Date: 20111206

File: 566-02-3408

Citation: 2011 PSLRB 140

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

THOMAS PROSPER

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Prosper v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Linda Gobeil, adjudicator

For the Grievor: Amarkai Laryea, Public Service Alliance of Canada

For the Employer: Martin Desmeules, counsel

Heard at Ottawa, Ontario,
September 19 and 20, 2011.

I. Individual grievance referred to adjudication

[1] This grievance, referred to adjudication by Thomas Prosper ("the grievor"), is against his employer's decision to recover vacation leave that was granted to him by mistake.

II. Summary of the evidence

[2] Both parties made opening statements. The grievor testified and filed two exhibits. The employer called three witnesses and filed one exhibit.

A. For the grievor

[3] The grievor is a senior program advisor with the Canada Border Service Agency (CBSA) or ("the employer"). He has been in that position for about eight years. He testified that he started his employment in the public service in 1974. In 1999, he left the public service and received his severance pay. In 2000, he returned to what was then the Canada Customs and Revenue Agency. In 2007, while inquiring as to whether he was entitled to the long-service-award recognition program, he asked if he was entitled to have his vacation leave adjusted to 1974, the year he started. In 2007, at the time of his request, the grievor was earning three weeks of vacation leave per year.

[4] On December 14, 2007, the grievor sent the following email to Monica Gould-Demers, at the time his compensation advisor in the employer's compensation unit:

> ***From:*** *Prosper, Tom*
> ***Sent:*** *December 14, 2007 1:33 PM*
> ***To:*** *Gould-Demers, Monica*
> ***Subject:*** *Prosper Leave Credits*
> ***Importance:*** *High*
> *Hi Monica,*
> *I hate to bother you again. However, I was recently advised that since my start date was reset in CAS to April 8, 1974 my vacation leave credits should also be adjusted to reflect a 1974 start.*
> *My question is:*
> - *Should I have been accumulating leave credits at the rates corresponding to my* cumulative *years of service as noted in Article 34 of the Collective Agreement since my return to the Agency?*
>
> *I have noted Article 34.03 and believe that subsection (b) is applicable in my situation. That is, I was a member of the PM group at the signing of the collective agreement on May 17, 1989 therefore, shall retain, for the purpose of "service" and of establishing my vacation entitlement those periods of former*

> *service which had previously qualified for counting as continuous employment.*
> *Thank you for your consideration of this matter.*
> ***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.*
>
> *(b) Notwithstanding (a) above, an employee who was a member of one of the bargaining units listed below on the date of signing of the relevant collective agreement or an employee who became a member of those bargaining units between the date of signing of the relevant collective agreement and May 31, 1990 shall retain, for the purpose of "service" and of establishing his or her vacation entitlement pursuant to this clause, those periods of former service which had previously qualified for counting as continuous employment, until such time as his or her employment in the Public Service is terminated.*
>
> …
>
> Tom Prosper
>
> …

[5] Ms. Gould-Demers replied as follows on December 20, 2007:

> ***From:*** *Gould-Demers, Monica*
> ***Sent:*** *December 20, 2007 3:43 PM*
> ***To:*** *Prosper, Tom*
> ***Subject:*** *RE: Prosper Leave Credits*
> *Hi Tom,*
> *Sorry for the delay in getting this information to you. We are having problems with the tool that we use to calculate the leave.*
> *Once this is up and running properly, I will ensure that your vacation credits reflect your continuous/discontinuous service.*
> *Thank you,*
> ***Monica Gould-Demers***
>
> …

[6] The grievor produced in evidence subsequent emails that he and Ms. Gould-Demers exchanged, confirming that the adjustments were made back to when he first joined the public service in 1974. On January 24, 2008, she informed that she had verified the procedure for his leave credit with her supervisor. He testified that he was very encouraged by what was taking place.

Ms. Gould-Demers sent the following email to the grievor on January 24, 2008:

> ***From:*** *Gould-Demers, Monica*
> ***Sent:*** *January 24, 2008 12:33 PM*
> ***To:*** *Prosper, Tom*
> ***Cc:*** *Drouin, Francine*
> ***Subject:*** *RE: Prosper Leave Credits*
> *Thank you for following up. I have verified the procedure with my supervisor, and I will be doing the calculations today.*
> *I will get back to you with the outcome,*
> *Monica*

[7] On January 30, 2008, Ms. Gould-Demers confirmed that the date for the grievor's vacation leave entitlement was reset to November 1975 (since he was away for one year in 1999, that year did not count for the purpose of accumulating vacation leave).

Ms. Gould-Demers emailed the following to the grievor on January 30, 2008:

> ***From:*** *Gould-Demers, Monica*
> ***Sent:*** *January 30, 2008 9:46 AM*
> ***To:*** *Prosper, Tom*
> ***Cc:*** *Drouin, Francine; Bedard, Raymond*
> ***Subject:*** *RE: Prosper Leave Credits*
> *Hi Tom,*
> *As per our telephone conversation this morning, I just want to confirm what we had discussed.*
> *I have done the recalculations, and your new Continuous/ Discontinuous Date is now* ***November 14, 1975.*** *I will be sending an email to our CSTC who will then forward it to CAS asking them to run time from your new date of November 14, 1975. Your previous date for Cont/Dist was November 6, 2000.*
> *I will verify your Personal Leave Status Report this week to ensure that CAS has given you the correct number of weeks(hours) to which you are entitled based on your new Date.*
> *Thank you for your continued patience,*
> *Monica*

[8] The grievor noted that again, just as in the previous email of January 24, 2008, Francine Drouin, who was Ms. Gould-Demers superior, was copied. So was Raymond Bédard, the grievor's supervisor. The grievor testified that Ms. Drouin's involvement reassured him that he would receive the adjustments to 1975.

[9] Other emails followed with details of calculating the additional vacation leave and the adjustments.

[10] In April 2008, the grievor testified that he received a statement of his leave credits for April 1, 2008 to April 1, 2009 that confirmed that the employer had credited him with 778.380 hours of vacation leave, including 553.380 hours that represented the adjustment made to reflect the year 1975 as his starting date. Moreover, his leave balance was 225.000 hours, up from 112 hours which represented the adjustment to reflect 1975 as his starting date.

[11] After receiving the statement of leave, the grievor consulted his wife and decided that he would take four weeks of vacation leave in July 2008 and then take Mondays and Fridays off in August, along with a full week at Christmas. He submitted his leave form for July to his supervisor, Mr. Bédard, on April 8, 2008. He also requested annual leave for the Mondays and Fridays of August 2008 on April 8 and June 16, 2008. Mr. Bédard approved them on April 18 and June 16, 2008 respectively. Finally, on April 21, 2008, he requested four days of annual leave for Christmas 2008. Mr. Bédard approved it on April 30, 2008. The grievor testified that before receiving the adjustment, he earned 112 hours of vacation leave per year (three weeks) and that he normally takes them all in the given year, via a couple of weeks in the summer and the rest at Christmas and March Break.

[12] The grievor indicated that, after his leave was approved, he arranged for a vacation at Disney World in Florida with his family for Christmas 2008. He then made financial commitments for the flight and the stay in May and June 2008.

[13] The grievor testified that, in April 2008, since he had a large amount of vacation leave that he did not intend to use, and since he did not want to carry it over to the next fiscal year, he planned to take the rest of the leave in cash and buy a second car. That he did, July 2008.

[14] The grievor testified that only when he returned from his vacation, on August 5, 2008, did he see an email sent to him on July 16, 2008 by Ms. Drouin. In it, Ms. Drouin informed him that he was not entitled to the vacation leave since he had received severance pay in the past. Her email reads as follows:

> ***From:*** *Drouin, Francine*
> ***Sent:*** *July 16, 2008 10:53 AM*
> ***To:*** *Prosper, Tom*
> ***Cc:*** *Pearson, Sylvie*
> ***Subject:*** *vacation leave balance reviewed as per the Collective agreement*

> ***Importance:*** *High*
>
> *Good morning Mr. Prosper*
>
> *After a file verification and as per the Collective agreement clause 34.2 your are not entitle to to all of your previous service to count toward the continuous and discountinuous date for vacation leave because you have received a severance pay when you resigned, I have changed you date to 06.11.2000 in our system this will leave a balance of vacation leave for 27.630 hours for the fiscal year 01.04.2008 to 31.03.2009.*
>
> *Francine Drouin*
>
> …
>
> [*sic* throughout]

[15] The grievor indicated that at that point he had already taken four weeks off, one week more than the three weeks he was initially entitled to for the whole year. The grievor also stated that he was shocked to hear that he was no longer entitled to that leave. He requested a meeting with his supervisor, Human Resources, Ms. Drouin and her supervisor, Jo-Anne Mudryk, to discuss the matter.

[16] The grievor testified that, at the beginning of August, he thought that the matter could still be resolved in his favor. Thus, after consulting with his supervisor, he took three days of vacation leave at the beginning of August. When he realized that the employer would not change its position, he did not take the rest of the Mondays and Fridays off in August as originally planned.

[17] The grievor testified that, when he found out about the employer's position, he did not cancel his trip to Disney World since his understanding was that he could not get reimbursed. The grievor indicated that he contacted his credit card company in order to seek cancellation and reimbursement but to no avail.

[18] The grievor testified that, since he expected to receive more vacation leave and did not anticipate using it all in fiscal year 2008, and since he did not want to carry over that leave to the next fiscal year, he planned to cash it out. With that in mind, he bought a second car in July 2008 with the money that he thought he would receive from cashing out some of his vacation leave. He indicated that, although nobody at the CBSA told him that he could cash out his additional leave, he was not aware that any

such request has been refused in the past. He indicated that he cashed out vacation leave in the 1970s. He also testified that, since he could not cash out his vacation leave, he decided to sell the car in September 2008 for $3000 which was $2000 less than what he paid for it in July 2008.

[19] The grievor testified that the entire experience left him disappointed and that it seems to him that the CBSA's Human Resources Department can act with impunity.

[20] In response to the employer's representative, the grievor admitted that he never discussed with Ms. Gould-Demers that he received severance pay in 1999. He also specified that, before 1999, he enjoyed six weeks of vacation leave. He also confirmed that he did not have copies of the airline tickets or hotel reservations from his trip to Disney World. He stated that he stayed on the Disney World site. He admitted that he would have gone to Disney World even if he had only had 112 hours of vacation leave in 2008, but he probably would not have stayed on its site. As for the car, the grievor indicated that he would not have bought it or that he might have waited until he retired. The grievor agreed that, although he does not agree with the employer's decision to recover the vacation leave granted in error, he did not have an issue with the employer's calculation of the number of hours.

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

[21] Ms. Gould-Demers testified on behalf of the employer. She stated that currently she is a compensation consultant with the CBSA and that she started in 2006 with the CBSA as a compensation trainee advisor. She explained that, at the relevant time, she was the grievor's compensation advisor and that she dealt with his requests, including the one in December 2007 about his continuous and discontinuous years of service. She indicated that she did not ask the grievor whether he had received severance pay in the past. She indicated that she never had a discussion with the grievor and that they always corresponded by email. Ms. Gould-Demers indicated that, as her team leader, Ms. Drouin had to be copied on her January 30, 2008 email to the grievor. Ms. Gould-Demers did not remember discussing the matter with her team leader. Although she assumed that she consulted her supervisor or others on this matter, Ms. Gould-Demers did not remember those consultations. She indicated that, in retrospect, she should have asked the grievor whether he received severance pay when he left the public service in 1999. She indicated that she had made her last entry on the grievor's file in January 2008.

[22] In response to a question from the grievor's representative about the email sent on January 24, 2008 to the grievor, Ms. Gould-Demers indicated that, by the phrase: "… verified the procedure with [her] supervisor," she meant that she would have verified with her supervisor the essential content of the grievor's email, which makes reference to severance pay.

[23] Francine Gladu (formerly Francine Drouin) also testified on behalf of the employer. She is currently the manager of compensation at the Department of Health and has been since March 2009. She explained that, at the time of the events at issue, she was Ms. Gould-Demers' supervisor. She explained that, at the time, she was responsible for eight employees, some of them trainees like Ms. Gould-Demers. She indicated that trainees reported to compensation advisors and that she would get involved if contacted directly. She indicated that her workload was significant and that she had to interact with many different people (employees, families, compensation advisors, etc.). She mentioned that she would get involved in the details of a file only when asked directly. She indicated that although she thought that the grievor was not entitled to the additional vacation leave since he had received severance pay years earlier as documents on his file showed, she did not recall the January 24, 2008 and the January 30, 2008 emails on which she was copied. She also did not remember Ms. Gould-Demers asking her for advice. However, later on in her testimony, Ms. Gladu indicated that she told Ms. Gould-Demers that the grievor was not entitled to the additional vacation leave. Ms. Gladu indicated that she was not involved until Ms. Mudryk asked her to look at the grievor's file. She indicated that she sent the July 16, 2008 email to the grievor informing him that he was not entitled to the additional vacation leave because he had received severance pay.

[24] Ms. Mudryk was the employer's final witness. She is currently the manager of compensation for the executive at the CBSA, and has been since January 2009. Before that, she was a compensation manager at CBSA headquarters. She became involved in the grievor's file after Sylvie Pearson, another compensation advisor who took over some of Ms. Gould-Demers' work, including the grievor's file, came to her. Ms. Mudryk said that, probably in June 2008, Ms. Pearson noticed from the grievor's file that he had a large amount of vacation leave, which should not have been the case, since he had received severance pay in the past. Ms. Mudryk then asked Ms. Gladu to look into the matter. Once they determined that the grievor was not entitled to the additional

leave, she also asked Ms. Gladu to prepare and send the July 16, 2008 email to the grievor. Ms. Mudryk asked Ms. Gladu to do it because she was the team supervisor.

[25] Ms. Mudryk indicated that in mid-August, she met with the grievor and his union representative about the content of the July 16, 2008 email. Ms. Gladu and a representative from Human Resources were also present. Ms. Mudryk testified that the meeting went as well as possible, given the circumstances. In response to a question from the grievor's representative as to whether the grievor had told her about the commitments that he had made, Ms. Mudryk replied that the grievor indicated that he still had holidays and that he wanted to take his daughter to Disney World in December.

III. Summary of the arguments

A. For the grievor

[26] The grievor's representative stated that the grievor's case is very unfortunate. The grievor, a long-time employee, left the public service in 1999 and received severance pay. He returned in 2000. In 2007, he inquired about the long-term service award. At the same time, he asked whether his vacation leave entitlement would be adjusted to the year on which he joined the public service. He was told that the vacation leave entitlement would be adjusted to 1975, only to be told later that that was an error.

[27] The grievor's representative argued that the principle of promissory estoppel applies. He referred me to *Sorensen et al. v. Treasury Board (Foreign Affairs and International Trade),* PSSRB File Nos. 166-02-25062, 24269, 24870 and 24905 (19961108). He also referred me to *Lapointe v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 57.

[28] He also referred me to *Brown and Beatty, Canadian Labour Arbitration,* 4th ed, at paragraph 2:2211 as follows:

> *The concept of equitable estoppel is well developed at common law and has been expressed in the following way:*
>
> > *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.*
>
> *One arbitrator has summarized the doctrine in the following terms:*
>
> > *It is apparent that there are two aspects of the doctrine as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so. The main situation where it would be inequitable for strict rights to be upheld would be where the party now setting up the estoppel has relied to his detriment.*
> >
> > *Thus the essentials of estoppel are: a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; and detriment resulting therefrom.*

[29] The grievor's representative reviewed the essential elements of estoppel and argued that they apply to this case.

1. <u>Clear and unequivocal representation that was relied on</u>

[30] The grievor's representative argued that the grievor acted diligently and reasonably. On December 14, 2007, he emailed his question to his compensation advisor and also asked whether the exception in clause 34.03 (b) of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group expiring on June 20, 2007 would give him the benefit of having his vacation leave credits adjusted to 1974. He received confirmation shortly after in an email sent by Ms. Gould-Demers and dated December 20, 2007 that his vacation leave credits would reflect his continuous and discontinuous

service. On January 24, 2008, Ms. Gould-Demers confirmed via email, copying her supervisor, Ms. Drouin, that she had "verified the procedure" with her supervisor and that she would be doing the calculations that day. Finally, via another email dated January 30, 2008, again copying her supervisor, Ms. Gould-Demers confirmed to the grievor that she finished the calculations, that his new continuous and discontinuous date was November 14, 1975 and that she would make sure that the system would reflect his vacation leave entitlement to that date.

[31] The grievor's representative argued that, even if the supervisor, Ms. Drouin, indicated to Ms. Gould-Demers that the grievor was not entitled to have his vacation leave credits adjusted back to his start date of November 1975, she never told the grievor. Nor did she make any intervention to that effect. Therefore, it can be concluded that she did not object to or intervene with the statement that Ms. Gould-Demers made to the grievor.

[32] The grievor's representative argued that despite the series of confirmations and double checks that started in December 2007, the grievor was never informed of any error until he returned from leave on August 5, 2008. Representations were clearly made to him, on which it was intended that he would rely. As a result, the grievor received an additional amount of leave to cover the period retroactive to 1975. His annual leave entitlement was also adjusted, on a go forward basis, to acknowledge the adjustment to his start date to 1975.

2. <u>Detrimental reliance</u>

[33] The grievor's representative argued that, not only was a promise made to the grievor, he relied on that promise. It is argued that, based on the revised amount of his leave, the grievor and his family made plans for the remainder of 2008 that included 20 days of vacation in July, Mondays and Fridays off in August and 4 days in December to visit Disney World. The grievor testified that he normally takes 5 to 10 days in July and that he saves the rest of his vacation for later in the year. The grievor's representative argued that, on a balance of probabilities, the grievor would not have taken all his vacation in July had he been earning only three weeks of annual vacation leave. He would have saved time for Christmas and for March Break. However, due to the error, the grievor took his entire leave entitlement and more in July because he relied on the statement made by the employer. His representative noted that all his leave requests were approved by his supervisor.

[34] The grievor's representative has no doubt that the grievor relied to his detriment on the representations made to him by the employer. Due to the employer's error, the grievor did not schedule his vacation as he wished. Moreover, he was in deficit for the remainder of the year 2008-2009. That deficit continued into 2009-2010.

[35] In support of his argument, the grievor's representative directed me to *Murchison v. Treasury Board (Department of Human Resources and Skills Development),* 2010 PSLRB 93.

[36] According to the grievor's representative, the fact that the grievor took leave based on the amount of leave confirmed to him, that he took a longer leave than he would normally have taken and that he is now in leave deficit, establishes detrimental reliance.

[37] The grievor's representative also argued that the grievor made other commitments based on the statement made to him. He bought a second car in anticipation that a portion of the vacation leave that he received in error would be cashed out. The car was purchased while he was on leave in July 2008. He had to sell it when he was told that he was not entitled to the additional leave. He sold it at a deficit. He bought it for $5000 and sold it for $3000.

[38] The grievor's representative argued that it was reasonable to assume that the grievor would cash out some leave since that was the practice at the CBSA. That point was based on clause 34.11 of the collective agreement, which deals with the carry over or liquidation of vacation leave. Furthermore, he argued that the employer's witness did not contradict this point.

[39] The grievor's representative stated that the grievor entered into another commitment based on the understanding that he would receive the additional leave, a trip to Disney World, in December 2008. The argument is that the trip was booked before the grievor was informed of the error. He had promised his daughter that they would go for her birthday. The grievor decided to take leave without pay since his leave bank was in deficit. This is another example of the grievor relying on the employer's promise to his detriment.

[40] According to the grievor's representative, the essential elements of promissory estoppel were proven; a promise was made that he was entitled to additional leave.

The grievor was forthright from the beginning. He inquired and was told that he was entitled to that leave. All his leave requests were approved. Detrimental reliance was also demonstrated. The grievor took leave that he thought he had; as a result, he took all his leave in July, bought a car and had to sell it at a loss. He went to Florida on leave without pay because he had made a financial commitment and because he was committed to his family. Finally, the grievor's representative noted that about seven months passed after the additional vacation leave was approved before the error was discovered.

[41] The grievor's representative asked that I allow the grievance and that I restore the amount of leave promised to the grievor and order adjusted his current fiscal-year vacation leave bank to reflect the entitlement back to 1975.

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

[42] The employer's representative made the general statement that errors happen and that they will continue to happen. This case is not about laying blame for the error. Everything in this case originated from an error. It must be possible to correct that error.

[43] The employer's representative argued that, without question, something given in error can be recovered. One has no right to what was given in error without a legal reason.

[44] The employer's representative maintained that no grounds of fairness allow an employee to benefit from an error. Only a legal doctrine can allow someone to benefit from an error. In this case, the legal doctrine would be promissory estoppel. Unless I find that applies to this case, nothing would allow the grievor to keep the additional vacation leave that was granted to him in error.

[45] The employer's representative argued that, for estoppel to apply, the following two elements must be present: first, by word or conduct, a promise or assurance must have been made that strict legal rights would not be enforced; second, detrimental reliance on that promise or assurance must be proved.

[46] The employer's representative referred me to the Supreme Court of Canada decision, *Maracle v. Travellers Indemnity Co. of Canada,* [1991] 2 S.C.R. 50. He also

referred me to *Tellus Communications Inc. v. Telecommunications Workers Union,* 2010 BCSC 1429.

[47] The employer's representative argued that, to consider estoppel, I first need to find or impute intent; I must conclude that the employer intended to relinquish its right under the collective agreement. An error, it is argued, does not qualify as intent. In this case, despite the fact that an error was made, the employer never intended to affect its legal rights under the collective agreement. As an example of an imputed intent, the employer's representative provided a situation in which it would have taken too much time for the employer to correct an error. That was not so in this case; the employer was diligent. The employer's representative referred me to paragraph 42 of *Tellus.*

[48] In this case, the employer had no intention of relinquishing its right. It never intended to give the grievor additional leave. In the circumstances, it is not unjust or unfair to recover what the grievor was not entitled to.

[49] The employer's representative distinguished this case from *Lapointe.* In that case, there was a lengthy period of four years that led the adjudicator to impute intent by the employer to relinquish its rights. In this case, after only 5 months, the employer, through Ms. Mudryk, acted promptly and diligently.

[50] The employer's representative also distinguished this case from *Murchison.* In that case, the time taken to discover the mistake and act on it was relevant. Furthermore, the adjudicator in *Murchison* had to decide on the application of subsection 155(3) of the *Financial Administration Act*, R.S.C. 1985, c.F-11, which is not relevant to this case.

[51] As to whether the grievor relied on the employer's actions, the employer's representative argued that, just because the grievor took the vacation leave, it does not mean that there was detrimental reliance. After all, the grievor enjoyed his days off. In August, he chose, after being informed that he was not entitled to the additional leave, to take three more days. As for the trip to Disney World, again, it was his choice and decision. Although this case is unfortunate, it does not establish detriment. There is no evidence that the grievor had to borrow money. He would have gone to Disney World no matter what.

[52] As for buying a second car, the employer's representative submitted that the grievor never approached the employer about cashing out his leave. That was pure speculation. He did not make any representation to the employer. The grievor failed to meet his burden of proof. There is no evidence of financial hardship. The grievor decided to sell to the first buyer for $2000 less than he was asking. He could have waited and obtained his price. The employer cannot be held responsible for the loss the grievor suffered. Moreover, losing money on the car did not deter the grievor from travelling at Christmas.

[53] In conclusion, the employer's representative argued that, before I decide whether the employer's actions were detrimental to the grievor, I must first determine whether there was intent or at least imputed intent by the employer to depart from the strict application of the collective agreement. An error does not create an entitlement for more vacation leave or cash in lieu than what the collective agreement provides. In this case, no promise was made: and there was no intention to give more. The employer acted quickly. The grievance should be denied.

C. <u>The grievor's rebuttal</u>

[54] In his rebuttal, the grievor's representative distinguished the facts in this case from those of *Lapointe* and *Ellement v. Treasury Board (Public Works and Government Services Canada),* PSSRB File No. 166-02-27688 (19970611). He argued that, although *Lapointe* was decided in favor of the grievor, there was no prior agreement that the employee would receive the overpayment. With respect to the trip to Disney World, the grievor's representative reiterated that the grievor testified that there could have been a charge for the cancellation. He argued that the grievor, in his email dated January 30, 2008 to Ms. Gould-Demers, asked about the possibility of cashing out his surplus vacation leave. Finally, the grievor's decisions`, made to his detriment, were based on the total amount of vacation leave represented to him; had a different total been presented to him, he might have made different decisions.

[55] The following is the text of the grievor's January 30, 2008 email to Ms Gould-Demers:

> *Subject: RE: Prosper Leave Credits*
> *Date: Wed, 30 Jan 2008 09:53:09 -0500*
> *From: Tom.Prosper@cbsa-asfc.gc.ca*
> *To: Monica.Gould-Demers@cbsa·asfc.gc.ca*

CC:Francine.Drouin@cbsa-asfc.gc.ca;
Raymond.Bedard@cbsa-asfc.gc.ca

Monica,
That's good news. As discussed, when we get the final tally of leave due I would like to meet to explore any options I may have with respect to cashing out, carrying over, early retirement etc.

…

I would like to thank you for your assistance in this matter and look forward to hearing from you soon.

Tom Prosper

…

IV. Reasons

[56] At the end of the hearing, the parties asked that, since no evidence was adduced about the calculation of the number of hours involved in this matter, I remain seized if any issue related to the decision's implementation were to arise.

[57] The facts of this case are not in dispute. The grievor grieved the employer's decision to recover an amount of vacation leave granted to him in error. The grievor was employed in the public service from 1974 to 1999. At that point, he left the public service and received severance pay. When he left he was entitled to the equivalent of six weeks of vacation per year. In 2000, he returned to public service. His vacation leave entitlement was then the equivalent of three weeks per year. In 2007, he inquired as to whether he would be entitled to the long-term service award. He also asked whether, when calculating his vacation leave entitlement, his years of service would go back to 1974. He emailed his pay advisor on December 14, 2007. In it, he refers to his return to the CBSA and reproduced the clause in the collective agreement dealing with situations in which an employee received severance pay and its impact on the vacation leave calculation. That email reads as follows:

From: *Prosper, Tom*
Sent: *December 14, 2007 1:33 PM*
To: *Gould-Demers, Monica*
Subject: *Prosper Leave Credits*
Importance: *High*
Hi Monica,
I hate to bother you again. However, I was recently advised that since my start date was reset in CAS to April 8, 1974 my vacation leave credits should also be adjusted to reflect a 1974 start.
My question is:

- *Should I have been accumulating leave credits at the rates corresponding to my* cumulative *years of service as noted in Article 34 of the Collective Agreement since my return to the Agency?*

I have noted Article 34.03 and believe that subsection (b) is applicable in my situation. That is, I was a member of the PM group at the signing of the collective agreement on May 17, 1989 therefore, shall retain, for the purpose of "service" and of establishing my vacation entitlement those periods of former service which had previously qualified for counting as continuous employment.
Thank you for your consideration of this matter.
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.

(b) Notwithstanding (a) above, an employee who was a member of one of the bargaining units listed below on the date of signing of the relevant collective agreement or an employee who became a member of those bargaining units between the date of signing of the relevant collective agreement and May 31, 1990 shall retain, for the purpose of "service" and of establishing his or her vacation entitlement pursuant to this clause, those periods of former service which had previously qualified for counting as continuous employment, until such time as his or her employment in the Public Service is terminated.

[58] More than once, Ms. Gould-Demers, acting on behalf of the employer as a pay advisor, confirmed in email to the grievor that his leave entitlements would go back to 1975 (instead of 1974, to account for the year he had left the public service). I also note that Ms. Gould-Demers' supervisor, Ms. Gladu (formally Ms. Drouin), was copied on the emails but that she never intervened or took any action to express her disagreement with granting the additional leave.

[59] As mentioned earlier in this decision, I do not believe that it is in dispute that a mistake was made in good faith and as a result, the grievor was awarded a large amount of vacation leave to which he was not entitled. Moreover, in 2008, his annual leave entitlement had been adjusted on a go forward basis to acknowledge the adjustment to his start date to 1975.

[60] The grievor's representative essentially argued that I should allow the grievance since the grievor relied on what was promised to him, acted in good faith, asked at the outset the relevant questions about his entitlement and received confirmation from the employer more than once. As a result of the employer's representations, he made commitments; he acted in a way that was detrimental to his interests. Estoppel should apply in favour of the grievor.

[61] Although the employer conceded that an error was made, it argued that estoppel will apply only if I conclude that there was an intent, real or imputed, by the employer to relinquish its rights by granting the additional vacation leave.

[62] The first question I need to answer is the following: by its actions, did the employer make an unequivocal representation to the grievor about his vacation leave entitlements? If answered affirmatively, then the second issue becomes whether the grievor acted on the employer's representation to his detriment.

[63] Addressing the first question, I conclude that the employer's actions, through its representatives, misled the grievor about his vacation leave entitlement and that it had the effect of a promise to him.

[64] In my opinion, from the beginning, the grievor asked his compensation advisor about his leave entitlements and whether the calculation of the entitlements could go back to 1974. In the email sent on December 14, 2007, the grievor was forthright about his situation. While the matter was never discussed orally with the employer's representatives, in my opinion, the content of the email is clear that the employer knew at that point, or ought to have known, that the grievor had left the public service a few years earlier and that, by the nature of the question and the reference in the email to severance pay, the employer must have known that the grievor had received severance pay at some point. Further, the employer was in a position to ascertain this fact either by consulting the grievor's file or by seeking the information from the grievor himself. It did not do so.

[65] In my view, upon receiving the email, it was up to the employer to properly assess the grievor's circumstances. Not only did it not do so, in subsequent emails between the parties, the employer continued to indicate that it was redoing the calculation and adjusting its system to reflect the new vacation leave entitlement. It finally confirmed in January 2008 the grievor's supposed vacation leave entitlement.

This is not a situation where an error was committed and the employer did not have a chance to correct it. Nor was the error difficult to detect. In her testimony, Ms. Gladu (formally Ms. Drouin) indicated that information about the grievor receiving severance pay was contained in his compensation file. Ms. Mudryk confirmed as much and indicated that Ms. Pearson came to her after looking into the grievor's file and realizing that there had been an error made.

[66] It is also important to note that, on the emails dated January 24 and 30, Ms. Gladu (formally Ms. Drouin) was copied but that she never intervened to verify and correct the error. Only in or about June 2008, when Ms. Mudryk was informed, did the employer begin to take action.

[67] Since I have decided that representations were made to the grievor about his additional vacation entitlements, and before I get to the question of whether he acted upon the employer's representations to his detriment, I must ask myself when, in a situation like this, did the employer's representations end? In my view, one cannot take advantage of an error indefinitely. Normally, the obligation ceases the moment the grievor is informed of the employer's error. In this case, that was when the grievor was informed that he was not entitled to the additional vacation leave. As stated as follows at paragraph 2:2213 of *Canadian Labour Arbitration*:

> *…However, once an estoppel has arisen, arbitrators are generally agreed that the estoppel may have a limited duration. Accordingly, notice of an intent to revert to the strict terms of the agreement, or conduct that indicates that there will be a reversion to the party's strict legal rights, such as the filing of a grievance, or the negotiation of settlement of a grievance, will bring the estoppel to an end….*

[68] I also believe that, in a situation like this, the employee has the obligation to mitigate whenever possible the damages that were caused by the error.

[69] I will now apply that reasoning to this case. The grievor testified that he returned from his holiday on August 5, 2008. Even though an email was sent to him on July 16, 2008, the grievor's explanation is that only on August 5, 2008 did he see it. At that point, he had enjoyed four weeks of holidays even though, if not for the mistake, he was entitled to only three weeks for the whole fiscal year. He testified that he normally takes a couple of weeks in the summer and the rest at Christmas and in March.

[70] I believe that the grievor acted to his detriment when, based on the representations made to him by the employer, he took four weeks off in July, even though he had only three weeks' vacation for the entire year. The evidence is that he would normally take 2 weeks off in the summer. The two extra weeks, which the grievor took solely as a result of the employer's representations to him, should not be recovered by the employer as they are properly covered by the principle of promissory estoppel.

[71] As for the three additional days the grievor took in August 2008, here again the uncontradicted evidence is that the grievor still thought the matter could be resolved and with the knowledge of his manager, Mr. Bédard, he took these three additional days of vacation. In the circumstances, I do not believe that the employer is entitled to recover those three days of vacation either.

[72] On the issue of the trip to Disney World, as mentioned earlier in this decision, I believe that, once informed of the employer's position in August 2008, the grievor then had an obligation to mitigate his damages. He was told on August 5, 2008 that he was not entitled to the additional vacation leave. He decided nonetheless to go ahead with his trip to Disney World even though it meant taking that leave without pay. It was his decision, and the employer cannot be held responsible. Moreover, no evidence was adduced as to the grievor's efforts to cancel the trip or to obtain reimbursement, other than vague evidence to the effect that the grievor had contacted his credit card company. The grievor testified that he "thought" that he could not be reimbursed. Such facts are not sufficient to find that the principle of promissory estoppel applies to the facts surrounding the trip to Disney World.

[73] I will turn now to the issue of the grievor's fiscal year vacation leave entitlement. As mentioned earlier, I do not think that, despite the fact that the grievor was made to believe that he was entitled to additional leave, it can continue indefinitely. Therefore, I conclude that the employer was right to reset the grievor's fiscal vacation leave entitlement in 2008 as per the collective agreement.

[74] Finally, on the issue of having to sell the car, the grievor's argument was that, in anticipation of being able to cash out some of the extra vacation leave, he bought a second car but that he had to sell it at a loss a month later when informed of the employer's position. Although the grievor testified that it has been the practice at the CBSA to cash out vacation leave at the end of the fiscal year, no evidence was adduced

that the grievor made any request to the employer to convert the unused portion of his vacation leave to cash that had been accepted, and then refused. Therefore, he should not be compensated for the loss that he incurred on the sale of the car.

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

(The Order appears on the next page)

V. Order

[76] The grievance is granted in part.

[77] I order that the grievor is entitled to have his leave bank re-credited for the two weeks of additional vacation leave that he took in July 2008.

[78] I order that the grievor is entitled to have his leave bank re-credited for the three days of vacation leave that he took in August 2008.

[79] I dismiss all other issues raised by the grievance.

[80] I remain seized for 90 days if any issue arises related to the implementation of this decision.

December 6, 2011

Linda Gobeil,
adjudicator