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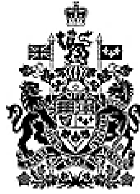

Public Service Labour Relations Act Before an adjudicator

BETWEEN

DEBORAH ANTHONY

Grievor

and

TREASURY BOARD
(Department of Veterans Affairs)

Employer

Indexed as
Anthony v. Treasury Board (Department of Veterans Affairs)

In the matter of an individual grievance referred to adjudication

Before: Catherine Ebbs, adjudicator

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Martin Desmeules, counsel

Heard at Charlottetown, Prince Edward Island,
October 21, 2014.

I. Individual grievance referred to adjudication

[1] From 2005 to 2012, Deborah Anthony ("the grievor") was not eligible to receive the annual bilingualism bonus, but the Department of Veterans Affairs ("the employer") paid it to her. This error on the part of the employer resulted in an overpayment to the grievor.

[2] When the employer discovered the error, it informed the grievor that it intended to recover the overpayment from her. A repayment plan was developed, and the grievor paid back the amount agreed upon before retiring in 2013.

[3] The grievor presented a grievance contesting the employer's decision to recover the overpayment. She asked that the employer use its discretion to write off the debt. The grievance was denied at the final level of the grievance process on June 12, 2012.

[4] The grievance was then referred to adjudication on July 16, 2012. As the grievor has repaid the amount owed to the employer, she requested that the grievance be allowed and that the employer return the money to her.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

II. Summary of the evidence

[6] At the hearing of the matter, the grievor was the sole witness. She stated that she worked at the Department of Veterans Affairs from 1981 until her retirement in 2013. Through those years, she upgraded her education and moved through a number of positions until she became National Manager, Financial Benefits Program.

[7] From 1987 to 2005, the grievor was eligible for and received the annual bilingualism bonus. However, in 2005, she accepted a promotion to an English-only position. At that time, the employer advised the grievor that her bilingualism bonus had been stopped.

[8] From 2005 to 2012, the grievor received her salary though direct deposit and never realized that she was continuing to receive the bilingual bonus. She stated that it would have been difficult for her to detect the error, particularly because her level of pay had increased in 2005 with the promotion, and the per-pay amount of the bilingualism bonus was small.

[9] The grievor stated that she had full confidence in the employer's pay system, and therefore did not expect any problem.

[10] The grievor explained that she was a single parent of three children. In 2012, all three children were attending university. The grievor was receiving child support for one child. However, she was supporting all three children, which included helping them financially with their university expenses. The grievor provided information about her monthly expenditures, which showed that having to reimburse the employer for the bilingualism bonus overpayment caused her financial hardship.

[11] The grievor stated that in February 2012, after being advised of the overpayment, she discussed repayment options with the employer. Originally, the employer demanded that she pay the full amount of the overpayment ($5605.93) by having deductions taken from each pay in an amount based on 10% of her salary.

[12] After the grievor explained her difficult financial situation, the employer agreed to reduce the amount owing by requiring her to repay only six of the seven years of overpayment ($4802.00). The employer also agreed to calculate the deductions based on 5% of her salary.

[13] The grievor stated that the pay deductions started in April 23, 2012, and that she had repaid the amount in full by March 2013. The grievor stated that in order to do this, she used credit, and that her family did without things that she would normally have been able to buy.

[14] In cross-examination, the grievor acknowledged that for some of the period from 2005 to 2012, she received paper copies of her pay stubs. The employer

presented the grievor with a document for her review. She acknowledged that although she was not familiar with the format of the document, it was about her pay, and it did have a line confirming that she was receiving the bilingualism bonus.

[15] The grievor stated that she did not always read the paper copies of her pay stubs. She reiterated that she was not aware of the overpayment until the employer told her about it in 2012, and she added that the employer should have been able to detect the error much sooner than it did.

III. Summary of the arguments

A. For the grievor

[16] The grievor contended that the principle of estoppel applies in the present case and that for this reason, it was inequitable to her for the employer to recover the overpayment.

[17] The grievor declared that she never had a problem with her pay before 2012, and she therefore assumed that her pay stub was accurate. Furthermore, the grievor did not know about the error until the employer advised her about it. The grievor noted that it took seven years for the employer to find the error, even though in that time it had opportunities to detect the problem. In her view, this amounted to negligence on the part of the employer, and it was unreasonable and unjust to require that the grievor pay back the overpayment, especially so close to her retirement.

[18] The grievor stated that she suffered financial hardship because of the overpayment as well as because of the requirement to repay it. The grievor planned her budget based on the belief that the pay amounts were correct. The grievor added that the employer recognized the financial hardship, first by altering the repayment plan, and second by acknowledging the financial burden of the error in its final level decision on the grievance.

[19] The grievor further relied on subsection 155(3) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; "the *FAA*") to argue that the employer has the discretion to choose not to recover an overpayment. Subsection 155(3) reads as follows:

> ***155.*** *(3) The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of*

> *any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made.*

[20] In support of her position, the grievor presented the following cases for consideration: *Lapointe v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 57 and *Murchison v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 93.

B. For the employer

[21] The employer contended that if money is received in error, a person does not have the right to keep it. It further stated that the principle of estoppel did not apply in the present case. The employer committed an administrative error, but it never made any assurance or promise related to that error.

[22] The employer stated that as soon as the error was discovered, it advised the grievor and demanded repayment. It submitted that estoppel had not been proven. Firstly, there was no promise or assurance made by the employer about the error. Secondly, the grievor did not change or modify her conduct as a result of the error and in fact, she was unaware that the error had been made until notified by the employer. The employer added that although the case is unfortunate, it acted reasonably once the error was discovered.

[23] The employer presented the following cases for consideration: *Veilleux et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 152; *Canada (Attorney General) v. Lamothe*, 2008 FC 411; *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112; *Dubé v. Canada (Attorney General)*, 2006 FC 796; *Katchin and Piotrowski v. Canadian Food Inspection Agency*, 2011 PSLRB 70; and *Pronovost v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 93.

C. Grievor's rebuttal

[24] The grievor maintained that estoppel had been proven. She contended that the administrative error itself can constitute the promise upon which the grievor relied to her detriment, and that it was not necessary for the employer to make a further comment or promise in relation to the error.

IV. <u>Reasons</u>

[25] The employer has the authority to recover moneys paid to employees in error. However, the employer also has the discretion not to require the recovery of such overpayments.

[26] I agree with the adjudicator's finding at paragraph 70 of *Murchison* that, although subsection 155(3) of the *FAA* allows the Receiver General to

> *. . . recover any overpayments, it does not state that it must or that it shall. The provision is not restrictive in any manner, and as such, it permits the employer to use its discretion in a given situation or circumstance.*

I also agree with the adjudicator's finding at paragraph 34 of *Lapointe* that the *FAA* ". . . is not restrictive, and in this case, it enabled the employer to exercise its discretion with respect to the grievor's specific situation. . . ." As the adjudicator further stated in that paragraph

> *. . . [i]t 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*.*

. . .

[27] The grievor contends that the employer should take the latter course of action in her case because of the principle of estoppel.

[28] The doctrine of estoppel is described in the following passage of *Combe v. Combe*, [1951] 1 All E.R. 767 (C.A) at page 770, quoted in *Lamothe* and in Brown and Beatty, *Canadian Labour Arbitration.* 4th ed. at paragraph 2:2211:

. . .

> *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 has been made by him . . . .*

. . .

[29] In *Lamothe*, the Federal Court of Canada discussed the requirements for a finding that a party made a promise or assurance to the other party:

. . .

> *The conduct or promise on which the party alleging estoppel relies must be "unequivocal". For example, R.B. Blasina, the adjudicator in* Abitibi Consolidated Inc. and I.W.A. Canada, Local 1-424 *(2000), 91 L.A.C. (4th) 21, stated:*
>
> > *In other words, an estoppel will arise when a person or party, unequivocally by his words or conduct, makes a representation or affirmation in circumstances which make it unfair or unjust to later resile from that representation or affirmation. The unfairness or injustice must be more than slight. It does not matter whether the representation or affirmation was made knowingly or unknowingly, or actively or passively. The representation is taken to have that meaning which reasonably was taken by the party who raises the estoppel.*
>
> . . .

[**Emphasis in the original**]

[30] The grievor contended that the employer made an unequivocal promise to her that her pay level was accurate. The employer's promise consisted of first, telling her in 2005 that the bilingual bonus had been stopped, and second, of paying it to her for seven years before detecting the error, even though it had opportunities in that time period to find the error.

[31] I find that the employer's 2005 statement that the bilingual bonus had been stopped, combined with the erroneous payment of the bonus over the unreasonably long period of seven years, led the grievor to budget as if her pay amounts were accurate.

[32] However, I further find that the employer has shown that during this period the grievor was receiving pay stubs from the employer that stated that her pay included payment of the bilingual bonus. The grievor testified that she rarely read her pay stubs. In that respect I am satisfied that the grievor did not see the information about the payment to her of the bilingual bonus, and did not know anything about the error until the employer advised her in 2012.

[33] The fact remains that the employer was not simply providing her with a cheque in a certain amount, leaving her to rely on that amount as a promise from the employer that it was accurate. It was also regularly providing her with the information she needed to determine herself if the amount was accurate. The grievor chose to not read the pay information which was a course of action she was entitled to take. However I find that because the employer was providing the grievor not only with the pay amount but also a description of what was included in the pay amount, there was no unequivocal promise or assurance on the part of the employer in the sense of being unambiguous and clear. There was simply an unfortunate error that was manifestly displayed in the pay information and that could have been detected by either the employer or the grievor if they had reviewed the pay information at any point in the seven year period.

[34] This makes the grievor's situation different from that of the grievors in *Lapointe* and other cases where estoppel was proven regarding salary overpayments. In those cases, the grievors had no way to know that the employer was making an error, and they were forced to rely totally on the employer's promise that they were receiving the amounts to which they were entitled.

[35] Because I conclude that the grievor has not proven that the employer had made an unequivocal promise in relation to her level of pay her grievance must be denied and, it is not necessary for me to examine the question of detrimental reliance. However, I agree with the parties that it was most unfortunate that the error persisted over seven years. The grievor stated that she organized her spending according to what she believed was her true salary level. As a result the grievor was unknowingly spending money to which she was not entitled. The amount of the overpayment was approximately $30 per month, but the recovery amount after seven years was significant.

[36] The grievance being denied, I would like to add, however, that it is unfortunate that, although the employer had advised the grievor upon her promotion to an English-only position that it would stop paying her the bilingualism bonus, it took the employer seven years to realize that it had forgotten to stop paying that bonus to her. What is most unfortunate in this case is that, although employees are normally given 35 days to file grievances regarding the administration of their pay, the employer had no misgivings about asking the grievor to correct its own seven-year-old mistake.

Although, in this case, there is no suggestion of bad faith on the employer's part, one could question the fairness of its dealings with the grievor when it ordered her to repay, in one year, moneys that had been overpaid to her over a seven year period, which forced her to constrict her lifestyle and to become a borrower in the year preceding her retirement. I believe that the employer could have shown some leniency towards the grievor in such circumstances.

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

(The Order appears on the next page)

V. Order

[38] The grievance is denied.

May 5, 2015.

Catherine Ebbs,
adjudicator