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File: 566-02-2322

Citation: 2011 PSLRB 57



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

SERGE LAPOINTE

Grievor

and

**TREASURY BOARD
(Department of Human Resources and Skills Development)**

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Patricia Harewood, grievance and adjudication officer

For the Employer: Martin Charron, counsel

Heard at Montréal, Quebec,
February 10, 2011.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] Serge Lapointe (“the grievor”) began his public service employment in 1973. When he filed his grievance, he had been, since March 15, 1999, in a position classified GL-MDO-04 (salary protected at the GS-04 level) in the Finance, Administration and Information Technology Branch of the Department of Human Resources and Skills Development (“the employer”) in Montréal.

[2] Between August 5, 2000 and August 4, 2004, because of an administrative error, the grievor was paid according to the wrong salary range, namely, at the hourly rate for Zone 1 instead of at the lower hourly rate for Zone 2. The grievor was unaware that he had been overpaid until he was informed by his supervisor, Jean-Marie Ducasse, on July 5, 2005 that the employer intended to recover an overpayment of \$9666.56 from his wages. The meeting with Mr. Ducasse was followed by discussions about how the recovery would affect the grievor’s quality of life. On July 28, 2005, the grievor was notified in writing about the overpayment.

[3] On March 27, 2006, the employer informed the grievor that it was required to recover the amount owing as quickly as possible. The employer also informed the grievor that the amount recovered would be 10 percent of his gross salary and that it would be deducted every pay period until the debt was erased. On April 18, 2006, the employer notified the grievor that the recovery would begin on May 17, 2006 and that it would be \$148.48 per pay for 65 pay periods, except for the last period, which would be \$20.56.

[4] On May 3, 2006, the grievor grieved the employer’s decision to proceed with the recovery. The grievance is worded as follows:

[Translation]

I contest the employer’s decision under subsection 155(1) of the Financial Administration Act to identify a salary overpayment in the gross amount of \$9666.56, which resulted from an administrative error.

I contest the employer’s decision to recover the amount owed to the Crown and to request that I repay that amount.

[5] The grievor requested the following corrective action:

[Translation]

I request that the Crown use its discretionary authority under the Financial Administration Act to write off the debt, given that the employer is entirely responsible for its existence.

I request that all recovery measures be suspended until my grievance has been settled, and I have right of recourse against the decisions.

I request that the deputy head consider the undue hardship that the decisions are creating in my current and future financial situations due to commitments entered into before the changes.

[6] On September 27, 2006, the grievor requested that the amount recovered in each period be reduced because of his financial situation. He tabled a financial statement dated September 21, 2006 to support his request. On December 15, 2006, the employer agreed to reduce the amount recovered each pay period to 5 percent of the grievor's gross salary, that is, \$74.20, until the anniversary date of his 35 years of service. The amount held from his pay was then set to \$148.20 until the debt was paid. The repayment ended on June 23, 2009. The grievor retired on July 18, 2009.

[7] In its responses at the first and final levels of the grievance procedure, the employer refused to suspend or to stop recovering the overpayment. At the first level, the grievor's immediate supervisor stated that he could not allow the grievance because debt write-off was national-level responsibility. In the response at the third and final level of the grievance procedure, the Head of Operations and Director General stated that an overpayment debt could not be written off without the Treasury Board's approval.

II. Summary of the evidence

[8] The grievor testified that he was surprised to learn on July 5, 2005 that he had been paid according to the wrong salary range. He stated that he remembered that, in March 2002, a colleague, classified MDO-05, had reported the retroactive payment for the January 1, 2001 to March 31, 2002 period being too high. After checking this over, the compensation section apparently reassured that employee that there was no error.

[9] The grievor stated that, when he received his new salary after the collective agreement was signed between the Treasury Board and the Public Service Alliance of Canada for the Operational Services Group (expiry date: August 4, 2003), he was doing different work and had salary protection at the GS-04 level. Thus, he did not notice the pay error. In addition, there had been talk during the negotiations of abolishing the rates of pay by zone. Consequently, he paid no attention to the matter and did not check his salary. The grievor added that he worked as a trucker and that he did not have access to a workstation at which he could have readily checked his salary. Mr. Ducasse was very sympathetic when he met with the grievor on July 5, 2005. Mr. Ducasse told the grievor that another employee, Jean-Luc Racette, who was classified MDO-05 and who had salary protection as he did, had also received an overpayment that the employer was preparing to recover.

[10] The grievor testified that the overpayment recovery put him and his family in a very difficult financial situation. The recovery of 10 percent of his gross salary represented a \$300 decrease in his monthly earnings, in addition to the salary reduction. He and his spouse run a foster home for four teenagers, for whom they receive \$3000 a month, which barely covers their expenses. To meet the family's needs, the grievor took out a line of credit. For three years, he was on a tight utilities budget. The eventual reduction of the holdback to 5 percent of his gross salary helped his budgeting but still left him unable to repay his line of credit. The shortfall left the grievor without enough money to finish paying off his mortgage before his retirement or to contribute to his RRSP as he normally did.

[11] The grievor explained that, in August 2004, with what he was earning then and with the money that he was saving since he quit smoking, he followed through on his dream of buying a trailer to make his family camping trips more comfortable. The grievor spoke passionately about his camping hobby. He also explained that he would not have incurred a \$10 000 debt had he been aware of his real salary. The shortfall left him with no choice but to sell the trailer. The stress caused by his financial situation damaged his health, raised his blood pressure and his cholesterol and worsened his diabetes. At the time of the hearing, he was working part-time as a school bus driver.

[12] André Julien is the union representative who advised the grievor and who represented him at the final level of the grievance procedure. He testified that the

grievor's files and those of Mr. Racette were processed together because the grievances were identical and because they were under the same union local. Although they were classified at different levels, both employees had salary protection and had received an overpayment. Prior to his current position, Mr. Julien was a collections officer with the Canada Revenue Agency. In preparation for the grievor's hearing and that of Mr. Racette at the first level of the grievance procedure, Mr. Ducasse called him to ask about the collection rules.

[13] Mr. Julien explained that the compensation rates for the different zones were listed in Schedule A to the collective agreement. Zone 1 includes British Columbia, the Yukon, Nunavut and the Northwest Territories. Zone 2 includes the Atlantic provinces, Quebec and Ontario. Zone 3 includes Manitoba, Saskatchewan and Alberta. According to Mr. Julien, out of all employees in the province doing manual work, only the grievor and Mr. Racette were overpaid. In January 2002, Mr. Racette contacted Mr. Ducasse about his retroactive payment following the November 19, 2001 salary revision. According to Mr. Julien, the employer told Mr. Racette that there was no error and that he need not have any concerns about cashing his cheque.

[14] Mr. Julien represented the grievor and Mr. Racette at a hearing of both grievances on July 26, 2006 at the third level of the grievance procedure.

[15] Mr. Ducasse has been the employer's director of administrative services for 28 years. He confirmed that he met with the grievor on July 5, 2005 to inform him of the overpayment for the period from August 5, 2000 to August 4, 2004. The meeting was followed by talks with the union and with human resources and financial services at headquarters to determine how the situation should be handled. Headquarters had a legal opinion that the employer was required to recover the overpayment. Mr. Ducasse offered the grievor financial support so that he could obtain expert advice.

[16] Mr. Ducasse testified that Mr. Racette had come to see him about a retroactive payment that he thought was too high. Mr. Ducasse referred him to the compensation unit to relieve his concerns. According to Mr. Ducasse, the compensation unit verbally reassured Mr. Racette that there was no error in his level of compensation. At that point, Mr. Ducasse was not aware of the source of the error noticed by Mr. Racette. He did not hear any more about the compensation issue until the matter was raised in July 2005. Mr. Ducasse confirmed that he had handled the grievor's and Mr. Racette's

files separately. Mr. Ducasse testified that he was not aware whether the employer had requested that the Treasury Board write off the grievor's debt.

III. Summary of the arguments

A. For the grievor

[17] The grievor argues that the principle of estoppel applies in this case and that the employer should not have recovered the overpayment. There was a promise to pay a higher salary over a four-year period, and the grievor acted on that promise to his detriment. The doctrine of estoppel is based on the principles of common law and equity.

[18] The grievor argues that it is not a simple error. One of the two affected employees raised the possibility of an error long before the employer noticed it. Mr. Ducasse did not follow up when the error was raised. The error lasted four years. The grievor was then penalized for the remaining years before his retirement, which were determining years for his pension. He was affected both personally and financially. The employer knew that the recovery would cause harm to an employee who was, essentially, earning a low salary. The grievor became indebted by securing a line of credit. He was unable to pay off his mortgage at the rate he had anticipated, was unable to contribute to his RRSP and had to give up on his recreational projects. In short, this is an ideal case for estoppel. Moreover, the employer did not attempt to have the Treasury Board write off the debt. The grievor acknowledged that Mr. Ducasse was very sympathetic, although he was unable to write off the debt. The grievor asks that I allow the grievance and use my discretion to grant the requested corrective action.

[19] In support of his position, the grievor cites the following decisions: *Defoy v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-25506 (19941025); *Conlon et al. v. Treasury Board (Public Works and Government Services Canada)*, PSSRB File Nos. 166-02-25629 to 25631 (19970604); and *Molbak v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-26472 (19950928) (upheld in [1996] F.C.J. No. 892 (T.D.) (QL)).

B. For the employer

[20] The employer argues that the overpayment was an unfortunate error and that it rectified the situation in 2005. Subsection 11(1) of the *Financial Administration Act* provides the authority to recover a debt owed the Crown. The employer does not deny its administrative error but points out that the grievor received an amount to which he had not been entitled.

[21] The employer argues that the only issue in dispute is the application of the principle of estoppel, which concerns an exception to the contractual intention of the parties and must be applied sparingly. In this case, the grievor must demonstrate that he met all the exceptional conditions, which he did not manage to do. The fact that a second employee was affected or raised the issue in 2001 is not relevant because there is no evidence that the facts are identical, other than that both received an overpayment that the employer recovered.

[22] The employer's promise to deviate from the collective agreement had to be clear and unequivocal, and it had to prompt the grievor to change his behaviour. The grievor had to be aware of the error and the promise. The grievor found out about the error only when Mr. Ducasse told him about it on July 5, 2005. The employer found out about the matter at the same time. The employer and the grievor had no discussions prompting him to act to his detriment. In addition, the collective agreement implies a negotiation between the employer and the bargaining agent and excludes individual agreements with employees.

[23] The employer argues that several things might have led the grievor to purchase a trailer, to not pay down his mortgage or to not contribute to an RRSP. The employer points out that the recovery did not affect the grievor's last years of service and that he renewed his mortgage after the recovery started. Moreover, he did not suffer any income tax consequences because he can ask the Canada Revenue Agency to make an adjustment for the prior years, if need be. The grievor's camping hobby began a number of years earlier, and his more recent acquisition of a trailer was prompted by his family's expansion rather than an increase in his income. The employer argues that the financial balance sheet did not adequately explain the grievor's financial difficulties.

[24] Even without a request to the Treasury Board for an exemption from recovering the debt, nothing prevents the employer from recovering the overpayment. The employer acted based on a legal opinion. In the absence of a clear and unequivocal promise by the employer to pay the grievor at a higher level than that to which he was entitled, the principle of estoppel does not apply, and I should dismiss the grievance.

[25] In support of its position, the employer cites the following decisions: *Légaré v. Canada (Treasury Board)*, [1987] F.C.J. No. 304 (C.A.) (QL); *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, [1984] 1 F.C. 1081 (C.A.); *Ménard v. Canada*, [1992] 3 F.C. 521 (C.A.); *Dubé v. Canada (Attorney General)*, 2006 FC 796; *Canada (Attorney General) v. Lamothe et al.*, 2008 FC 411; *Maccabée v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-19793 (19900905); *Molbak; Ellement v. Treasury Board (Public Works and Government Services Canada)*, PSSRB File No. 166-02-27688 (19970611); *Bolton v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSLRB 39; *Matear v. Treasury Board (Department of Indian and Northern Affairs)*, 2009 PSLRB 97; *Murchison v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 93; and *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112.

C. The grievor's response

[26] The grievor responds to the employer's submissions by raising the fact that his case and that of Mr. Racette were combined for processing under the accelerated grievance procedure. Those two employees were part of the same group that was subject to the same incorrect application of the collective agreement; i.e., they were compensated at the Zone 1 rate instead of at the Zone 2 rate. The employer paying the employees at the wrong rate for four years constituted a promise. The employer's assurance to Mr. Racette constituted an implicit promise. And, in the end, the employer did not make the effort to request that the appropriate authority write off the debt.

[27] Moreover, the consequences of the recovery continue to be felt. The grievor retired only after repaying the overpayment. He currently works as a bus driver. He has not been able to pay off his mortgage as he had intended. He is no longer able to enjoy his camping hobby.

III. Reasons

[28] In this case, the grievor has grieved the employer's decision to recover an overpayment of \$9666.56 resulting from a misapplication of the collective agreement, under which he was paid at a higher rate than he was entitled for four years (August 5, 2000 to August 4, 2004). The employer informed the grievor on July 5, 2005, and started recovering the amount in question a year later. It took the grievor three years to repay the amount claimed, that is, until two weeks before he retired.

[29] The grievor argues that the principle of estoppel applies to this case. That principle was described by Lord Denning in *Amalgamated Investment and Property Co. Ltd. v. Texas Commerce International Bank Ltd.*, [1981] 3 All E.R. 577, as follows:

...

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 - 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.

...

[30] In *Canada (Attorney General) v. Molbak*, [1996] F.C.J. No. 892 (T.D.) (QL), the Federal Court held that an adjudicator under the *Public Service Staff Relations Act* had jurisdiction to hear a grievance and to apply the principle of estoppel. According to that principle, a party that receives a salary overpayment may challenge the decision to recover the overpayment if the party can establish detrimental reliance on the error. In my opinion, that principle readily applies to this case.

[31] The error occurred over a period of four years, without the employer taking any action. The employer did not deny its error. The evidence shows that another employee

raised the question of a possible error when he received his retroactive payment following the salary revision on November 19, 2001. I believe that the four-year period misled the grievor about his compensation and that it had the effect of a promise to him.

[32] Overall, it seems to me that the employer had more than one opportunity to check the grievor's salary, particularly with each pay increment and collective agreement renewal. Realizing several years later that an administrative error occurred does not release the employer from its duty of vigilance with respect to the fair compensation of its employee, as provided under the collective agreement.

[33] In light of the grievor's weekly pay stubs between August 5, 2000 and July 18, 2009, I am convinced that he entered honestly into a financial commitment based on the salary he received between August 5, 2000 and August 4, 2004 and that he would not have done so otherwise. He took on a major expense that he otherwise would not have. He took out a line of credit to help him meet his monthly commitments, and he was unable to pay off his mortgage before his retirement, as he had planned, or to contribute to his RRSP, as he normally did.

[34] The *Financial Administration Act* allows the employer to exercise its discretion when deciding whether to proceed with a recovery. The provision is not restrictive, and in this case, it enabled the employer to exercise its discretion with respect to the grievor's specific situation. It should be noted that the Public Service Labour Relations Board has, on more than one occasion, applied the principle of estoppel to situations in which employees were misled by the employer's representations, namely, in *Molbak*, *Murchison*, *Conlon* and *Defoy*.

[35] In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee Relations' Union* (1999), 84 L.A.C. (4th) 252, the arbitrator held that a six-year delay in recovering an amount owed the employer as a result of an overpayment of benefits to which the employee was not entitled was unreasonable and even unjust. In this case, the 7-year delay, which includes the 5 years before the employer noticed its error and the 2 years before it proceeded with the recovery, is every bit as unfair given that the grievor was coming to the end of a 35-year career with the public service and had a low income. Because of the scope of the employer's discretion and its delay in asserting its claim, I find that

the employer exercised its discretion to recover the overpayment in an unreasonable manner.

[36] I am aware that this case originated in the province of Quebec and that the concepts of civil law are not identical to those of common law. In *Ménard*, the Federal Court of Appeal did not consider it appropriate to discuss the principle of estoppel in a case originating in the province of Quebec. However, the Court stated the following:

...

[30] To begin with, although the principle of estoppel is not part of our civil law, it bears a close resemblance to several aspects of the civil law concept of the fin de non-recevoir. . . .

...

The Court pointed out that, under civil law, a contractual promise is valid even without a consideration provided by the beneficiary. In this case, and for the reasons indicated earlier, I believe that the employer's error had the effect of a promise to the grievor without him having to provide a consideration.

[37] Consequently, the grievance is allowed. The overpayment amount recovered must be repaid to the grievor.

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

(The Order appears on the following page)

IV. Order

[39] The grievance is allowed.

[40] I order the employer to repay the grievor the amount of \$9666.56 as soon as possible.

April 26, 2011.

PSLRB Translation

**Michele A. Pineau,
adjudicator**