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File: 566-02-450

Citation: 2009 PSLRB 97

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JAMIE MATEAR

Grievor

and

TREASURY BOARD
(Department of Indian and Northern Affairs)

Employer

Indexed as
Matear v. Treasury Board (Department of Indian and Northern Affairs)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Dan Rafferty, Professional Institute of the Public Service of Canada

For the Employer: Isabel Blanchard, counsel

Heard at Toronto, Ontario,
June 16, 2009.

I. Individual grievance referred to adjudication

[1] Jamie Matear ("the grievor") was hired in 2003 by Industry Canada from outside the public service to a position classified at the CO-02 level in the Aboriginal Business Canada (ABC) section in Toronto. The ABC section became part of Indian and Northern Affairs Canada (INAC) in December 2006.

[2] When an arbitral award retroactively restructured the CO-02 pay scale 18 months after he was hired, the grievor expected his employer to honour an alleged pre-hiring promise to pay him at the scale's middle rate. When the employer applied the restructuring rules of the collective agreement with a different result, the grievor tried unsuccessfully to convince the employer to keep that promise.

[3] In this decision, I consider the grievor's argument that the employer should be estopped from applying the strict scale restructuring rules of the collective agreement and that it should instead be required to readjust his starting salary in keeping with the employer's alleged promise at the time that the grievor accepted the job offer to pay him at the middle rate of the CO-02 pay scale.

[4] On March 30, 2006, the grievor filed a grievance that reads 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.*

. . .

[5] Following Industry Canada's final-level reply dated June 23, 2006 denying his grievance, the grievor referred it to the Public Service Labour Relations 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 the Treasury Board ("the employer") and the bargaining agent for the Audit, Commerce and Purchasing Group (AV) that expired June 21, 2007 ("the collective agreement") (Exhibit G-1).

[6] In *Matear v. Treasury Board (Department of Industry)*, 2008 PSRLB 11, I dismissed an objection by the employer that an adjudicator lacks jurisdiction under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*") to consider the grievance. Based on written submissions received from the parties, I ruled that there was a *prima facie* connection between the intent of the grievance and a provision of the applicable collective agreement and that, therefore, the grievance related to the interpretation or application of a provision of the collective agreement within the meaning of paragraph 209(1)(*a*) of the *Act*.

[7] I ordered that a hearing be scheduled on the merits of the grievance unless the parties advised me that they wished to continue to proceed on the basis of written submissions. The parties did not so advise.

II. Summary of the evidence

[8] During the summer of 2003, the grievor learned from a friend employed in the ABC section in Toronto that Industry Canada had opened a national competition to fill CO-02 development officer positions in a number of locations across the country, including Toronto. The grievor applied, wrote a qualifying examination and then attended an interview. He stated that he was aware at that time through his friend that the position was unionized and that the collective agreement had expired.

[9] The grievor was successful in the selection process and received a letter of offer dated November 21, 2003 (Exhibit G-3). The letter of offer outlined the salary range for the CO-02 level ($53,865 to $76,311) and proposed $65,086 as the grievor's rate of pay on appointment. The grievor testified that he was disappointed with the salary offer

because he felt that his educational qualifications and relevant work experience justified a higher rate of pay.

[10] The grievor recounted that he contacted and then met with Peter Jones, a member of the interview panel and his prospective manager, to discuss his concerns about the salary offer. Mr. Jones explained that a comparison of the grievor's education and experience with the education and experience of approximately twelve other development officers hired by the employer was the basis for offering him a salary in the middle of the CO-02 pay range. The grievor asked Mr. Jones if he would review the offer with his superiors. Mr. Jones agreed and used a document provided by the grievor in subsequent discussions with his principals.

[11] When the grievor followed up with Mr. Jones on December 3 or 4, 2003, he was disappointed to learn that the department was standing by its salary offer. The grievor nonetheless decided to accept the position, taking into account that a new collective agreement would likely produce "some increment" to his rate of pay. He signed the letter of offer and started work. He informed another prospective employer — an investment research house in Toronto — that he had decided to join Industry Canada.

[12] The grievor stated that the phrase that Mr. Jones always used to describe the salary offer was that it was the "middle of the pay scale." He reported that Mr. Jones also said in a conversation that he assumed that the grievor would attain the maximum of the pay range within five years.

[13] The grievor learned about the details of the June 2005 arbitral award for the AV Group through a letter circulated to staff. In addition to annual pay increases applied retroactively, the award added a new step to the top of the CO-02 pay range and deleted the bottom step, both effective June 22, 2003, before the grievor's hiring. Before and after the restructuring, the CO-02 pay scale was composed of nine steps.

[14] The grievor recalled that he was initially pleased by the news but that, when the pay scale restructuring was implemented, he noticed that his position in the pay range remained unchanged — equivalent to the fifth step in the old CO-02 pay scale, which had become the fourth step in the new CO-02 range. He felt that he was one step behind where he should have been; that is, at the fifth or middle step of the new CO-02 pay scale. His subsequent protracted efforts to convince the employer to correct the situation did not succeed. As explained to him in a March 27, 2006 letter from

Rosemary Maggio, a human resources advisor with Industry Canada, his salary conformed with what was required by Pay Note 1 of the new collective agreement (Exhibit E-4).

[15] The grievor reiterated that he understood when he was hired that Mr. Jones had considered his education and experience compared to others and had committed to paying him in the middle of the group. He understood that the middle of the pay range would always be his starting point.

[16] The grievor testified that he left the public service on October 31, 2008. By that time, he estimated that his loss arising from the employer's failure to keep its promise amounted to just over $16,000.

[17] In cross-examination, the grievor stated that he did not discuss the actual salary "number" ($65,086) with Mr. Jones. He reconfirmed that Mr. Jones had explained that the salary offer was in the middle of the CO-02 range because of the comparison of his education and experience to the education and experience of other employees. The grievor agreed that they did not talk about the outstanding collective agreement and that he did not know at that time about the possibility of pay scale restructuring.

[18] When asked specifically whether Mr. Jones had made a promise that the grievor would remain at the fifth step of the pay scale in the event of pay scale restructuring, the grievor answered that their discussion had not gone into that level of detail.

[19] The grievor confirmed that he received annual increments and pay revisions during his employment in the department and that he left it in 2008 at a pay rate above the middle of the CO-02 pay range.

[20] Mr. Jones appeared as the employer's first witness. He described the selection process that resulted in the offer of employment to the grievor. He indicated that he and the other panel members interviewed six or seven persons for development officer positions in the Ontario region and ultimately chose three, two from outside the public service and one internal candidate. The starting salary offered to the internal candidate was determined using the employer's standard guidelines for pay on internal promotion. For the two external candidates, the employer compared their education and experience to the qualifications of other CO-02 development officers and concluded that the average salary for comparably qualified employees fell in the range

of $63,000 to $65,000. While the employer's policy recommended appointing external applicants at the minimum of the salary range, Mr. Jones recognized the need for consistency and recommended a salary offer of $65,086 — the step in the CO-02 pay scale closest to the $63,000 to $65,000 range. The employer offered a position to the grievor on that basis.

[21] Mr. Jones recalled that the grievor contacted him and requested a review of the salary offer. Mr. Jones asked the grievor to email him a rationale for a higher starting salary. After reviewing the grievor's submission, Mr. Jones discussed the issue with his director and with the human resources coordinator, both of whom supported Mr. Jones' evaluation that the information submitted by the grievor did not justify a higher offer.

[22] Mr. Jones testified that he did not discuss how the employer determined the precise salary offer with the grievor before sending him the job offer. He did recall telling the grievor that he would receive a rate of pay around the middle of the CO-02 pay range when asked about the effect of the offer. At that time, Mr. Jones did not realize that the collective agreement had expired.

[23] Mr. Jones denied promising the grievor that the grievor would always remain at the middle of the CO-02 range. He indicated that he would not have made that promise because he could not have known what would happen in the future under the collective agreement.

[24] Mr. Jones confirmed the accuracy of Ms. Maggio's March 27, 2006 account of the employer's position and what had transpired regarding the salary offer to the grievor (Exhibit E-4).

[25] In cross-examination, Mr. Jones testified that he provided the grievor with his rationale for finding that a salary of $63,000 to $65,000 was appropriate when the grievor contacted him. He told the grievor that he had surveyed other employees and found on that basis that he should be placed around the middle of the CO-02 range. Looking at the specific salaries in the collective agreement, there was no step at around $63,000, leaving him to recommend $65,086 as the closest step. He recalled using words in his conversation with the grievor to the effect that ". . . it will start you around the middle of the range."

[26] In further cross-examination, the grievor pressed Mr. Jones as to whether he believed that $66,713 — the step in the restructured CO-02 pay scale immediately below $65,086 — was in the middle of the range. He answered that $66,713 seemed pretty close to the middle. Challenged by the grievor that the middle of the new range was instead $69,591, Mr. Jones agreed that $69,591 was around the middle.

[27] Two other Industry Canada witnesses appeared for the employer: Lisa Lovis, Manager, Compensation and Benefits, Ontario Region, and Ms. Maggio, Senior Human Resources Advisor.

[28] Ms. Lovis described the implementation of the pay scale restructuring using Pay Note 1 of the collective agreement (Exhibit G-1). For employees at steps 2 through 8 of the previous CO-02 scale, the "straight down rule" automatically applied. It applied as well to employees at the ninth or maximum step of the old pay range unless they had received that salary for 12 months or more, in which case they moved to the newly added step. Step 1 of the previous collective agreement was dropped. Employees continued to receive annual increments until they reached the maximum of the range.

[29] Ms. Maggio confirmed her role in providing the explanation of the department's position to the grievor in her letter of March 27, 2006 (Exhibit E-4).

III. Summary of the arguments

A. For the grievor

[30] The grievor submitted that I must decide whether the employer should be permitted to withdraw from the representation that it made to the grievor at the time of hiring that his salary would be "in the middle" of the CO-02 salary range or whether it is required by the doctrine of promissory estoppel to honour that promise in the context of the restructured salary range that resulted from the arbitral award.

[31] The grievor cited the following definitions of estoppel taken from two leading British cases each of which was decided by Lord Denning. In 1951, when he was Justice of Appeal, he wrote the following in the seminal decision of *Combe v. Combe*, [1951] 1 All E.R. 767:

. . .

> *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.*

. . .

In 1981, as Master of the Rolls, he wrote the following in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce Int'l Bank Ltd.*, [1981] 3 All E.R. 577:

> *The doctrine of estoppel is one of the most flexible and useful in the armoury of the law ... At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*

. . .

[32] The grievor outlined the basic elements of estoppel identified in Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., 2:2211, as follows:

> *1) a clear and unequivocal representation, made by words or conduct*
>
> *2) intended to be relied upon by the party to whom it was directed*
>
> *3) some reliance in the form of some action or inaction*
>
> *4) detriment resulting therefrom*

[33] According to the grievor, the facts of the case demonstrate that the doctrine of estoppel does apply and that it operates to require the employer to maintain the grievor's starting salary at the middle of the restructured CO-02 range; that is, at the fifth of the nine steps in the new pay scale effective on June 22, 2003 ($67,894, which became $69,591 after a 2.5 percent annual increase was applied), as opposed to the fourth step of nine in the new pay scale ($65,086, which became $66,713 after the annual increase). In the new and restructured scale, only the amount at the new fifth step would accomplish the objective of providing a salary "around the middle" or "in the middle." By contrast, the new rate at which the grievor was placed as a result of Pay Note 1 of the collective agreement was $14,380 from the top and $8,623 from the bottom, hardly "around the middle" and definitely not "in the middle."

1. Clear and unequivocal representation

[34] The grievor submitted that Mr. Jones made a clear and unequivocal representation to the grievor. He confirmed to the grievor that the department had decided that his rate of pay should be "around the middle" of the CO-02 range of rates, according to his testimony, or "in the middle" of the CO-02 range of rates according to the grievor's testimony — the reason for offering him $65,086. The representation was thus expressed both in words through the explanation given to the grievor and through the employer's subsequent conduct in placing him at the fifth step of the (then-expired) CO-02 nine-step pay scale.

2. Intended to be relied upon

[35] Mr. Jones intended that the grievor rely on the representation. Mr. Jones must have known that the grievor was in the process of deciding whether to accept Industry Canada's offer of employment. Given the grievor's attempts to persuade him that he should receive a salary higher than $65,086, Mr. Jones could not have spoken idly when he promised the grievor a salary in the middle of the CO-02 range.

3. Reliance

[36] The grievor relied on Mr. Jones' explanation that the grievor's education and experience merited a salary in the middle of the range. He relied on Mr. Jones' promise that he would be paid in the middle of the range, stopped his efforts to negotiate a higher salary and ended his discussions with another potential employer. He also

relied on the fact that Mr. Jones' representation would be carried over into the new collective agreement once it was settled.

4. <u>Detriment</u>

[37] As a consequence of the application of Pay Note 1 of the collective agreement, the grievor in the end fell to the fourth step of the CO-02 scale of rates retroactive to his date of hire, losing the promised salary "in the middle" of the range.

[38] Therefore, the grievor submitted that all the required elements for an estoppel applied.

[39] The grievor accepts that the employer's application of the "straight down" rule under Pay Note 1 of the collective agreement would be correct in ordinary circumstances. All employees would normally be bound by Pay Note 1. The exception is, as in this case, a situation where individual circumstances give rise to an estoppel. The grievor accepted the offer of employment at $65,086 in December 2003. That salary was, for all intents and purposes, a stand-in for the amount that would later be substituted retroactively by the arbitral award. Once the new rates were established, they were the only true and valid salaries for the bargaining unit. To consistently apply its decision to place the grievor in the middle of the pay range, the employer had to ensure that the grievor's new salary level was at the same step in the new pay scale as was the "holdover" from the old collective agreement. The purpose of the doctrine of estoppel in this type of case is to permit an exception to the strict application of a provision of the collective agreement that would otherwise frustrate the promise or representation that the employer made to the grievor. Applying the doctrine of estoppel permits the waiver of Pay Note 1 for him and for him alone.

[40] The grievor referred me to several decisions illustrating the application of the doctrine of estoppel that he maintained were relevant to his case: *Vancouver v. Canadian Union of Public Employees, Local 15*, [2000] B.C.C.A.A.A. No. 148 (QL); *Grey Bruce Regional Health Centre v. O.P.S.E.U., Local 235* (1993), 35 L.A.C. (4th) 136; *Toronto (City) v. C.U.P.E., Local 79* (2002), 110 L.A.C. (4th) 1; *Pacific Press Ltd. v. Vancouver - New Westminster Newspaper Guild, Local 115* (1987), 31 L.A.C. (3d) 411; and *Molbak v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-26472 (19950928).

B. For the employer

[41] The employer submitted that the issue in this case is simple: Has the grievor established the application of the doctrine of promissory estoppel in the circumstances of his case?

[42] According to the employer, it is the grievor's burden to prove the estoppel: *Ellement v. Treasury Board (Public Works and Government Services Canada)*, PSSRB File No. 166-02-27688 (19970611), at para 35.

[43] The Supreme Court of Canada set out the doctrine of estoppel in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, at page 57, as follows:

> ***13.*** *The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In* John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:*
>
> > *It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.*
>
> *This passage was cited with approval by McIntyre J. in* Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.*

See also Brown and Beatty, as cited by the grievor.

[44] The employer submitted that the grievor must prove that a clear and unambiguous promise was made and that he relied on the promise to his detriment. If the grievor fails to prove either element, the doctrine of promissory estoppel does not apply: *Long v. Canada (Treasury Board)*, [1990] 1 F.C. 3 (no promise); and *Ménard v. Canada*, [1992] 3 F.C. 521(C.A.) (no detriment).

[45] Mr. Jones explained that he determined the compensation for both persons hired from outside the public service to CO-02 development officer positions in his region based on their experience and education. He surveyed the salaries of other employees and found that an offer in the range of $63,000 to $65,000 would be appropriate. He looked at the collective agreement and found that the only rate in that range was $65,086. He made the offer to the grievor on that basis.

[46] The employer noted that the grievor confirmed in his testimony that Mr. Jones said that the salary offer resulted from a comparison to other employees and that it would place him in the middle of the salary range. The grievor also confirmed that they did not discuss a new collective agreement and that neither he nor Mr. Jones was aware that a new collective agreement would change the steps in the pay scale. The grievor conceded that Mr. Jones never promised that the grievor would remain in the middle of the pay scale.

[47] The employer drew particular attention to Mr. Jones' testimony that his reference to "around the middle of the pay scale" arose in response to a question from the grievor as to where the salary offer would put him in the pay scale.

[48] The foregoing evidence proves that there was no clear and unambiguous promise to the effect that the grievor's salary would remain at the middle of the CO-02 pay scale. The discussion between the grievor and Mr. Jones related only to the letter of offer and to the salary offer of $65,086. The letter itself was clear (Exhibit G-3). The employer offered a specific salary, not a range or a level or step within the pay scale.

[49] The employer also contended that there was no evidence that the grievor relied on the alleged promise to his detriment. With respect to his pursuit of employment with another employer at the time of hiring, the grievor accepted a clear letter of offer and contacted his other prospective employer and stated that he was no longer interested in that option. After joining the department, he continued to benefit from annual pay increments and pay revisions as a result of the collective agreement. He left the public service in 2008 at a salary above the middle of the range.

[50] With no clear and unambiguous promise and no detriment, the grievance should be dismissed.

[51] During argument, the employer also referred me to the following decisions: *Hicks v. Treasury Board (Human Resources Development Canada)*, PSSRB File No. 166-02-27345 (19970425); *Bolton v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 39; and *Jefferies et al. v. Canadian Food Inspection Agency*, 2003 PSSRB 55.

C. Grievor's rebuttal

[52] The grievor submitted that the distinction between his testimony that Mr. Jones promised a salary "in the middle" of the pay range and Mr. Jones' evidence that he referred to a salary "around the middle" of the pay range is not an important difference.

[53] All the case law holds that the application of the doctrine of estoppel depends on the specific facts of each case. Each of the decisions cited by the employer can be distinguished on its facts. For example, the situation examined in *Hicks* may resemble this case in some ways, but it remains factually distinct. Mr. Hicks was an employee who worked in the public service when he accepted a promotion, which was not the case with the grievor. It was the particular facts of the situation that the adjudicator examined in *Hicks* that led him to find that there was no detrimental reliance. As a result, its conclusion does not apply to the different fact situation in the grievor's case.

[54] The grievor concluded that he was content to rest on the evidence that he gave and on his main arguments.

IV. Reasons

[55] Were it the case that Pay Note 1 of the collective agreement strictly applied, the grievor would accept that the employer correctly determined his salary in the restructured CO-02 pay scale. Pay Note 1 did not apply, according to the grievor, because the employer made a pre-hiring promise that required it to depart from a strict adherence to the collective agreement.

[56] Pay Note 1 of Appendix A of the collective agreement reads as follows:

> *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.*
>
> . . .

[57] Under the "straight down" rule expressed in Pay Note 1 of the collective agreement and applied by the employer in the grievor's case, an employee compensated at the CO-02 rate of $65,086 in the "From" line of Appendix A was paid, on restructuring, at $65,086 in the "X" line (restructured rates), the rate immediately below, and then at $66,713 in the "A" line (after the application of the 2.5 percent economic increase), again the rate immediately below. Both the "X" line and the "A" line had retroactive effect to June 22, 2003. The following depicts that application of Pay Note 1 in the grievor's case:

From: 53865 56673 59477 62286 ***65086*** *67894 70694 73507 76311*

X: 56673 59477 62286 ***65086*** *67894 70694 73507 76311 79115*

A: 58090 60964 63843 ***66713*** *69591 72461 75345 78219 81093*

[Emphasis added]

[58] As shown above, the rate of pay of $65,086 was the fifth of nine steps in the "From" line and the fourth of nine steps in the "X" and "A" lines. The grievor claims that his regression from the fifth step to the fourth step of the scale violated what Mr. Jones had promised him. I note that there is no apparent dispute between the parties that the "straight down" rule does apply in the transition from the "X" line to the "A" line. The dispute solely concerns the appropriate identification of the grievor's rate of pay in the "X" line given his salary on appointment of $65,086 in the "From" line.

[59] According to the grievor, the employer should have respected its pre-hiring promise and paid the grievor at $67,894, the new middle rate or fifth step in the "X" line, illustrated as follows:

From: 53865 56673 59477 62286 ***65086*** *67894 70694 73507 76311*

X: 56673 59477 62286 65086 ***67894*** *70694 73507 76311 79115*

A: 58090 60964 63843 66713 ***69591*** *72461 75345 78219 81093*

[Emphasis added]

[60] The parties substantially agree on what the grievor must prove to establish that the doctrine of promissory estoppel applies in this case. I accept the employer's formulation of the two central elements of the test; that is, that the grievor must prove both that the employer made a clear and unambiguous promise to the grievor to pay him at the middle rate of the CO-02 pay scale and also that the grievor relied on that promise to his detriment. If the grievor does not prove both elements, the doctrine of promissory estoppel does not apply, and the employer's application of Pay Note 1 of the collective agreement must stand. The applicable standard of proof is the normal civil threshold, "on the balance of probabilities."

[61] There is certainly no doubt that the letter of offer to the grievor (Exhibit G-3) was clear, as argued by the employer. The employer proposed $65,086 to the grievor as his starting salary without stating any other modifying condition. There is no mention in the letter that the rate offered by the employer comprised the "middle of the range" or its "fifth step." There is also no reference to any future modification of that rate under a new collective agreement, let alone a statement that could plausibly be interpreted as conveying a clear promise that the grievor would continue to be paid at the middle of the range in future circumstances. I note as well that the grievor signed the letter without adding any conditions on his acceptance of the salary offer about the position of his salary in the CO-02 pay scale.

[62] That said, the letter of offer does not itself dispose of the possibility that the employer made a different or additional representation to the grievor before he was hired. Clear and unambiguous evidence that Mr. Jones, or someone else, orally promised the grievor that he would be paid "at the middle rate of pay" or at the fifth step of the pay scale as of his starting date of December 4, 2003 — whatever the middle or fifth step of the scale might turn out to be in the future — could potentially satisfy the first element required to set up an estoppel.

[63] In my view, the evidence given by Mr. Jones leads in a different direction. According to Mr. Jones, the critical factor in his decision setting a starting salary of $65,086 for the grievor was his finding that a range of $63,000 to $65,000 was appropriate based on a comparison of the grievor's education and experience with the education and experience of other CO-02 development officers. He testified that he selected the specific salary of $65,086 based on that finding and because it was the closest step in the pay scale to the desired range. To be sure, $65,086 was the fifth or middle step of the CO-02 range, but Mr. Jones depicted that result as a consequence of his concern about salary comparability, not as a promise made in and of itself. He specifically denied promising to pay the grievor at the middle of the range into the future. He also testified that he referred to "the middle of the range" in answer to a question from the grievor about the effect of the salary offer, a response that tends once more to cast the remark more as a description of the outcome than as a promise actually given to the grievor.

[64] For his part, the grievor testified that he and Mr. Jones did not talk about the actual salary "number" ($65,086). Asked in cross-examination whether Mr. Jones made a promise to the grievor about remaining at the fifth step of the pay scale, the grievor answered that their discussion ". . . had not gone into that level of detail." When the grievor confirmed that Mr. Jones explained to him that the salary offer was in the middle of the CO-02 range based on a comparison of education and experience, his testimony, in my opinion, supported Mr. Jones' recollection of their conversation rather than challenged it.

[65] The scale restructuring later ordered by the arbitral award was obviously unexpected. The grievor may have looked back at his conversations with Mr. Jones and at the letter of offer and concluded that they conveyed a continuing commitment to pay him at the middle step of the CO-02 range. Nonetheless, I do not find in his testimony the type of clear and unambiguous evidence that would be required to prove that commitment or to overcome the credible account given by Mr. Jones to a different effect. While I can accept that Mr. Jones might have said "at the middle of the range" as opposed to "around the middle of the range" as maintained by the grievor — if it were important to make such a finding — I am unable to go further. In my view, the better interpretation of the evidence of the two major witnesses is that Mr. Jones decided to pay the grievor in the range of $63,000 to $65,000 on hiring based on a comparison of education and experience, that he selected $65,086 as a result, that he explained his

rationale to the grievor, when asked, and that he made no other specific representation that could comprise a clear and unambiguous promise. Ms. Maggio's after-the-fact account of what occurred in her letter of March 27, 2006 (Exhibit E-4) serves to reinforce that view.

[66] Apart from the lack of evidence of a clear and unambiguous promise, the logic underlying the facts does not suggest that Mr. Jones would have promised the grievor the result that the latter seeks. As stated above, the undisputed evidence was that Mr. Jones based his explanation of the salary offer on the results of a survey that he conducted of salaries paid to other employees hired to CO-02 development officer positions with comparable education and work experience. That survey led him to decide on a starting rate in the $63,000 to $65,000 range. How, then, would Mr. Jones have justified a December 4, 2003 starting salary of $67,894 in the "X" line of the new collective agreement — had it been in place at that time — when that rate obviously did not coincide with the range that he concluded was appropriate? Placing the grievor at the $67,894 step on that date would have disturbed the very salary comparability that Mr. Jones identified as his reason for selecting the rate of $65,086 in the first place. The "straight down" rule in Pay Note 1 would have operated at that time to place other employees paid at $65,086 in the "From" line at $65,086 in the "X" line. Paid instead at $67,894 in the "X" line, the grievor would have received a benefit not available to other employees, moving him one step ahead of where Mr. Jones' comparability analysis suggested that he should have been placed. The evidence is clear that Mr. Jones did not think about the possibility of a future scale restructuring when he offered $65,086 to the grievor. Had he been able to foresee that possibility, is it likely that he would have discounted his concern about salary comparability with other employees and accepted that the grievor should receive exceptional treatment? I think not. In any event, estoppel requires not only that Mr. Jones turned his mind to the possibility, but also that he express a promise based on his conclusion, which he did not.

[67] In summary, I find that the grievor has not proven that the employer made a clear and unambiguous promise to pay him at the middle or fifth step of the restructured CO-02 range. More specifically, the grievor did not prove to my satisfaction that anything said to him by Mr. Jones can reasonably be interpreted as a clear and unambiguous representation that required the employer to pay the grievor at

$67,894 in the restructured "X" line of the new collective agreement rather than at $65,086 as stipulated by Pay Note 1.

[68] In the absence of proof by the grievor on a balance of probabilities that the employer made a clear and unambiguous promise, the doctrine of estoppel does not apply. Without a basis for applying the doctrine of promissory estoppel, the grievance must fail. As accepted by both parties, the employer otherwise implemented Pay Note 1 of the collective agreement correctly with respect to the grievor.

[69] I wish to note that I did not find it necessary to rely on the case law submitted by the parties, other that for confirmation of the elements of the doctrine of promissory estoppel. In my view, the decision in this case reflects the particular facts in evidence and need not rely on issues of law settled in other decisions.

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

(The Order appears on the next page)

V. Order

[71] The grievance is denied.

August 12, 2009.

Dan Butler,
adjudicator