Date: 20100823

File: 566-02-2899

Citation: **2010 PSLRB 93**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ANNE MURCHISON

Grievor

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan R. Quigley, adjudicator

For the Grievor: Dan Fisher, Public Service Alliance of Canada

For the Employer: Victoria Yankou, counsel

Heard at Toronto, Ontario,
May 7, 2010.

I. Individual grievance referred to adjudication

[1] Anne Murchison ("the grievor") is employed by the Department of Human Resources and Skills Development ("the employer") as a corporate service analyst at the AS-02 group and level in Toronto, Ontario.

[2] On January 10, 2008, she filed a grievance alleging that an administrative error, on the part of the employer, resulted in her receiving an overpayment of $11 564.85, which the employer proceeded to recover.

[3] On May 29, 2009, the grievor referred her grievance to adjudication and requested the following corrective action:

> 1. *No action be initiated to commence recovery of alleged overpayment as this would cause me financial hardship.*
>
> 2. *No action be initiated to commence recovery of alleged overpayment due to error on part of employer and debt to be forgiven.*
>
> [*Sic* throughout]

[4] Both parties made brief opening statements. The employer called one witness and filed six exhibits. The grievor testified and filed seven exhibits.

[5] The collective agreement in force when the grievance was filed was the agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services group, expiry date June 20, 2007 ("the collective agreement") (Exhibit G-1).

II. Summary of the evidence

A. For the grievor

[6] The grievor testified that she began her career in 1974 with the employer at the CR-04 group and level. In 1991, the grievor went on maternity leave, and in 1993, she retired. In 1999, the grievor returned to work for the employer in a part-time position at the CR-04 group and level. In 2000, the grievor secured an indeterminate position at the CR-04 group and level. In 2006, she secured a position as a corporate service analyst at the AS-02 group and level.

[7] The grievor testified that, in 2002, on review of her annual leave credit statement provided by the employer, she noticed that she was credited for five weeks

of annual leave. The grievor stated that she believed that she was entitled to only four weeks of annual leave and that there may have been an error in the employer's calculation. The grievor immediately approached Julia Llano-Rodriguez, her supervisor, to enquire if she was truly entitled to five weeks, explaining that when she retired in 1993 she had taken her pension entitlements and severance pay. Ms. Llano-Rodriguez met with Karen Hunt, Compensation Advisor, to inform her of the grievor's concerns. The grievor met with Ms. Hunt and Pat Russell, Head of Compensation, on several occasions and was assured that she was entitled to five weeks of annual leave on a yearly basis.

[8] On December 27, 2007, the grievor received a letter from Nadine Bennett, Compensation Advisor, advising her that, as a result of a regional file review project, it was discovered that she had received an over credit of 521.175 hours of annual leave, which resulted in a salary overpayment of $11 564.85 (Exhibit G-6(a)).

[9] The grievor was referred by her bargaining agent representative to Exhibit G-6(b), which contains the employer's calculation of her original annual leave record and her revised annual leave record, and which is reproduced below:

Original Annual Leave Record

Year	*Previous hours*	*Original Credit*	*Debit leave utilized*	*Balance hours*
2000/01	*0*	*187.5*	*67.5*	*120*
2001/02	*120*	*187.5*	*287.5*	*20*
2002/03	*20*	*188.1*	*200.5*	*7.6*
2003/04	*7.6*	*188.1*	*89*	*106.7*
2004/05	*106.7*	*188.1*	*294*	*0.8*
2005/06	*0.8*	*187.5*	*186*	*2.3*
2006/07	*2.3*	*187.5*	*189*	*0.8*
2007/08	*0.8*	*187.5*	*153.5*	*34.8*
Original		*1501.8*	*1467*	

Revised Annual Leave Record

Year	*Previous hours*	*Original Credit*	*Debit leave utilized*	*Cumulative Balance*	*Salary April/substantive*	*Dollar Value*
2000/01	*0*	*112.5*	*67.5*	*45*	*$30,257*	
2001/02	*120*	*112.5*	*287.5*	*-130*	*$34,596*	*-$2,298.62*
2002/03	*20*	*112.5*	*200.5*	*-88*	*$36,508*	*-$1,641.98*
2003/04	*7.6*	*112.5*	*89*	*23.5*	*$38,387*	
2004/05	*106.7*	*112.5*	*294*	*-158*	*$46,667*	*-$3,768.47*

2005/06	*0.8*	*112.5*	*186*	*-73.5*	*$49,532*	*-$1,860.68*
2006/07	*2.3*	*115.625*	*189*	*-73.375*	*$50,721*	*-$1,902.10*
2007/08	*0.8*	*150*	*153.5*	*-3.5*	*$51,989*	*-$93.00*
Revised		*940.625*	*1467*			*-$11,564.85*

[10] The grievor was referred to an email sent by Ms. Llano-Rodriguez. The grievor stated that the email confirmed that she and her supervisor had inquired into her annual leave entitlements (Exhibit G-7). The email reads as follows:

. . .

> *When Anne Murchison got indeterminate status and was informed by our then Compensation Advisor Karen Hunt that she was entitled to five (5) weeks annual leave. I had very strong reservations as to the entitlement that I questioned it to our then Compensation Advisor Pat Russell; who informed me that Anne Murchison was really entitled to them.*
>
> *I again brought up the subject with the Director of Financial Services who both Anne Murchison and myself were working for. I was eventually told to drop the subject that Anne Murchison was entitled to the five (5) weeks.*
>
> *I always had doubt that she was entitled to them and now she has no choice of no fault of her own to pay all that money back. Had the compensation advisors done their job properly, Anne would not have to go through this mess.*
>
> . . .
>
> [*Sic* throughout]

The grievor was referred by her bargaining agent representative to article 52 of the collective agreement and was asked if the employer had offered her leave with or without pay for other reasons to offset the recovery of the overpayment. She replied in the negative. Clause 52.01 reads as follows:

> ***LEAVE WITH OR WITHOUT PAY FOR OTHER REASONS***
>
> ***52.01*** *At its discretion, the Employer may grant:*
>
> *(a) leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld;*
>
> *(b) leave with or without pay for purposes other than those specified in this Agreement.*

[11] In cross-examination, the grievor was referred to the part of the *Treasury Board Pay Administration Guide* entitled *Recovery of Amounts Due to the Crown — Application for Lower Rate of Recovery* (Exhibit E-1). The grievor testified that she complained to Ms. Bennett that the recovery action was unfair and that she could not afford the Receiver General's overpayment recovery rate of 10 percent of her biweekly gross salary. As such, she requested a lower recovery rate, and the employer agreed to a 2.5 percent recovery rate on the outstanding overpayment of $11 564.85.

[12] In reply, the grievor stated that her grievance was denied at the final level of the grievance process and that she agreed to sign the reduced recovery rate of 2.5 percent as she could not afford the monthly payments because her husband is a part-time employee and it would cause her financial hardship.

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

[13] Ms. Bennett began her employment with the employer in 1991 and is currently employed as a compensation benefit advisor. Ms. Bennett testified that in 2006 the employer entered into a labour market agreement under which federal public service employees were transferred to provincial jurisdictions. As a result of the transfer of employees, a number of annual-leave credit problems were discovered. In February 2007, the employer instructed its compensation benefit advisors to complete a review of the leave credits of all employees in alphabetical order.

[14] Ms. Bennett referred to clause 34.03 of the collective agreement, which sets out the test of whether continuous or discontinuous service within the public service counts toward the accumulation of vacation leave credits. Clause 34.03 reads in part as follows:

> *34.03*
>
> *(a) For the purpose of clause 34.02 only, all service within the Public Service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the Public Service, takes or has taken severance pay. However, the above exception shall not apply to an employee who receives severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.*
>
> . . .

[15] Ms. Bennett stated that she also used the Treasury Board *Continuous/Discontinuous Service* part of the *Pay Administration Guide* (Exhibit E-3) as a guide to ensure that her calculations of the grievor's annual leave credits were correct.

[16] Ms. Bennett advised the grievor that from 2000 to 2008 she had received an over credit of 65 hours of annual leave credits due to an administrative error, which resulted in an overpayment of her salary based on her annual leave usage. The overpayment totalled $11 564.85, which was based on the salary she earned in each years in which she took annual leave. The grievor was advised that the $11 564.85 would be recovered as soon as possible under the authority of subsection 155(3) of the *Financial Administration Act* ("the *FAA*"), which reads as follows:

> ***155.*** *(3) The Receiver General may recover any overpayment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the overpayment was made.*

[17] Ms. Bennett explained that, when the grievor retired, she received severance pay, and as such, her continuous service started on September 30, 1999, the date on which she returned to the public service. Therefore, the grievor should have earned 112.5 hours of annual leave per annum as opposed to 187.5 hours per annum. Ms. Bennett stated that her analysis of the grievor's annual leave entitlements was verified by Joe Dziak, Acting Manager of Compensation and Benefits Services, and by a technical advisor. She stated that the role of the technical advisor is to verify a compensation benefit advisor's calculations. In other words, the technical advisor is a subject matter expert.

[18] Ms. Bennett stated that part of the Treasury Board *Pay Administration Guide*, *Recovery of Amounts Due to the Crown — Application for Lower Rate of Recovery*, permits employees who owe large amounts of overpayments not only to extend the recovery rate over a number of pay periods but also to request a lower recovery rate. Mr. Dziak approved the grievor's request to extend the reimbursement period and to reduce the recovery rate from 10 percent of her gross salary to 2.5 percent due to the hardship that she cited.

[19] Ms. Bennett testified that, on February 7, 2008, the employer began recovering the overpayments at the rate of $49.82 per pay period (Exhibit E-6).

[20] In cross-examination, Ms. Bennett agreed that the recovery of the overpayment began eight years after the grievor returned to the public service. She also agreed that employees receive a yearly annual leave statement, which is signed by the employer, and that the employer had approved the grievor's annual leave requests.

[21] Ms. Bennett also agreed with the bargaining agent representative that subsection 155(3) of the *FAA* states that the Receiver General may recover, not that it shall recover or must recover overpayments. However, she stated that her employer instructed her to follow the Treasury Board *Continuous/Discontinuous Service* part of the *Pay Administration Guide* to recover the grievor's overpayment.

[22] Ms. Bennett was asked by the bargaining agent representative if the intent of article 52 of the collective agreement was to permit the employer to retroactively grant employees leave with or without pay for other reasons. Ms. Bennett replied, "That may be a possibility; however, I don't know the rules for that."

[23] In reply, when Ms. Bennett was asked by counsel for the employer if she knew of any circumstances in which the employer had retroactively granted leave with or without pay under article 52 of the collective agreement for the recovery of an overpayment due the Crown, she replied, "No, it is my understanding that leave with or without pay for other reasons is usually granted for a day due to a snowstorm."

III. Summary of the arguments

A. For the grievor

[24] The bargaining agent representative submitted that the employer made an error, in good faith. However, that does not preclude the employer from using its discretion and acting reasonably, given the circumstances. The grievor questioned her leave entitlements, as did her supervisor, on several occasions. The employer has technical advisors who specialize in these matters. However, it chose not to use them when the grievor first expressed her concerns. As well, the grievor received a yearly annual leave credit statement from the employer that she presumed was accurate, and the employer also approved her annual leave requests each year.

[25] The bargaining agent representative argued that the *FAA* states that the Receiver General may recover any overpayments. As such, under that provision, the employer is not compelled to recover amounts owed it, and it is given the discretion to act reasonably. Considering the length of time it took the employer to discover the error, it would have been reasonable not to recover the overpayment.

[26] The bargaining agent representative noted that article 52 of the collective agreement also provides the employer with an opportunity and the flexibility to use its discretion by substituting the recovery of the overpayment with leave with or without pay but that it chose not to.

[27] The bargaining agent representative submitted that the grievor was not unjustly enriched. She made no misrepresentations. She accepted the employer's calculation of her annual leave credits for eight years. During that time, the employer accepted her annual leave requests. The grievor testified that the recovery of the overpayment created a financial hardship because it was unexpected and because her husband is a part-time employee.

[28] The bargaining agent representative submitted the following four decisions: *Molbak v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-26472 (19950928); *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee Relations' Union* (1999), 84 L.A.C. (4th) 252 ("*British Columbia Government*"); *Adamson v. Treasury Board (Canada Employment and Immigration Commission)*, PSLRB File No. 166-02-16207 (19880211); and *Conlon et al. v. Treasury Board (Public Works and Government Services Canada)*, PSSRB File Nos. 166-02-25629 to 25631 (19970604).

[29] The bargaining agent representative argued that the facts in this grievance are similar to the facts in *British Columbia Government*. In that decision, the arbitrator believed that the employer could not recover an overpayment from an employee after six years. Therefore, I should follow the jurisprudence and allow the grievance.

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

[30] Counsel for the employer submitted that the over credit of the grievor's annual leave was due to an administrative error. Thus, the employer is obligated to recover the overpayment of her salary under subsection 155(3) of the *FAA*.

[31] Counsel for the employer argued that the grievor raised the issue about the amount of annual leave credits she was receiving in 2002 and that the audit of her annual leave credits was completed in 2007. The decision submitted by the bargaining agent representative, *British Columbia Government*, is not a decision rendered by the Public Service Labour Relations Board or any other court of law. Therefore, it is not binding. Regardless, the employer has not run afoul of the six-year limitation period for the recovery of overpayments, as noted in *British Columbia Government*, as the grievor advised the employer of her concerns only in 2002, and the error was discovered only in 2007.

[32] Counsel for the employer stated that the employer proceeded with recovering the overpayments as soon as it realized the administrative error in the grievor's annual leave credits. The employer acknowledged that the grievor is understandably upset. However, in an effort to minimize the impact of the recovery action, it agreed to reduce the 10 percent recovery rate of her monthly salary to a 2.5 percent recovery rate, which lengthened the recovery period, thus showing discretion and flexibility.

[33] Counsel for the employer stated that article 52 of the collective agreement was not intended to substitute overpayments due the Crown with leave with or without pay. Ms. Bennett testified that the intent of that article was to provide the employer with an opportunity to use its discretion to handle events on any given day, such as a snowstorm.

[34] Counsel for the employer argued that the burden of proof was on the grievor to demonstrate financial hardship. In other words, the grievor would have had to adduce evidence (a dollar figure) for each year that the employer had over-credited her annual leave and the hardship that she suffered. In other words, a detrimental reliance would have had to have been proven. The grievor did not adduce evidence to support her claim of financial hardship. Thus, there is no merit to her claim, and therefore, her grievance must fail.

[35] The employer requested that the grievance be dismissed and referred to the following decisions: *Veilleux et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 152; *Bolton v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 39; *Ellement v. Treasury Board (Public Works and Government Services Canada)*, PSSRB File No. 166-02-27688 (19970611); and *Prichard v. Treasury Board (National Defence)*, PSSRB File No. 166-02-14277 (19840724).

IV. Reasons

[36] The grievor grieved the employer's decision to retroactively recover an overpayment of $11 564.85, which is the equivalent of an over credit of 521.175 hours of annual leave to her leave bank from fiscal year 2000-2001 to fiscal year 2007-2008.

[37] The grievor testified that, in 2002, she noticed on her annual leave credit statement that she had been credited with five weeks of annual leave. The grievor believed that she should have been entitled to only four weeks of annual leave. She met with Ms. Llano-Rodriguez, her supervisor, Ms. Hunt, her compensation advisor, and Ms. Russell, Head of Compensation, to ensure that she was entitled to 5 weeks (187.5 hours) of annual leave as opposed to 4 weeks (112.5 hours) of annual leave per fiscal year.

[38] The employer assured the grievor in several meetings that she was entitled to 187.5 hours of annual leave per fiscal year.

[39] In December 2007, Ms. Bennett, the grievor's compensation advisor, advised the grievor that, due to an administrative error, she had been credited 187.5 hours of annual leave per fiscal year instead of her actual annual leave entitlement of 112.5 hours per fiscal year. The over credit of her annual leave had begun in the 2000-2001 fiscal year. The result of the administrative error was the equivalent of 521.175 hours of annual leave or $11 564.85 of salary. The $11 564.85 was based on the salary the grievor earned in each fiscal year (2000 to 2007).

[40] The grievor, when informed about the decision to recover $11 564.85 from her biweekly salary, cited fiscal hardship. Counsel for the employer argued that subsection 155(3) of the *FAA* entitles the Receiver General to recover amounts due the Crown. She also argued that, in an effort to minimize the impact on the grievor, the employer used its discretion by reducing the standard 10 percent recovery rate of her monthly salary to a 2.5 percent recovery rate. Counsel for the employer also argued that the grievor had not proven by way of evidence any detrimental reliance, and therefore, her grievance must fail.

[41] The grievor approached her supervisor, her compensation advisor and the head of compensation in 2002 on several occasions to ensure that she was entitled to 187.5 hours of annual leave per annum. She was assured by the employer that she was entitled to that amount. Ms. Bennett testified that the department has technical

advisors who are subject matter experts to assist compensation advisors. For reasons known only to the employer, it is obvious that either the technical advisors are not subject matter experts or the compensation advisors do not use them. Regardless, the employer had the opportunity to use its technical advisors to verify the grievor's entitlements.

[42] The grievor legitimately believed that she was entitled to the leave calculated by the employer, and her leave was approved each time she took it.

[43] Through its own calculations (Exhibit G-6(b)), the employer showed that, from fiscal year 2000-2001 to fiscal year 2007-2008, the grievor was credited with 187.5 hours of annual leave. Each year, the employer produces an employee annual-leave credit statement that details the hours of annual leave credited to an employee. The premise is that the employer's calculations are correct, and if they are not correct, one would assume that when a compensation advisor performs each employee's annual leave entitlement and usage calculation for the fiscal year that the calculations, if in error, are corrected.

[44] In overpayment cases, the Board's case law holds that detrimental reliance needs to be proven by the grievor. The grievor's representative never demonstrated the presence of detrimental reliance of a financial nature on the part of the grievor and instead argued that repaying the amount calculated presented a financial hardship for the grievor. Financial hardship is not the same as detrimental reliance: detrimental reliance occurs at the time of the error and arises from the fact that the grievor relied on the statement or error of the employer and incurred a debt or acted in a manner which indicated that he/she relied on the employer's word or error. Financial hardship, on the other hand, arises from the discovery of the error and the consequent request by the employer to repay what has been given in error. This being the case, the doctrine of estoppel, as it has typically been applied in cases related to monetary overpayments, cannot be used by the grievor to found her grievance.

[45] The crux of this case lies in the interpretation of subsection 155(3) of the FAA which states: "The Receiver General may recover any overpayment made . . . on account of salary, wages, pay or pay and allowances. . . ."

[46] It is on this subsection that the employer has based its decision to justify the recovery action. The parties did not question the application of this subsection since it

has been applied in the past without question or issue. However, it is my conclusion that this subsection does not apply to the present circumstances.

[47] Subsection 155(3) applies to overpayments of a monetary amount. The words of the clause clearly state that the employer's powers of recovery extend to "overpayments made . . . on account of salary, wages, pay or pay and allowances." The term "overpayment" is of significance, as are the terms "salary, wages, pay or pay and allowances." They are terms of art and denote concepts that are distinct from the concept of annual leave credits. Leave credits are not salary, wages, pay or allowances, they are credits. All of these terms (credits, pay, wages, salary and allowances) are terms of art in labour law and while salary, pay and wages may resemble each other, they are far different concepts from annual leave credits.

[48] When an employee takes two weeks of leave, the employer does not convert that leave period to the money equivalent. It simply deducts the equivalent amount of leave credits from the employee's leave bank, which totals are expressed in terms of hours or days or weeks, but not dollar amounts. The collective agreement provides for the conversion of credits to dollar amounts only when an employee leaves the public service and their unused annual leave credits must be cashed out. Clause 34.13 states:

> *When an employee dies or otherwise ceases to be employed, the employee's estate or the employee shall be paid amount equal to the product obtained by multiplying the number of days of earned but unused vacation and furlough leave to the employee's credit by the daily rate of pay…*

[49] This does not mean that credits are money. They remain credits, which must now be converted to their cash equivalent by virtue of necessity. Clause 34.13 provides for the conversion to a dollar amount since the employer can no longer provide the employee with the benefit they have earned: leave. Therefore, a conversion to dollars is necessary.

[50] In stating the above, I should specify that the employer is not without recourse entirely. If the employer is unable to recover the leave credits through a mechanism mandated by the collective agreement and is unable to effect the recovery under the provisions of the *FAA*, it is not obliged to turn a blind eye to the error in all circumstances. The employer would be entitled to use its management rights in order to recover the wrongly credited surplus leave credits. However, such an exercise of its rights would be subject to reasonableness. In this case, the recovery of credits some

years after they have been credited and confirmed by the employer in several annual leave credit statements and after pointed inquiries by the grievor regarding the amount of leave credited to her account, all lead me to conclude that the exercise of management rights in this case in order to recover the equivalent monetary amount would be unreasonable.

[51] If I am wrong regarding the above, and subsection 155(3) of the *FAA* applies, it is my belief that the grievor should succeed. As outlined by both of the parties in their argument, the grievor needs to prove detrimental reliance. The case law typically analyzes this issue by looking at the financial obligations undertaken by grievors and whether those obligations were undertaken in reliance on the employer's wage calculations. However, these cases have also concerned the classic cases of wage overpayments. In this case, the grievor has been over-credited leave credits. In her case, therefore, the issue of detrimental reliance should be analyzed from the perspective of the grievor's actions vis-à-vis those credits and the employer's assurances that they in fact had been properly credited to her. The grievor took leave in accordance with her leave bank statement and in that sense, detrimentally relied upon the assurances of her employer. She has, I find, proven detrimental reliance on her part.

[52] Subsection 155(3) of the *FAA* was not meant to apply to an employee who took leave to which they were not entitled. The employer can, if it wishes for bookkeeping purposes, quantify the extra leave taken as a monetary amount, but it is not, technically, a debt owed to the Crown. The "debt" owed by the grievor is certainly not one that was incurred on account of salary, wages or pay and allowances. What the grievor received was leave to which she was not entitled, not salary. As a public service employee, she received the usual yearly salary to which she was entitled. What she received "extra" was permission to be absent on days when she should normally have been at work.

[53] While the collective agreement provides for an advance of vacation leave credits in clause 34.04 to an employee who has insufficient credits, only clause 34.08 addresses the employer's right to recover in some manner in the case of vacation leave:

> *34.08 (b) Providing the employee has been authorized to proceed on vacation leave for the period concerned, pay in advance of going on vacation shall be made prior to the commencement of leave. Any overpayment in respect of such*

> *pay advances shall be an immediate first charge against any subsequent pay entitlements and shall be recovered in full prior to any further payment of salary.*

This clause does not apply to the grievor's situation since there was no advance of annual leave credits made to her, only an inadvertent crediting.

[54] In the following three sections, I will examine the jurisprudence of this Board and the prior Board, as well as of the Federal Court, regarding the issue of the recovery of overpayments.

V. PSSRB jurisprudence

[55] In the case of *Green* (PSSRB File No. 166-02-393), the adjudicator rejected the notion of the applicability of estoppel to such cases (his approach has since been resoundingly rejected by other adjudicators). In it, he clearly refers to "payments" made in error being recoverable.

[56] In *Pearce* (PSSRB Board File No. 166-02-7016), the grievor submitted, and the supervisor approved, a vacation leave request of 20 days. The grievor did not have the credits to cover his absence and a grievance against his employer's recovery action was sustained. At page 6 the adjudicator stated:

> *. . . There was clear representation by the employer that the grievor's application had been approved and the leave granted, he was allowed to go on leave without being told there was a problem, and he left for twenty days of leave with pay without at any time before or during that leave being put in a position to choose between returning after seventeen days and forfeiting three days pay. Accordingly, there was a clear representation of fact made by the employer to the grievor on which the grievor was meant to rely and on which he did rely to his detriment.*

[57] In that case, the supervisor acted on innocent ignorance (he thought the grievor had the credits when he did not) whereas in the case at hand, the employer not only had the opportunity to check its facts but was specifically asked to do so by the grievor. No innocent ignorance can be claimed by the employer in this case.

[58] In *Prichard* (PSSRB Board File No. 166-02-14277), the grievor had, as the result of an error on the part of the employer, been credited with 200 days of unearned sick leave credits. The grievor had used most of the sick leave prior to leaving employment, and the employer had taken the equivalent monetary amount out of his severance pay.

The evidence disclosed that the grievor was aware that he was not entitled to the leave but said nothing and took almost all of it. The adjudicator held that there were no extraordinary circumstances to prevent the employer from doing what it did. In the case before me, the grievor is entirely innocent of any blame, and I find that extraordinary circumstances are present.

[59] In *Adamson*, PSSRB Board File No. 166-02-16207, the employer sought to recover salary that it had overpaid the grievor when it had calculated her new salary on promotion. The adjudicator held that the employer had given the employee information on her salary as an inducement to remain in her acting position and could not, several months later, reclaim a portion of the monies paid to her. The adjudicator referred to the employee having been induced by employer representations that were intended to be relied upon, but never once mentions the word estoppel. This decision is based on the existence of a financial debt to the Receiver General and therefore falls under the *FAA* and the traditional interpretation of subsection 155(3), which I conclude is inapplicable in the present case.

[60] In *Conlon* (PSSRB Board File No. 166-02-25629 to 31) the grievors were inadvertently overpaid as the result of a classification conversion. The adjudicator held that the employer was estopped from recovery because the grievors had not submitted classification grievances in reliance on their receipt of the increment. This case is somewhat interesting in that it highlights the fact that detrimental reliance can be present in a form other than a financial debt that a grievor chooses to undertake (i.e. mortgage, car, vacation etc.). In the present case, the reliance is found in the fact that the grievor took longer vacations than she would have otherwise if she had been advised that her vacation would be a combination of leave with and without pay.

[61] In *Molbak* (PSSRB Board File No. 166-02-26472), the adjudicator based his decision on the principle of estoppel: the grievor had been assured by the employer that she was entitled to the salary given and based on that salary, she had purchased a condominium. When she was advised of the overpayment she had attempted to cancel the deal, found two roommates etc. There was clear evidence of detrimental reliance. *Molbak* is the classic case of an overpayment of monies and is in my opinion a different case from the case presently under consideration.

[62] In the *Ellement* case (PSSRB File No. 166-02-27688), the parties were in agreement that, commencing in June 1992, the grievor was overpaid as a result of a

clerical error on the part of the employer as to the date of his entitlement to an annual increment. Most of the overpayment occurred by continuing the error during the statutory freeze period, which ended in June 1996. Some of the overpayment received by the grievor was used for a cruise and some was invested in mutual funds but the grievor acknowledged that he had taken cruises and had invested in mutual funds prior to the overpayment. The fact that grievor spent the money did not of itself establish detrimental reliance and in these circumstances. The adjudicator found there was no detrimental reliance on part of grievor and that the doctrine of estoppel did not apply. I would again distinguish this case from the one before me now on the basis that *Ellement* is a case which does concern an overpayment of the type covered by subsection 155(3) of the *FAA*.

VI. PSLRB jurisprudence

[63] In the *Bolton* case, 2003 PSSRB 39, the grievor, a teacher at Indian and Northern Affairs Canada (INAC), grieved the employer's decision to recover overpayments on his salary which were the result of incorrect calculations by the employer regarding annual pay increments. The adjudicator found that the onus was on the grievor to establish that estoppel applied and held that the requirements to establish the existence of estoppel had not been made out in that he was not satisfied that the grievor had detrimentally relied on the miscalculated salary. The adjudicator determined that there was no evidence of any special projects undertaken or special financial commitments made because of the receipt of these payments, nor had it "altered its position in any way because these moneys were received". The present case is very different in nature.

[64] In *Veilleux et al.* (2009 PSLRB 152), the employer obliged the grievors to repay excess hours of leave taken on designated paid holidays. The employer normally reconciled the balance of the hours regularly but had failed to do so between 2002 and 2006 as a result of an employee whose work was behind schedule. The grievors did not question the eight-hour value assigned by the employer to a designated paid holiday and recognized the employer’s right to reclaim overpayments over the course of the preceding year but argued that the employer went too far in reclaiming overpayments made over several years. While the employer was not diligent in its reconciliation and should not have waited so long to recover the amounts, the grievors were negligent in not advising the employer that leave overpayments had accumulated. The grievances were denied. This case is different from the present case in two respects. First, I am not prepared to accept that subsection 155(3) applies. Secondly, the present grievor is

completely innocent and in no way negligent in not alerting the employer to the situation. In fact, the opposite is true and she alerted the employer-twice. It was not she who was negligent in this case, it was the employer. Again, the *Veilleux* case is inapplicable in this instance.

VII. Federal Court jurisprudence

[65] In *Andrews v. Brent* [1981] 1 F.C. 181, the Federal Court upheld the right of the employer to recover, through deduction from the employee's pay, an amount to cover the cost of repairs to a vehicle which had been damaged through the employee's negligence. This case is sometimes cited (in *Prichard* for example) as jurisprudential support for the employer's right to recover. However, one must keep in mind that the employee was clearly negligent and responsible for causing the damage and the Court, at page 188, held that the Crown could invoke what it refers to as a "statutory administrative procedure" (the *FAA* recovery section identical to the one in issue in the present case) for the "assertion of a civil claim." There was a specific provision, made under the auspices of the *FAA,* which provided for the Crown claiming reimbursement for damage to property by employees. The context of *Andrews* is far different from that in the case at hand.

[66] In *Ménard v. Canada* [1992] 3 F.C. 521, the Federal Court of Appeal considered an application for judicial review by two nurses against a decision of the Board, which denied their grievance. The employer had, as a result of a mistaken reading of the collective agreement, erroneously paid them overtime for certain hours worked, and then recovered the amount once the error was discovered.

[67] The Federal Court of Appeal allowed the application of one and denied that of the second grievor. The decision stated that while one applicant had not proven detrimental reliance, the other could benefit from the application of the principle of unjust enrichment. This case differs from the present case under consideration in that it was a straightforward application of the *FAA* provision and concerned a salary overpayment, not an overpayment of leave credits. Nonetheless, the Court was clearly sympathetic to the grievor and willing to find a way to allow the application for judicial review. In fact, most decisions of this Board and the former Board demonstrate a willingness to correct unfairness.

VIII. Summary

[68] Decisions involving the recovery of overpayments have all centered on the concept of estoppel since it was accepted that the *FAA* provision applied in such cases. For me, the issue in this case is, first and foremost, whether subsection 155(3) of the *FAA* does apply to the grievor. It is my belief that it is not applicable, for the reasons outlined earlier.

[69] Given the absence of anything in the law or the collective agreement dealing with the issue, general management rights prevail and those rights give the employer some discretion to correct errors. However, discretion must be exercised reasonably and the recovery of a debt caused by the negligence of the employer and allowed to balloon over the years, despite inquiries by the grievor regarding her entitlements, is an unreasonable exercise of discretion. In the case of the grievor, detrimental reliance can be found in the fact that the grievor took the leave that she believed she was entitled to.

[70] Finally, although subsection 155(3) of the *FAA* states that the Receiver General may recover any overpayments, it does not state that it must or that it shall. The provision is not restrictive in any manner, and as such, it permits the employer to use its discretion in a given situation or circumstance.

[71] The grievor testified that the recovery of $11 564.85 created an undue hardship as her husband was a part-time employee. Counsel for the employer had an opportunity to cross-examine the witness and to question the grievor on the extent of her financial hardship year by year. She chose not to. A reasonable person, on a balance of probabilities, could determine that an employee at the AS-02 group and level who receives an unexpected bill for $11 564.85 would experience financial hardship. I accept that the employer used a minimal amount of discretion in reducing the recovery rate from 10 percent to 2.5 percent. However, in this case, because of the excessive time, the employer took to discover its administrative error and because it was not vigilant or using all its resources to confirm the grievor's annual leave credits, I find that the employer's decision to recover the full amount ($11 564.85) of the salary overpayment was unreasonable.

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

[73] (The Order appears on the next page)

IX. Order

[74] The grievance is allowed.

[75] The employer will reimburse the grievor any amount of the $11 564.85 that it has already recovered.

[76] The grievor did not claim interest on the amount recovered by the employer. Therefore, I need not address that matter in this decision.

August 23, 2010.

Dan R. Quigley,
adjudicator