> *Specifically, Article 45.02 provides that an employee is entitled to be paid for services rendered at "the pay specified in Appendix "A" for the classification of the position to which the employee is appointed..."*

. . .

[21] As I understand the situation from the undisputed facts in the parties' submissions, the grievor entered into an agreement with Industry Canada prior to becoming an employee that he would be paid at the middle rate of the CO-02 pay scale upon hiring. The employer made an official offer of employment to the grievor at an annual salary of $65 086. The grievor signed the offer to signify his acceptance and commenced employment on December 4, 2003. On that date, $65 086 was the fifth or middle step of a nine-step pay scale for the CO-02 level under the terms then in effect of a collective agreement that had expired on June 21, 2003. On May 24, 2005, one-and-a-half years after the grievor began work, the parties signed a replacement collective agreement that incorporated the terms of an arbitral award dated

April 11, 2005. Some of the terms of the award, specifically those relating to pay, were retroactively applied to June 22, 2003. Part of the new pay regime involved a restructuring of pay scales. Under the restructuring, the existing minimum step of the CO-02 pay scale was eliminated effective June 22, 2003, and a new maximum step was added on the same date. The result remained a nine-step pay scale for the CO-02 level but $65 086 became the fourth step in the CO-02 range, one below the fifth or new middle step, $67 894. All steps in the scale were then adjusted by an economic increase also effective June 22, 2003. The rate $65 086 became $66 713 and $67 894 became $69 591.

[22] According to the grievor's representative, ". . . a proper application of the collective agreement . . . ought to have resulted in [the grievor's] salary being increased by one level to reflect the fact that the middle of the range had moved [emphasis added]." A proper application of the pay restructuring ". . . would have resulted in Mr. Matear remaining at the middle of that scale." The direct inference is that paying the grievor under the new collective agreement at the fourth step of the C0-02 scale rather than the fifth was a misapplication of the collective agreement.

[23] Has the grievor's representative made a *prima facie* case here that the alleged breach of the private agreement to pay the grievor upon hiring at the middle rate of the C0-02 scale is related to the interpretation or application of a provision of the collective agreement and thus within the authority of an adjudicator? If so, how is that breach related to a provision of the collective agreement?

[24] Pay Note 5 (Appendix "A") of the collective agreement specifically governed the administration of the scale restructuring:

> *5. Restructure Administration*
>
> *(1) Employees who have been at the maximum rate of pay for their level for twelve (12) months or more on June 22, 2003, will move to the new maximum rate of pay effective June 22, 2003.*
>
> *(2) Employees who were at the 1st step of the pay range, on June 22, 2003 will move to the next higher rate of pay on June 22, 2003. The anniversary date remains unchanged.*

[25] Nothing in Pay Note 5 addressed the situation of employees paid at rates other than the maximum or minimum within the restructured C0-02 pay scale. It governed

only the case of employees paid at the top rate for their level for 12 months or more as of June 22, 2003, and those paid at the lowest rate or "1st step", neither of which covers the grievor's status.

[26] In the absence of any other specific provision about the scale restructuring, the general rule expressed in Pay Note 1 must have applied:

> *1. An employee . . . shall, on the relevant effective date of adjustments to rates of pay, be paid in the new scale of rates at the rate shown immediately below the employee's former rate, except that where an employee, during the retroactive period, was paid on initial appointment at a rate of pay above the minimum, or was promoted or transferred and paid at a rate of pay above the rates specified by the regulations for promotion or transfer, the employee shall be paid in the new scale of rates at the rate of pay nearest to but not less than the rate of pay at which the employee was appointed and, at the discretion of the Deputy Head, may be paid at any rate up to and including the rate shown immediately below the rate the employee was receiving.*

[27] The grievor's representative did not refer explicitly to Pay Note 1 in her argument.

[28] The only provision of the collective agreement specifically cited by the grievor's representative was clause 45.02:

> ***45.02*** *An employee is entitled to be paid for services rendered at:*
>
> *(a) the pay specified in Appendix "A" for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment,*
>
> *or*
>
> *(b) the pay specified in Appendix "A" for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.*

[29] In my view, the grievance does not plausibly relate to the interpretation or application of clause 45.02 of the collective agreement. That provision stipulates that an employee must be paid in the pay scale that coincides with his or her classification; that is to say, an employee whose position was classified at the CO-02 level must have

been paid in the CO-02 scale of rates in Appendix "A". It does not regulate where an employee should be paid within the range. The dispute cannot hinge on clause 45.02.

[30] Absent a specifically claimed connection to any other provision of the collective agreement, the crux of the grievor's argument, I believe, must bring us back to Pay Note 1. While not explicitly referenced by the grievor's representative in her submissions, Pay Note 1 is implicitly invoked, albeit in a somewhat different way.

[31] Parenthetically, Pay Note 1 does appear to identify as an exception to the normal rule for administering the scale restructuring the situation of an employee paid on initial appointment during the retroactive period above the minimum rate of pay. The grievor, however, did not take the position that his situation was exceptional within the meaning of Pay Note 1 in his original grievance nor has his representative made any argument to that effect before me.

[32] At first glance at least, a plain reading of Pay Note 1 suggests that the parties intended that an employee compensated at the CO-02 rate of $65 086 in the "From" line of Appendix "A" was to be paid on restructuring at $65 086 in the "X" line, the rate immediately below, and then at $66 713 in the "A" line (economic increase), again the rate immediately below:

From:	…	59477	62286	**65086**	67894	70694	…
X:	…	59477	62286	**65086**	67894	70694	…
A:	…	60964	63843	**66713**	69591	72461	…

That is, in fact, the outcome that the grievor challenges.

[33] The grievor's representative states that, ". . . [o]nce the rates were restructured, the employer applied the Collective Agreement and rates of pay provisions therein, to the Grievor's salary level at the time, based on the initial starting salary of $65, 086, instead of the new restructured "middle" salary of $69, 591." I take it that the grievor's underlying position is that the employer should <u>not</u> apply the normal pay restructuring rule in Pay Note 1 of the collective agreement. The grievor's claim, in effect, is that the intent of the private agreement supersedes what may arguably be the normal interpretation of Pay Note 1. Following the grievor's position, the employer should have first paid the grievor at the new middle of the CO-02 pay scale ($67 894)

in the "X" line retroactive to his hiring date and only then implemented the economic increase in the "A" line resulting in a final rate of $69 591:

From:	… 59477 62286 **65086** 67894 70694 …
X:	… 59477 62286 65086 **67894** 70694 …
A:	… 60964 63843 66713 **69591** 72461 …

[34] Here, the grievor's representative invokes the doctrine of estoppel. Estoppel is necessary to her case because the grievor does not want the collective agreement to apply as written:

. . .

> *The estoppel argument applies to prevent the Employer from relying on the strict terms of the Agreement, which, if starting with the base salary as monetary figure, would result in the reality of what occurred here; the Grievor was downgraded to one step below the middle of the scale. The Grievor is claiming that due to the promise to pay him at the middle, that was relied upon by him, to his detriment, the Employer is estopped from making this interpretation of the Collective Agreement. The estoppel argument necessarily implies that the Collective Agreement is involved.*

. . .

[35] The logic of the grievor's submission is that an adjudicator can accept jurisdiction because the source of the problem was the employer's application of a provision of the arbitral ward/collective agreement to the grievor's situation. In the words of the grievor's representative, ". . . [t]he estoppel argument necessarily implies that the Collective Agreement is involved." By applying its terms, the employer gave rise to a problematic result that was necessarily related to ". . . the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award . . ." thereby engaging paragraph 209(1)(*a*) of the *Act*.

[36] The foregoing analysis leads me to refine the jurisdictional issue before me: is the grievance "related to" the interpretation or application of a provision of the collective agreement within the meaning of subparagraph 209(1)(*a*) of the *Act* even though the grievor's representative actually contends that the employer should be

estopped from applying the collective agreement and instead enforce a private agreement to a different effect?

[37] In coming to pose the jurisdictional issue in that fashion, I note that I do not subscribe to the employer's position that the real subject matter of the grievance was the Treasury Board policy on pay above the minimum on appointment, an authority outside an adjudicator's jurisdiction according to counsel for the employer. In my opinion, whether the employer correctly applied that policy when it entered enter into the agreement to pay the grievor at the middle rate is not really the question. To that extent, I agree with the grievor's representative when she stated that ". . . the policy will not assist in determining this dispute."

[38] Nor does *Evans et al.*, argued by the employer's representative, greatly assist me in determining the jurisdictional question that I have posed. In *Evans et al.*, the adjudicator could not find a provision of the collective agreement more than "remotely relevant" to the grievance before him. That is not the case here. The application of Pay Note 1 clearly plays a role in understanding the pay outcome to which the grievor objects.

[39] *Weber* and *Cherrier*, cited by the employer's representative, indicate that it is important to inquire into the intent behind a grievance when assessing jurisdiction. The reason for that inquiry in *Weber* related to the appropriateness of the labour arbitration process for determining the issue posed in the case as opposed to submitting it to the courts. In *Cherrier*, the issue was an adjudicator's jurisdiction to consider a case involving discrimination given the availability under the *Canadian Human Rights Act* of "another administrative process for redress" within the meaning of section 91 of the (then) *Public Service Staff Relations Act*. Neither purpose directly applies here. While it is nonetheless plainly important in this case that I understand the intent behind the grievance, in the general sense indicated by *Weber*, I do not believe that that requirement absolves me of the duty to inquire further about the application of the *Act* by determining whether the grievance is "related to" the interpretation or application of a provision of the collective agreement within the meaning of subparagraph 209(1)(*a*).

[40] What do the words "related to" in subparagraph 209(1)(*a*) of the *Act* mean? In the absence of clear statutory guidance on this point, I believe that the expression should be given its plain and ordinary meaning. *The New Shorter Oxford Dictionary*,

1993 edition, Clarendon Press, Oxford, defines "related" as "hav[ing] some connection with, be connected . . . ." The same authority defines a "connection" as a "causal or logical relationship or association, (an) interdependence . . . ." *The Canadian Oxford Dictionary*, 2nd ed., Oxford University Press, Toronto, 2004, refers to something as "related" when it is "associated." *Merriam-Webster's Collegiate Dictionary*, 4th ed., Merriam-Webster, Springfield, Massachusetts, 2004, indicates that something is "related" if it is "connected by reason of an established or discoverable relation."

[41] In the sense attributed to the term by the foregoing authorities, it would seem that, if a grievance has an association with, is connected to, or bears relation to a provision of a collective agreement or arbitral award, then it can be said to be "related to" that provision of the collective agreement or arbitral award.

[42] Let me assume for the moment that the intent of the grievance at issue is best described as requiring the employer to honour the private pre-hiring agreement between the grievor and the employer concerning the grievor's rate of pay on appointment. That depiction tends to have the effect of distancing the primary dispute from the collective agreement. Nonetheless, in my view, the interpretation or application of Pay Note 1 necessarily comes into play even when the intent of the grievance is so described. It was ultimately the employer's administration of the pay scale restructuring under Pay Note 1 that caused the grievor to feel aggrieved. Whether the grievor was correct in feeling aggrieved — or whether there is any basis to his contention that the employer must respect its promise to him by reason of estoppel or otherwise — it was ultimately the employer's application of Pay Note 1 to the grievor's specific situation that revealed the problem. There is a connection or association. In that sense, the intent of the grievance to enforce the private agreement does relate to the interpretation or application of Pay Note 1 of the collective agreement. The relationship is not "remote" in the sense found in *Evans*. It appears to me to be more direct and substantial.

[43] That said, it is possible to describe the intent of the grievance in a different manner that draws the link to the collective agreement more clearly. The intent of a grievance is intimately linked to what it seeks to achieve. Rather than depicting the intent of the grievance in this case as seeking to enforce a private agreement — a means to an objective but not the objective itself — posit instead that its real purpose is to require the employer to pay the grievor retroactively at a different rate of pay

upon scale restructuring by incorporating into the administration of Pay Note 1 consideration of the hiring promise made by the employer concerning the grievor's rate of pay on appointment. Recast in that fashion, the connection between the intent of the grievance and the collective agreement is more apparent. Its intent is to secure a different administration of the pay scale restructuring mandated by the collective agreement, and specifically by Pay Note 1, in the particular circumstances experienced by the grievor.

[44] Under either description of the intent of the grievance, I conclude that I am unable to allow the employer's jurisdictional objection. I find that there is in the submissions of the grievor's representative a *prima facie* connection between the intent of the grievance and a provision of the applicable collective agreement. In that respect, I find that the grievance relates to the interpretation or application of a provision of the collective agreement within the meaning of subparagraph 209(1)(*a*) of the *Act*.

[45] These reasons for decisions are limited to the issue of jurisdiction. The grievor's representative has raised an estoppel argument in support of her contention that the employer must pay the grievor a different rate of pay. The employer's representative has replied to that argument. One or both parties may wish to adduce other evidence or make further submissions regarding the estoppel argument or otherwise regarding the interpretation or application of the collective agreement. Unless the parties agree that there is no need for further evidence and inform the Board's Registry that they will rely on the written submissions made to date, I believe that it is appropriate to convene a hearing on the merits of the grievance. Alternatively, the parties may request that a decision be made solely on the basis of further written submissions.

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

(The Order appears on the next page)

IV. Order

[47] The objection to jurisdiction is dismissed.

[48] The Board's Director of Registry Operations and Policy will schedule a hearing for the grievance on its merits in consultation with the representatives of the parties unless the parties request, and the adjudicator accepts, to proceed on the basis of the written submissions already made or on the basis of further written submissions to be made.

February 18, 2008.

Dan Butler,
adjudicator