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Public Service
Labour Relations Act

Before the Vice-Chairperson
and an adjudicator

BETWEEN

DONALD CAWLEY

Applicant and Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Respondent and Employer

Indexed as
Cawley v. Treasury Board (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication and an application for extension of time referred to in paragraph 61*(b)* of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: Renaud Paquet, Vice-Chairperson and adjudicator

For the Applicant and Grievor: Chris Buchanan, counsel

For the Respondent and Employer: Caroline Engmann, counsel

Heard at Victoria, British Columbia,
October 9 and 10, 2013.

I. Individual grievance referred to adjudication

[1] Donald Cawley ("the grievor") retired from his job with the Canadian Coast Guard at the Department of Fisheries and Oceans ("the employer") on November 1, 2007 due to illness. In December 2010, he filed a grievance against the employer's decision to recover $9 528.88 on March 11, 2010, from a reclassification payment that was made to him. The grievor would have received a gross total of $19 736.54, but instead, he received $10 207.66 because of that recovery.

[2] In 2003, the grievor, along with other employees, filed a grievance alleging that he was not properly classified. In July 2003, that grievance was partially allowed. In September 2006, meetings were held between the employer, the grievor and other employees to rewrite their job descriptions. Following the meetings, the employer informed the employees that the classification of their positions would be reviewed shortly.

[3] In December 2006, the grievor was diagnosed with cancer. He underwent surgery and returned to work in January 2007. In March 2007, it was discovered that he had another form of cancer. He underwent further surgery, chemotherapy and radiation. He used his sick leave until the end of October 2007 and retired on November 1, 2007.

[4] The details and corrective action sections of the grievance form read as follows:

> . . .
>
> *I grieve the recovery of monies in the amount of 9,528.88 from my pay/severance.*
>
> *I ask that estoppel be applied to this as the recovery of monies causes me undue hardship.*
>
> . . .
>
> *I ask that said monies be returned due to the error on the part of the employer and that debt be forgiven.*

[5] There was no reply from the employer at the first level of the grievance procedure. At the second level, the employer denied the grievance on the basis that the grievor was not an employee when he grieved. The employer also denied the grievance at the final level on that basis. On that point, the employer wrote the following in its reply at the final level of the grievance procedure:

. . .

> *As per Section 208(1) of the* Public Service Labour Relations Act*, only an employee can present a grievance. You retired on November 1, 2007, yet you filed your two grievances (7168 and 7169) on December 3, 2010, several years after you ceased to be an employee. Therefore, you are not eligible as a retiree to present these two grievances and you are not covered by the collective agreement as you ceased to be an employee of the public service. As such, your two grievances are denied and the corrective action requested will not be granted.*
>
> *Nevertheless, I will address the merits of grievance* [sic] *7168 and 7169, given your allegation of undue hardship.*

. . .

[6] On September 16, 2011, the grievor gave notice to the Canadian Human Rights Commission (CHRC) of his intention to raise at adjudication an issue involving the interpretation or the application of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 (*CHRA*). On September 26, 2011, the CHRC indicated that it intended to make submissions on this matter. It made its submissions on February 3, 2012. However, the grievor withdrew his allegations of human rights violations at the hearing. Consequently, I will not report on any of the submissions that I received on this issue.

[7] The grievance was referred to adjudication on September 19, 2011. In reply to the referral, on October 18, 2011, the employer objected to the jurisdiction of an adjudicator to hear the grievance because the grievor was no longer an employee when he filed his grievance. However, the employer did not raise at that time any timeliness objection related to the fact that the grieved decision to recover $9 528.88 was made in March 2010 but that the grievance was filed only in December 2010.

[8] At my request, the parties made several written submissions related to the employer's preliminary objection. After reviewing those submissions, I concluded that an oral hearing was necessary in order to have a better understanding of the facts of the case. In one of his submissions, the grievor applied for an extension of the time limits to file a grievance.

[9] Pursuant to section 45 of the *Public Service Labour Relations Act* ("the *Act*"), the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise his powers pursuant to paragraph 61(*b*) of the *Public Service Labour Relations Board*

Regulations ("the *Regulations*") to hear and decide the matter relating to the extension of time.

II. Summary of the evidence

[10] The parties adduced 20 documents in evidence. The grievor testified. The employer called Sherry McDonald, Dieter Losel and Drew Edey as witnesses. From 2007 to 2011, Ms. McDonald was manager of compensation for the employer for British Columbia. Mr. Losel has been the supervisor of marine and civil infrastructure since 2004 and Mr. Edey the superintendent of marine and civil infrastructure since 2008. Between 2004 and 2007, the grievor reported to Mr. Losel, who has reported to Mr. Edey since 2008.

[11] The grievor held continuous employment with the employer between 1982 and November 1, 2007. In 1999, he was appointed to the position of Foreman, Aids to Navigation Technician. The position was then classified at the GL-INM-11/C3 group, subgroup and level. “GL” refers to the General Labour and Trades group. The GL group is divided into subgroups, such as INM (Instrument Maintaining) or MAM (Machinery Maintaining), to which I will refer later. According to the GL classification standard, part of which was adduced in evidence at the hearing, the “C3” reference, also called the supervisory differential, refers to the nature of a position’s supervisory responsibility. C3 implies that the incumbent supervises between 6 and 20 employees.

[12] In 2001, the grievor, like many of his colleagues across Canada, filed a classification grievance against the classification of his position at the GL-INM-11/C3 group and level. He thought it should be classified in another group at a higher level. The employer replied to the grievance at the final level on December 14, 2006. In that reply, the employer indicated that the grievor’s position should be covered by a national model work description. The employer anticipated that that national work description would be forthcoming in early 2007 and that the classification of the position would follow in the coming months. The employer stated that to that extent, the grievance was partly granted. Unfortunately, the employer’s classification decision did not come in the “coming months.”

[13] On December 8, 2006, the grievor learned that he had a cancer and he had emergency surgery. In January 2007, he was diagnosed with another form of cancer. He had surgery for that cancer and was under chemotherapy treatment for the

following six months. The grievor testified that in September 2007, his doctors suggested to him that it would be better for him to retire, to remove stress from his life and to improve his recovery. Unfortunately, the grievor's health only temporarily improved because he was diagnosed with other cancers later on, which implied more chemotherapy and medical treatments.

[14] Because of his health, the grievor formally advised the employer in June 2007 that he would retire on November 1, 2007. On June 8, 2007, Mr. Losel wrote to the grievor, informing him that he was accepting his resignation and that he wished to thank him for his contributions and dedication to the Canadian Coast Guard. The grievor testified that he would have worked an extra three years had he been healthy. He did not incur a pension penalty when he retired, but his pension was based on 25 years of service rather than 28 years, as he had initially planned.

[15] On December 1, 2009, the employer finally wrote to the grievor to inform him of its decision on his revised classification. However, the grievor testified that he never received that letter since it was addressed to his old workplace mailing address. On March 22, 2010, one of the employer's compensation advisors stated in a letter received by the grievor that his former position had been reclassified from GL-INM-11/C3 to GL-MAM-11/C2. Moving from the INM-11 subgroup to the MAM-11 subgroup meant a pay increase for the grievor. However, the change from the C3 to the C2 supervisory differential implied that the differential for supervising staff would be reduced from 15% of the pay rate to 11%.

[16] The grievor's reclassification to GL-MAM-11/C2 was effective retroactively to December 14, 2001. According to the document submitted at the hearing, the change from the INM subgroup to the MAM subgroup resulted in a retroactive payment of $19 736.54. However, the change from the C3 supervisory differential to the C2 differential resulted in an overpayment of $9 528.88 since the grievor was paid the C3 differential between 2001 and his retirement in 2007.

[17] On March 28 and April 25, 2010, the grievor communicated with Mr. Edey, reminding him that the grievor was told when he obtained his former job that he would always maintain the C3 differential during his time as a foreman. He also stated that the differential was not to change because of the salary protection provisions of the relevant collective agreement. He argued that he supervised more than six employees during the period at issue. He reiterated that position in his testimony. On

April 27, 2010, Mr. Edey answered the grievor, explaining that according to the data he had, the grievor did not supervise six employees or more during that period.

[18] The grievor testified that he would not have applied for the position that he occupied from 1999 to his retirement had it been at the C2 supervisory differential. He said that the employer promised him that the position would remain at the C3 level until his retirement but that it would probably be reduced to the C2 level after his departure. The grievor also testified that his decision to retire was made on the basis of the pension earnings that his wages, including the C3 supervisory differential, would generate.

[19] Ms. McDonald testified that she made the decision to recover the lower supervisory differential from the grievor's reclassification retroactive payment. She testified that in doing it, she simply applied the employer's policies and the salary tables of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Operational Services Group ("the collective agreement") (expiry date, August 4, 2011). She testified that the salary protection clause of the collective agreement did not apply to the grievor since the salary of a GL-MAM-11/C2 is higher than the salary of a GL-INM-11/C3.

[20] According to the collective agreement, the supervisory differential has 10 levels. Positions classified in the B4, C3 and D2 categories are paid at level 3, which provides a premium equal to 15% of salary. Positions classified in the B3 and C2 categories are paid at level 2, which provides a premium equal to 11% of salary. Clause 5.01 of Appendix B of the collective agreement provides details on who should receive the differential. It reads as follows:

> ***5.01*** *A supervisory differential, as established in Annex C, shall be paid to employees in the bargaining unit who encumber positions which receive a supervisory rating under the classification standard, and who perform supervisory duties.*

[21] The grievor adduced in evidence a memorandum signed on January 7, 2009 by Robb Wight, the director general of Integrated Technical Services. That memo dealt with several aspects of the impact of the national classification decisions made by the employer at that time. The grievor's former position was directly affected by those decisions. The memorandum stated that superintendents "must meet" with each employee to review their classification decisions and to notify them of their grievance

rights. The grievor testified that Mr. Edey never met with him. Mr. Edey testified that he did not have to meet with the grievor since he was no longer an employee. The memorandum also states that the employees negatively affected by the classification review would be salary protected and that no salary would be recovered from them.

III. Summary of the arguments

A. For the grievor

[22] The grievor argued he had the right to file a grievance even though he was retired as the subject of the grievance arose out of the employment relationship between him and his employer. While the *Act* does indeed seem to indicate that former employees are entitled to submit a grievance only with respect to a disciplinary action or a termination of employment, that interpretation was widened by *Canada (Treasury Board) v. Lavoie*, [1978] 1 F.C. 778 (C.A.), and subsequent decisions. The Federal Court of Appeal in *Lavoie* concluded that the right of former employees to grieve is not limited by the statutory language.

[23] The grievor grieved the employer's attempt to recover an overpayment that was made as a result of a reclassification of his position. The reclassification arose out of the employment relationship between him and his employer and therefore falls within the ambit of the Court's intentions in *Lavoie*. Furthermore, the grievor argued that in keeping with the duty of fairness in the administrative process, as set out in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, he ought to have the right to contest the employer's attempt to recover such a substantial sum of money from him.

[24] The Supreme Court of Canada held in *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, that arbitrators ought to have exclusive jurisdiction over labour disputes. The result of *Weber* and subsequent decisions is that courts may refuse jurisdiction for labour-related matters, requiring instead that the aggrieved person seek resolution through labour tribunals. Should the adjudicator refuse to be seized of this grievance, the grievor will be left with no recourse to contest the salary recovery, which is a result that certainly violates principles of natural justice.

[25] The grievor argued that he was never advised while he was employed or after that his former position supervisory differential would be reduced to C2. In fact, he

was promised that his position would remain at the C3 differential, but it was reduced retroactively for the six years before he retired, even though for part of that period he supervised more than six employees. In addition, he was never given the opportunity to contest the employer's findings that his position would be rated at the C2 differential. Sufficient information should have been provided to him to allow him meaningful participation in the process. On that point, the grievor referred me to *Hale v. Canada (Treasury Board)*, [1996] 3 F.C. 3 (T.D.).

[26] The grievor argued that the doctrine of estoppel applies to this case. The employer promised him that the C3 differential would be maintained, and it broke that promise. The grievor acted on that promise. He retired based on estimated revenues that included the maintaining of the C3 supervisory differential. The employer did not provide any justification to recover funds from the grievor. It could have used its discretionary power to not recover them. Instead, the employer went back 10 years in recovering funds, 3 years after the grievor retired.

[27] The employer did not raise the timeliness issue when it was time to do so, after the grievance was referred to adjudication. Nor did it raise the issue in the grievance replies. In not acting when it should have, it waived its right to do so later on.

[28] The grievor argued that his grievance is not a classification grievance. The grievance did not challenge the classification decision but rather the employer's decision to recover more than $9 000 from him, even though the employer had promised him that his supervisory differential would remain at the C3 level.

[29] The grievor referred me to the following decisions: *Hale*; *Molbak v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-26472 (19950928); *Defoy v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-25506 (19941025); *Murchison v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 93; *Lapointe v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 57; *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64; *Cardinal v. Solicitor General (Department)*, PSSRB File No. 161-02-178 (19790221); *Salie v. Canada (Attorney General)*, 2013 FC 122; and *McWilliams et al. v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 58.

B. For the employer

[30] The employer argued that the grievor did not have standing when he grieved. The issue giving rise to the grievance arose on March 22, 2010, more than two years after he had left the public service on November 1, 2007. The grievor was then a former employee. The *Act* clearly indicates that the only situations that provide former employees with the entitlement to submit a grievance are disciplinary actions and terminations of employment. As the grievor was not disciplined or terminated, he clearly does not meet that criterion.

[31] The overpayment situation arose from a retroactive reclassification that was applied to many employees. The grievor knew that the classification of his position was under review when he retired. The supervisory differential was part of the grievor's classification, and its reduction from C3 to C2 was part of that classification review. In fact, the grievance is a classification grievance, and such a grievance cannot be referred to adjudication. Even had the grievor still been an employee, he would not have been able to refer his grievance to adjudication.

[32] The employer admitted that it was late raising the issue of timeliness. It did not raise it when replying to the grievance and not within 30 days of being advised that the grievance was referred to adjudication. The employer felt that raising it was unnecessary since it believed that the grievor did not have standing because he was no longer an employee.

[33] The employer argued that the grievor's application for an extension of time should be dismissed. The grievor did not present any clear and cogent reason to justify the delay to file his grievance. Furthermore, the grievance has no chance of success at adjudication because the grievor has no standing and because the adjudicator has no jurisdiction to hear a classification grievance.

[34] The employer argued that it was in its right to recover the overpayment resulting from the change to the supervisory differential. The recovery was done from the total reclassification payment. At the end of that exercise, the grievor received a substantial amount of money. Salary protection did not apply to him since the salary of the position was higher after the reclassification exercise than before.

[35] The doctrine of estoppel does not apply to this case. The grievor did not produce evidence that his C3 differential would be maintained. His only evidence was that someone told him so, but that person was not called as a witness. The grievor did not know what the result of the classification review would be when he retired. He cannot argue detrimental reliance, meaning that he made his decision to retire based on a higher salary for the calculation of his pension. He had no guarantee that his position would be reclassified.

[36] The employer referred me to the following decisions: *Murchison; Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40; *Canada (Attorney General) v. Churcher*, 2010 FC 1007; *Churcher v. Treasury Board (Department of Fisheries and Oceans)*, 2009 PSLRB 83; *Canadian Federal Pilots Association v. Treasury Board*, 2011 PSLRB 84; *Cockell v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-21132 (19910918); *Comiskey v. Jensen et al.*, 2012 PSLRB 22; *Doiron v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 77; *Glowinski v. Treasury Board (Department of Industry)*, 2007 PSLRB 91; *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92; *Jarry and Antonopoulos v. Treasury Board (Department of Justice)*, 2009 PSLRB 11; *Kidd v. National Research Council of Canada*, 2010 PSLRB 73; *Lagacé v. Treasury Board (Immigration and Refugee Board)*, 2011 PSLRB 68; *Payne and Ohl v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 33; *Prosper v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 140; *Vidlak v. Treasury Board (Canadian International Development Agency)*, 2006 PSLRB 96; and *Lavoie*.

IV. Reasons

[37] I have a grievance, several objections to my jurisdiction and an application for an extension of time in front of me. I will first determine whether the grievor could file a grievance when he did since he had already retired from the public service and was no longer an employee. If I conclude that the grievor had standing, I will examine the question of timeliness and the application for an extension of time if necessary. Finally, if the grievor has standing and there are no timeliness issues, I will examine the employer's objection about my lack of jurisdiction over the grievance, because it deals with classification, and the grievor's estoppel argument.

A. Mr. Cawley's right to grieve after he retired

[38] The evidence shows the grievor retired on November 1, 2007. Many years before then, he had filed a classification grievance. As result of the classification review, which was completed in late 2009, the employer decided that the grievor's position would be reclassified from the GL-INM-11/C3 group and level to the GL-MAM-11/C2 group and level. The reclassification decision applied retroactively to late 2001. It seems that the grievor was informed of that decision only in March 2010. He was then advised that the employer recovered from him an overpayment of $9 528.88 from a total retroactive payment of $19 736.54. Those amounts are before tax. The $19 736.54 represented the positive difference between the INM-11 and MAM-11 salary, and the $9 528.88 represented the negative difference between the C3 and C2 supervisory differential. The grievor was not satisfied with the employer's decision to recover retroactively from him the loss in the supervisory differential, and he filed a grievance in December 2010.

[39] The employer argued that the grievor was not an employee when he filed his grievance. The grievor argued that he was within his rights to file a grievance as its subject arose out of the employment relationship between him and his employer. He also argued that the employer's reading of the *Act* is not supported by the jurisprudence.

[40] The term "employee" is defined as follows in Part 2 of the *Act*:

> . . .
>
> ***206.*** *(1) The following definitions apply in this Part.*
>
> . . .
>
> *"employee" has the meaning that would be assigned by the definition "employee" in subsection 2(1) if that definition were read without reference to paragraphs* (e) *and* (i) *and without reference to the words "except in Part 2".*
>
> . . .
>
> *(2) Every reference in this Part to an "employee" includes a former employee for the purposes of any provisions of this Part respecting grievances with respect to*
>
> (a) *any disciplinary action resulting in suspension, or any termination of employment, under paragraph*

> *12(1)*(c)*, (*d*) or (*e*) of the* Financial Administration Act*; or*
>
> (b) *in the case of a separate agency, any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(2)*(c) *or (*d*) of the* Financial Administration Act *or under any provision of any Act of Parliament, or any regulation, order or other instrument made under the authority of an Act of Parliament, respecting the powers or functions of the separate agency.*
>
> . . .

[41] The relevant part of subsection 2(1) of the *Act*, to which subsection 206(1) refers, reads as follows:

> ***2.*** *(1) The following definitions apply in this Act.*
>
> . . .
>
> *"employee", except in Part 2, means a person employed in the public service, other than . . . .*
>
> . . .

[42] The grievor was not employed in the public service when he filed his grievance, and his grievance did not deal with termination or discipline. In addition, he was not an employee when the employer recovered money from him. Even though the context was different, the Federal Court of Appeal decided in *Lavoie* that a person does not necessarily lose the right to grieve on departure for non-disciplinary reasons. The Court wrote the following at paragraph 10:

> *. . . In my view, the introductory words of section 90(1) of the Public Service Staff Relations Act must be read as including any person who feels himself to be aggrieved as an "employee". Otherwise a person who, while an "employee" had a grievance -- e.g. in respect of classification or salary -- would be deprived of the right to grieve by a termination of employment -- e.g. by a lay-off. It would take very clear words to convince me that this result could have been intended.*

[43] In *Lavoie*, the Federal Court of Appeal was interpreting the 1970 version of the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35 (*PSSRA*). However, as stated in *Kidd*, there is no meaningful difference between that version and the *Act* on the issue of a former employee's right to grieve. In both, the term employee refers to a person

working in the public service and includes former employees for the purpose of grievances related to discipliniary action or termination of employment In *Lavoie*, the Court interpreted those provisions of the *PSSRA* in such a way that an employee could not be deprived of his or her right to grieve by virtue of the fact that the employement relationship was severed. The Court stated that very clear words are required to deprive an individual of his or her right to grieve. As *Lavoie* holds, it could not have been the intent of the legislature to deprive employees or former empoyees of a right to grieve matters that occurred while they were employees.

[44] The same logic should apply to issues or conflicts arising from the employment relationship but which are settled, through no fault of an employee, some years later after their retirement. If payments or benefits are due employees after they depart from the public service, those employees should have some redress mechanism open to them to challenge an employer's decision that, in their opinion, deprives them from what they were entitled to as a result of their former employment relationship. In this case, the grievor believes that the employer unjustly deprived him of more than $9 000. He has the right to challenge the employer on that decision, and as the grievor argued, based on *Weber*, adjudication would be the right place to do it. Some decisions that the grievor referred to also support the argument that former employees keep the right to grieve issues or conflicts arising from the employment relationship. At paragraphs 61 to 64 of *Salie*, the Federal Court wrote the following:

> *[61] Thus, not only did* Lavoie *involve what was alleged to have been a disciplinary dismissal, the Court's comments cited above appear to preserve the right of former employees to grieve where the matter giving rise to the grievance arose during the course of the individual's employment, where the individual was 'aggrieved as an employee'.*
>
> *[62] Similarly, in* Gloin*, the Federal Court of Appeal held that former employees could grieve their rejection on probation, even where it was not alleged that the rejection constituted disguised discipline, given that the individuals were nevertheless 'aggrieved as employees': at para. 8.*
>
> *[63]* Cardinal *confirmed the right of a former Public Servant to continue with a grievance relating to his classification which had started while he was a government employee, the classification of an employee being clearly a matter that arises in the course of the individual's employment. Similarly, in* Hunt*, the former employee was permitted to grieve the denial of disability benefits and the application of certain policies to*

> *him. All of the events that gave rise to the grievances occurred while Mr. Hunt was a Public Servant.*
>
> *[64] The above cases were all decided under the provisions of the* PSSRA*, whereas* Glowinski v. Canada (Treasury Board)*, 2006 FC 78, [2006] F.C.J. No. 99 [*Glowinski *#1];*Glowinski v. Treasury Board (Department of Industry)*, 2007 PSLRB 91, [2007] CPSLRB No 69 [*Glowinski *#2] were decided under the new* PSLRA*. In* Glowinski *#1, this Court concluded that a former Public Servant had an adequate alternate remedy through the grievance process where the grievance related to the rate at which the individual was paid* while he was a government employee.

[45] The alternative to grieving would have been for the grievor to take his labour relations dispute to the Federal Court. This dispute involves the employer's right to the retroactive application of the C2 supervisory differential to the grievor's position and the grievor's right to keep the C3 differential on the basis of promissory estoppel. Even though the decision to recover those sums was made more than two years after the grievor left the workplace, the source of the dispute originates from the time the grievor worked for the employer. The classification decision was made in late 2009 and applied retroactively to late 2001. That means that the employer took eight years to fix that classification problem. Had the employer taken three, four or five years to fix the problem, for example, the grievor would still have been an employee and would have had an uncontested right to grieve the employer's decision to recover money from him. I do not see why the grievor should lose his right to grieve because of the employer's lack of efficiency in reviewing the grievor's classification.

B. <u>The issue of timeliness and the application for an extension of time</u>

[46] The grievor was covered by the Operational Services Group collective agreement. According to the collective agreement, the grievor should have filed his grievance within 25 days of becoming aware that money would be recovered from him. The relevant provision of the collective agreement reads as follows:

. . .

> ***18.15*** *A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance. The Employer may present a policy grievance in*

> *the manner prescribed in clause 18.04 not later than the twenty-fifth (25th) day after the date on which the Employer is notified orally or in writing or on which the Employer first becomes aware of the action or circumstances giving rise to the policy grievance.*
>
> . . .

[47] The employer recovered $9 528.88 from the grievor in March 2010. The grievor had 25 days to file a grievance. He waited nine months to file his grievance. Surprisingly, the employer did not raise a timeliness issue when it replied to the grievance at any level of the grievance procedure. Nor did it raise that issue within 30 days after it was informed that the grievance had been referred to adjudication. In fact, the employer first raised it in early 2012. The employer argued that it was not necessary to raise the timeliness objection earlier since it had already raised the issue of the grievor's standing to file a grievance.

[48] In acting as it did, the employer waived its right to raise a timeliness objection. In fact, it should have raised that issue when it replied to the grievance in 2010. It should also have reiterated its objection within 30 days of the grievance being referred to adjudication. An adjudicator cannot accept a timeliness objection if the objecting party has not met the requirements of section 95 of the *Public Service Labour Relations Board Regulations*, SOR/2005-79 ("the *Regulations*"). The requirements stated in section 95 are mandatory, not discretionary. That section reads as follows:

> ***95.*** *(1) A party may, no later than 30 days after being provided with a copy of the notice of the reference to adjudication,*
>
> > *(*a*) raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the presentation of a grievance at a level of the grievance process has not been met; or*
> >
> > *(*b*) raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the reference to adjudication has not been met.*
>
> *(2) The objection referred to in paragraph (1)(*a*) may be raised only if the grievance was rejected at the level at which the time limit was not met and at all subsequent levels of the grievance process for that reason.*

> *(3) If the party raises an objection referred to in subsection (1), it shall provide a statement in writing giving details regarding its objection to the Executive Director.*

[49] On April 16, 2012, in reaction to the employer's timeliness objection, the grievor wrote to the Board, arguing that the employer was estopped from raising the issue of timeliness by virtue of section 95 of the *Regulations*. In that letter, the grievor also applied for an extension of the time limit to file a grievance as per section 61 of the *Regulations*. Considering my ruling on the timeliness objection, that application has become unnecessary and moot. There is no need for me to address it.

C. Is this a classification grievance, and does the doctrine of estoppel apply?

[50] In his grievance, the grievor challenged the employer's decision to recover $9 528.88 from him. He argued that that amount should not have been recovered from him, and he asked that the doctrine of estoppel be applied. The dispute arose from the employer's decision to change the supervisory differential attached to the grievor's former position from the C3 level to the C2 level retroactively to 2001. The grievor alleged that he was promised that his supervisory differential would not be lowered as long as he occupied his position. He testified that he made his retirement decision on that basis.

[51] According to the employer's classification system and to the GL classification standard, the classification of the grievor's former position contained three dimensions. First, the employer had to establish whether the position belonged to the GL group. The employer's classification review determined that the grievor's position should be part of the GL group. Second, that GL position had to be assigned to a subgroup or a trade. In this case, the position was originally part of the INM subgroup. The employer's classification review determined that the position should be part of the MAM subgroup. Third, because the position involved supervision, it had to be assigned a supervisory level, based on the GL classification standard supervisory rating plan. The employer's classification review determined that the position should be rated at the C2 supervisory level instead of the existing C3 level.

[52] When applied retroactively to 2001, the employer's classification review implied a retroactive gross payment of $10 207.66 for the grievor. The move from the INM subgroup to the MAM subgroup implied a gross payment of $19 736.54, and the move from the C3 level to the C2 level, a deduction of $9 528.88 from that payment.

[53] The evidence clearly supports that this grievance is directly related to the employer's classification review and to its retroactive application to 2001. It is trite law that I have no jurisdiction over classification grievances. Some evidence questioned the appropriateness of the employer's decision to reduce the supervisory rating from the C3 level to the C2 level. I have no jurisdiction to examine that question since it is a classification decision. Nor do I have jurisdiction over the date that the employer chose to retroactively apply that decision.

[54] The employer provided detailed evidence on how it calculated the amount it had to pay the grievor for the difference in pay between the INM subgroup and the MAM subgroup and the amount it had to deduct for the difference in pay between the C3 and the C2 supervisory differentials. The grievor did not challenge the exactness of those calculations. He did not allege that the employer violated the collective agreement by not correctly applying its pay provision. I conclude from that that at issue is not the exactness of what was recovered but rather the decision to recover money.

[55] The grievor argued that the doctrine of estoppel applies to his case. Even if he were correct, I would not have jurisdiction to make a decision about it since the topic on which the estoppel would be applied is directly related to classification.

[56] In the alternative, I do not find that estoppel applies to this situation. For that doctrine to apply, the employer must have made a contractual promise, and the grievor would have had to establish that he acted differently based on that promise in a way that had a detrimental effect on him. I believe that the grievor was promised by his superior that his C3 differential would be maintained as long as he remained an employee. It make sense that that promise was made in the context of the salary protection clause of the collective agreement, a clause that no longer applied to the grievor given the results of his classification grievance. Finally, the grievor did not convince me that he acted on that behalf or promise and that the decisions he then made had a detrimental effect on him.

[57] The grievor testified that his decision to retire was driven by his health condition. He had cancer and needed to reduce his level of stress as much as possible. One way was to stop working. He formally advised the employer in June 2007 that he would retire on November 1, 2007. The grievor testified that he would have worked an extra three years had he been healthy. He also testified that he made his retirement

decision on the basis that he would keep the C3 supervisory differential. Those two parts of his testimony are contradictory. I believe that the grievor retired for health reasons. While his decisions to retire was no doubt influenced by his calculations of what he believed his pension would be, such calculations could not reasonably be based on an assumption on his part that he would be reclassified to the GL-MAM-11/C3 group and level. He might have thought at the time that his pension would be based on earnings including the C3 supervisory differentials. However, his pension based on the GL-MAM-11/C2 salary is higher than it would have been had it been based on his former GL-INM-11/C3 salary. I therefore conclude that no detrimental reliance was proven.

[58] This case is different from the cases submitted by the grievor in support of his estoppel argument. I do not find it necessary to comment on those cases in detail. I find it sufficient to state that in each case in which the doctrine of estoppel was applied, the grievors were made a contractual promise and made decisions on the basis of that promise. Those grievors established that the erroneous promise had a detrimental effect on them. That is not so in this case.

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

(The Order appears on the next page)

V. Order

[60] The grievance is denied.

[61] The application for an extension of time is moot.

November 7, 2013.

Renaud Paquet,
adjudicator