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Public Service Labour Relations Act Before an adjudicator

BETWEEN

JEFFREY CLOUGH, EDWARD LEUNG AND DIAN ROBSON

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Clough et al. v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Beth Bilson, adjudicator

For the Grievors: Harinder Mahil and Simon Cott, Professional Institute of the Public Service of Canada

For the Employer: Lea Bou Karam, counsel

Heard at Vancouver, British Columbia,
October 2, 2014.

I. Individual grievances referred to adjudication

[1] The Professional Institute of the Public Service of Canada ("the bargaining agent" or PIPSC) has referred to adjudication the grievances of Jeffrey Clough, Edward Leung and Dian Robson ("the grievors"). At the time of the events giving rise to the grievances, all three grievors were employed by the Canada Revenue Agency (CRA or "the employer") as excise tax auditors. The grievances allege that the employer misinterpreted the term "continuous employment" as it related to the amended severance-pay provisions of the collective agreement between the PIPSC and the employer for the Audit, Financial and Scientific (AFS) Group that came into effect on July 10, 2012 ("the collective agreement").

[2] 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 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. Background

[3] It should be noted that although the bargaining agent filed 71 grievances concerning this issue, and although the parties have apparently agreed that the outcome in this case would be relevant to the resolution of those grievances, this decision is based on the evidence and arguments presented with respect to these three grievances alone. I have not approached this case as a policy grievance and make no comment about how my findings might be relevant to other grievances.

[4] Until 2010, the three grievors were sales tax auditors employed by the British Columbia government. In 2010, the B.C. government entered into agreements with the Government of Canada to transfer the functions performed by these employees to the CRA as part of a strategy to harmonize the administration of provincial sales taxes and

the federal goods and services tax, which would create a harmonized sales tax (HST). A human resources agreement (HRA) concluded between the two levels of government in March 2010 (Exhibit U-1, Tab 6) outlined the terms on which employees of the B.C. provincial government would be transferred to the CRA.

[5] Before the transfer process was entirely complete, the citizens of B.C. voted against proceeding towards the HST in a referendum in August 2011. A number of employees who had moved to the CRA returned to employment with the B.C. provincial government. The three grievors were among those who chose to remain with the CRA.

[6] Article 19 of the collective agreement in force in 2011, headed "Severance Pay," referred to six different circumstances under which severance payments would be made: layoff, resignation, rejection on probation, retirement, death, or termination for cause for incapacity or incompetence reasons. In all these cases, severance payments were to be calculated based on "continuous employment."

[7] In the new collective agreement that came into force in July 2012, which expired on December 21, 2014, the preamble to article 19 indicated that severance payments would no longer be made in cases of resignation or retirement. The preamble read:

> *Effective on the date of signing this Collective Agreement, paragraphs 19.01 (b) and (d) are no longer in effect in the Collective Agreement; as a result, the accrual of continuous employment for severance pay on resignation and retirement will cease.*

[8] A new clause, 19.05, rather awkwardly headed "Severance Termination," was added, which contemplated a one-time payment to all current employees, as follows:

> ***19.05 Severance Termination***
>
> *a) Subject to 19.02 above, indeterminate employees on the date of signing this Collective Agreement, shall be entitled to a severance payment equal to one (1) weeks' pay for each complete year of continuous employment and, in the case of a partial year of continuous employment, one (1) weeks' pay multiplied by the number of days of continuous employment divided by three hundred and sixty-five (365), to a maximum of thirty (30) weeks.*
>
> *b) Subject to 19.02 above, determinate employees on the date of signing this Collective Agreement shall be entitled to*

> *a severance payment equal to one (1) weeks' pay for each complete year of continuous employment, to a maximum of thirty (30) weeks.*

[9] In the definitions section of the collective agreement, clause 2.01, the definition for the term "continuous employment" states only that it ". . . has the same meaning as specified in the Employer's Terms and Conditions of Employment Policy on the date of signing of this Agreement."

[10] Counsel for the employer referred me to an undated draft version of the CRA "Policy on Terms and Conditions of Employment," version 4.0 (Exhibit E-3). The bargaining agent did not dispute that it was the relevant policy document. The term "continuous employment" was defined in that document as ". . . one or more periods of service in the public service, as defined in the *Public Service Superannuation Act*, with allowable breaks only as provided for in the terms and conditions of employment applicable to the person." "Public Service" is defined in the *PSSA* as follows:

> *"public service" means the several positions in or under any department or portion of the executive government of Canada, except those portions of departments or portions of the executive government of Canada prescribed by the regulations and, for the purposes of this Part, of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer and office of the Conflict of Interest and Ethics Commissioner and any board, commission, corporation or portion of the federal public administration specified in Schedule I . . .*

[11] Part 4 of the "Policy on Terms and Conditions of Employment," which elaborates on the periods that "count as continuous employment," lists a number of scenarios, all of which relate either to prior service on a casual or term basis or to service in the Canadian Forces, the Royal Canadian Mounted Police (RCMP) or the office of a minister or the leader of the opposition. None of these scenarios has any relevance to the situation of the grievors in this case.

[12] The bargaining agent representatives argued that because of how they commenced their CRA employment and because of agreements and assurances received at the relevant time, the grievors are entitled to have their prior service with the B.C. government taken into account as part of their continuous employment for the purpose of calculating the amount of the severance payment they should receive under clause 19.05 of the collective agreement.

[13] Counsel for the employer argued that the definitions of "continuous employment" that are applicable exclude the grievors' service in the B.C. government.

III. Summary of the evidence

A. For the grievors

[14] The bargaining agent called the three grievors as witnesses, as well as David Gray, an employee of the bargaining agent.

[15] Ms. Robson testified that she began working for the CRA on November 1, 2010. Before that, she had worked without interruption for the B.C. government since May 12, 2003.

[16] In cross-examination, Ms. Robson testified that auditing was her second career. She had obtained her certified management accountant designation at the age of 60, and her work as an auditor was important to her.

[17] Ms. Robson testified that being able to continue to work as a professional auditor was a primary consideration for her when the transfer of employees from the B.C. provincial government to the CRA was being discussed.

[18] Ms. Robson said that, along with a number of other employees, she attended a meeting with CRA representatives on March 16, 2010, which was before any offer of employment was made to her. She said the CRA representatives expressed how happy the employer was to have the employees from the B.C. government joining the CRA and said they would try to ensure a "seamless transition" to employment in the CRA. CRA representatives assured the B.C. government employees that their benefits would not stop, and they were encouraged to transfer as soon as possible to the federal pension plan. As she recalled it, they were assured that their service to the province would be recognized in relation to all benefits. At the lunch break, she said that other employees confirmed her understanding that they would be entitled to full benefits if they moved over to the federal government.

[19] In cross-examination, Ms. Robson agreed that there had been a PowerPoint presentation, although she could not remember exactly who had gone through it on behalf of the CRA. Nor could she recall whether any representatives of the B.C. government made presentations at the meeting.

[20] Ms. Robson said that she did not remember receiving any documentation at the March 2010 meeting. She did not remember seeing the HRA before the meeting, although she did see a copy of it sometime in the spring of 2010. Although she had not been given an actual offer of employment with the CRA before the March meeting, she said that it was quite clear that her position in the B.C. government would no longer be available; if she wished to stay with the province, she would have to apply for a different position. She felt that her only choice was of which wave of employees she wished to join in the move to the CRA.

[21] Ms. Robson said that she also attended two further meetings, on July 10, 2010, and September 22, 2010, which were directed at the first wave of employees who would be transferring to the CRA. At the July meeting, Ms. Robson said the focus was on going over CRA policies. At the September meeting, there was further discussion of how the move to the CRA would affect the entitlement of employees to several benefits. When she did move to the CRA in November 2010, Ms. Robson said that she had to sign some documents related to benefits. In December, she received an additional package (Exhibit U-1, Tab 13), describing the benefits provided to CRA employees. A significant portion of these documents took the form of questions and answers about particular benefits. It is interesting to note that in Chapter 1, Standard Benefits, at item 1.1.3, the following statement appears:

. . .

> *Also, certain unrelated employers (provincial or civic governments as well as private sector employers) have pension plans that have been approved by Treasury Board for the purposes of the Superannuation plan. This means that you may be able to elect to count this service under the PSSA.*

. . .

[22] Ms. Robson also pointed to her personal leave status reports (Exhibit U-1, Tab 14), which are documents generated by the employer showing how much leave of several kinds an employee has accrued and expended. In the documents dating from the earlier period of Ms. Robson's service with the CRA, her continuous employment date is shown as May 12, 2003, the date she began her employment with the B.C. government. However, in the document generated on September 4, 2012, her

continuous employment date was altered to November 1, 2010, the date she began working for the CRA.

[23] In cross-examination, Ms. Robson said that her primary concern in moving to the CRA was not the rate of pay, although she recalled assurances that the pay for the transferring employees would be as close as possible to their previous salaries. Nor was there a concern with the location of the work, since she had been working close to the CRA office in downtown Vancouver, B.C. Her major preoccupation was with continuing to work as a professional auditor. For this reason, she was concerned when she was initially placed in an AU-02 position; she did make a without-prejudice request to be placed in the AU-03 classification, which would have assured her the kind of work she wanted.

[24] Mr. Clough testified that he had also begun working for the CRA on November 1, 2010. Before that, he had worked for the B.C. government as a retail sales tax auditor without interruption from April 1, 1986. Although he did not attend the meeting organized by the CRA in March 2010, he did hear reports of it from other employees, who said their understanding was that there would be a seamless transition to employment with the CRA and that all of their "credits" would stay the same. He did attend the meetings in July and September.

[25] Mr. Clough testified that his understanding was also based in part on an email exchange (Exhibit U-5) between Brian Simundic, a close colleague, and Sharon Cole, whose email signature described her as the compensation lead for the Provincial Sales Tax Administration Reform (PSTAR) project. Mr. Simundic forwarded these emails to Mr. Clough for his information. Mr. Simundic was contemplating retirement, and he raised a number of questions about his pension entitlement. In her response, Ms. Cole replied that ". . . any service that you had with the province will be counted as part of severance pay when you leave the CRA."

[26] Mr. Clough testified that his understanding was that his job would be eliminated when the employees were transferred and that the business unit he had been working in would be "more or less" eliminated, although a few employees would remain to administer other legislation. It was clear that he would likely be laid off if he elected not to move to the CRA. He understood that the original prospect for the employees being transferred was that they would be in the Public Service Alliance of Canada's (PSAC) bargaining unit in desk audit rather than field audit positions. He said that he

was not particularly concerned about the type of work he would be doing; he was more concerned about job security and a comparable level of compensation. He chose not to transfer his pension, so, unlike Mr. Simundic, the calculation of pension time was not a concern for him. He did not consider retirement as an option to transferring to the CRA.

[27] Mr. Clough said that he had also reviewed the HRA (Exhibit U-1, Tab 6) a number of times. He was not sure precisely when it had been provided to him, but he thought he saw it between March and May 2010. He also saw the amendment to the HRA (Exhibit U-1, Tab 8) sometime in June.

[28] There was also a memorandum of understanding (MOU) between the CRA and the bargaining agent, which was concluded on April 23, 2010; Mr. Clough said he thought he saw it in May because his recollection was that he read it 30 days after it had been agreed to.

[29] From all the information available to him, including a package of information similar to that received by Ms. Robson (Exhibit U-1, Tab 9), Mr. Clough said that he concluded that his service for the province would be taken into account when he moved to the federal government. He said that he had a brief conversation with Ms. Cole at one of the information sessions and that she had said it would be "almost as if you worked here from day one."

[30] Mr. Leung, the third grievor, also began working for the CRA on November 1, 2010. He had begun working for the B.C. government on May 31, 1999, and had no interruptions to his service.

[31] Mr. Leung attended the March 16 and September 22 meetings. His recollection was that the CRA representatives had emphasized at the March meeting what a good organization he and his fellow employees would be moving to and had described opportunities for training and advancement within the CRA. He also recalled that the transition was described as seamless and that the impression conveyed was that the only difference would be that an employee was sitting at one desk one day and at a different desk the next. At the September meeting, there was a more specific discussion of benefits, and his understanding was that all benefits would be transferred.

[32] Mr. Leung's recollection was that he saw the HRA (Exhibit U-1, Tab 6) in April 2010 and that he received a package of information about benefits (Exhibit U-1, Tab 10) in November. He also noted his personal leave status reports (Exhibit U-1, Tab 11), which initially showed his continuous employment date as May 31, 1999. However, the report generated on September 23, 2014, showed it as November 1, 2010, the date he began working at the CRA. He said that he was not advised about this change or the reasons for it.

[33] Mr. Leung said that he understood that his position with the B.C. government was likely to be eliminated. He was originally concerned with the suggestion that he would be moving to a desk audit position with the CRA, as his desire was to be in a position in which he would be required to maintain his professional accounting designation. His major interest in moving to the CRA was with the potential for training and advancement opportunities.

[34] Under cross-examination, Mr. Leung said that he had been a union steward when he worked for the B.C. government. He said his recollection was that the collective agreement there had not provided for severance pay in the case of a resignation, and he acknowledged that he had resigned from the B.C. government to take the job with the CRA.

[35] Mr. Gray was the final bargaining agent witness. Now retired, he had worked for the CRA in Victoria, B.C., for 29 years as a senior tax avoidance auditor. He had also held a succession of elected positions with the bargaining agent, including five years as a national vice-president. It was in this latter capacity that he gave evidence.

[36] Counsel for the employer raised an objection to permitting Mr. Gray to testify on the grounds that evidence of the kind he proposed to provide was not necessary to interpreting the collective agreement. Extrinsic evidence is generally admitted only if there is some ambiguity in the terms of the collective agreement, and counsel for the employer argued that the term "continuous employment" is not ambiguous but can be interpreted by reference to the definitions provided in the collective agreement, the employer's policy and the legislation.

[37] My ruling was to allow Mr. Gray to testify, although the weight of his evidence would obviously continue to be an issue. Although, generally speaking, the parties must live with the words they have chosen to commit to paper in a collective

agreement, and an adjudicator must arrive at an interpretation of those words as they exist, in this case, the bargaining agent made a plausible argument that it was not possible to understand the status of this group of employees without referring to extrinsic evidence. I was persuaded that the term "continuous employment" is not fully accessible simply by a reading of the collective agreement and that Mr. Gray should be permitted to give evidence about the evolution of the parties' understanding in relation to the employees transferred from the B.C. provincial government to the CRA.

[38] Mr. Gray said that when the transfer of employees from the B.C. and Ontario provincial governments to the CRA to administer the HST in those provinces was first considered, the PIPSC's Audit, Financial and Scientific (AFS) section entered into negotiations with the CRA concerning the appropriate terms for the transfer. However, the PIPSC's members defeated its initial proposals; they were apprehensive about the implications of incorporating a new group of employees, with established seniority, into the bargaining unit. From the point of view of the AFS members, they were being asked to accommodate 1200 new employees in the bargaining unit in Ontario and 300 in B.C. without any assurance that there would be enough jobs for everyone.

[39] After the PIPSC proposal was defeated, the CRA proposed that the employees be added to the PSAC bargaining unit instead. Mr. Gray said this alternative was of concern to the PIPSC because it might have led to job losses in their bargaining unit and would have foreclosed opportunities to develop the HST audit stream as a new field for professional auditors in the public service.

[40] Mr. Gray said that the PIPSC approached the CRA about reopening the negotiations, and the CRA indicated it was willing, provided an agreement could be reached within two weeks. Mr. Gray said it was also clear that the single non-negotiable item for the CRA was that the PIPSC would have to recognize the years of provincial service of the employees being transferred. Given that that issue had led the PIPSC membership to reject the initial proposal, Mr. Gray said that the PIPSC knew that the negotiations would be challenging.

[41] Nonetheless, the PIPSC succeeded in concluding an MOU with the CRA concerning the transfers. The MOU contained the following clause: "4) PIPSC-AFS agreed to recognize the service of provincial employees accepting employment at CRA as a result of offers made pursuant to any Human Resources Agreement."

[42] Other features of the MOU were the CRA's commitment to creating a "distinct business line for GST/HST work," the PIPSC's commitment to organize town hall meetings to explain the MOU and ". . . to make every reasonable effort to obtain their support regarding the new business line," and the parties' joint agreement to continue to meet to ". . . ensure a common understanding of the provisions of this agreement."

[43] Mr. Gray noted that the terms of the initial HRA (Exhibit U-1, Tab 6) referred to the collective agreement between the CRA and the PSAC because at that time the PSAC bargaining unit was the only destination contemplated for the transferring employees. However, the terms of the MOU obligated the CRA to engage in further discussions with the provinces to modify the parts of the HRA indicating the positions to which employees would be moved. An amendment was made to the HRA (Exhibit U-1, Tab 8) to reflect the fact that some of the employees would be moved to PIPSC-represented positions.

[44] Given this history, Mr. Gray said that the PIPSC leadership put considerable effort into preparing to present the MOU to its members. Mr. Gray produced PowerPoint slides, one set prepared by the CRA for a briefing of bargaining unit leaders (Exhibit U-7) and the other prepared by the PIPSC for the broader membership (Exhibit U-6). The PIPSC slides indicated that the PIPSC had agreed to recognize the provincial service of the employees being transferred and that the CRA had made a commitment to create a distinctive HST line of business and to allow PIPSC input into classification issues.

[45] In crafting the slide presentation, Mr. Gray said he and others were concerned with stressing that they had obtained more than "Article 35," the defeated proposal. Mr. Gray said that the MOU continued to attract criticism from some PIPSC members and that although he was not directly involved in negotiating the new collective agreement in 2012, he knew the past controversy was in the minds of the bargaining team.

[46] The slide set prepared by the CRA (Exhibit U-7) was dated June 28, 2010, and contained the following summary of one feature of the amended HRA:

> *Continuous service date with the Province to be recognized by the CRA fir [sic] the purpose of service in accordance with the provisions of CRA collective agreements or applicable CRA policy. As a result of the agreement with PIPSC,*

> *employees will be able to move between the bargaining units and their years of service will be recognized.*

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

[47] The employer called two witnesses. The first was Cary O'Brien, now Director of the Agency Transformation Office of the CRA but previously Director of the PSTAR project management office. Mr. O'Brien had worked at the CRA for 33 years. He said that his job in connection with the PSTAR project was to manage the implementation of the HST in B.C., Ontario and Prince Edward Island, which included overseeing the human resources, communications and administrative dimensions of the project.

[48] Mr. O'Brien was one of the CRA representatives involved in negotiating the HRA with the B.C. government. He stressed that the PIPSC had not been involved in negotiating that agreement; it was a government-to-government agreement. He cited article 8 of the original HRA, which read as follows:

> *8.1 Employees who accept a position at the CRA shall have their service seniority with the British Columbia government recognized by the CRA.*
>
> *8.2 This service recognition will apply to the following entitlements, provided for in the CRA-PSAC collective agreement as well as any future entitlements which are determined on the basis of a period of service or employment:*
>
> *i. Vacation leave, subject to 9.4*
>
> *ii. Maternity Leave without Pay and Special Maternity Allowance for Totally Disabled Employees*
>
> *iii. Parental leave without Pay and Special Parental Allowance for Totally Disabled Employees*
>
> *iv. Pre-retirement Leave*
>
> *v. Severance Pay as it pertains to the qualifying period to receive such pay*
>
> *vi. Transition Support Measures related to Work Force Adjustment*
>
> *vii. Marriage Leave with Pay*

[49] Mr. O'Brien said that his recollection was that the B.C. government had organized an information session about the HRA, which some CRA representatives had

attended. At further information sessions, CRA representatives had talked about particular job opportunities. He did not recall any discussion of severance, and his recollection was that the sessions were more concerned with the kinds of jobs available, locations, hours of work, and so on. He was not present at the September information meeting.

[50] Mr. O'Brien acknowledged that following the B.C. referendum on the HST, a number of employees had returned to the B.C. provincial public service but that a number had remained with the CRA. He felt that their length of service with the CRA had been appropriately recognized. Mr. O'Brien said that he could not comment on the MOU as he had not been involved in negotiating that agreement.

[51] The second witness called by the employer was Paul Morin, the assistant director of the Compensation Client Service Centre in Winnipeg. He acted as a liaison to the PSTAR project team and oversaw the work of four teams entering data during the move of employees from provincial governments to the CRA. Mr. Morin testified that efforts were made to provide common information to employees who asked questions about the transfer. Phil McCutcheon and Ms. Cole both had responsibilities for providing information; the three grievors mentioned that Ms. Cole had presented at the information sessions they had attended.

[52] Mr. Morin said the purpose of the information sessions was to answer questions from employees and to help them fill out forms for federal government health and dental programs. There were four waves of employees transferring, and information sessions were organized for all transferring employees. Mr. Morin said that he attended one of the information sessions in B.C. with Ms. Cole, which occurred after offers of employment had been made. His recollection was that the session focused on health and dental benefits and that there were no questions from employees about severance.

[53] Mr. Morin said that the record system shows three different dates for each employee — continuous employment, continuous service and "continuous/discontinuous" service — plus additional dates for some employees. The continuous/discontinuous service date is used to calculate vacation benefits and may be altered to reflect absences or periods of term employment. The continuous service date and the continuous employment date are normally given as the date an employee's employment started with the federal public service.

[54] Mr. Morin said that separate files were maintained for the employees who were transferring to the CRA, and the HRA was attached to these files. The HRA indicated that service with the provincial government was to be included in the service indicated for the transferring employees, so the dates originally entered for those employees were their start dates with the provincial public service. Mr. Morin said he understood there was a distinction between the effect this would have on eligibility for a severance payment and the effect on the calculation of the amount of the payment. For example, he said that the part of article 19 of the collective agreement then in effect relating to resignation said that an employee would be entitled to a severance payment after 10 years of continuous employment; the provincial start date would be used to determine this eligibility. In calculating the amount of the payment, on the other hand, the start date with the CRA would be used.

[55] Mr. Morin said that he was familiar with reports like the personal leave status reports put in evidence by the grievors (Exhibit U-1, Tabs 11 and 14). He acknowledged that the continuous employment dates initially shown in those reports were the dates on which the employees started their employment with the provincial government and that those dates were later changed to their start dates with the CRA. He said that when the original entries were made, the assumption was that the employees would be staying in the federal public service. However, when it became clear that many of the employees in B.C. would be returning to the B.C. provincial government, he said it was thought that it would be misleading to continue to use the B.C. provincial government start dates.

[56] Under cross-examination, Mr. Morin acknowledged that although he recollected the change as being tied to the B.C. referendum and to the prospect of employees returning to employment with the B.C. government, the documents appeared to show that the change took place after the referendum. In fact, the change took place after the new agreement had been concluded, with the changes to article 19.

[57] On re-examination, Mr. Morin reiterated that he had not directly dealt with employees asking questions about the severance provisions but that he understood the concern about the date that should appear in the corporate reports that were to be connected with the employees' return to the B.C. government.

IV. Summary of the arguments

A. For the grievors

[58] The bargaining agent took the position that in calculating the severance benefit to be paid under clause 19.05 of the collective agreement, the grievors' service with the B.C. government should be considered part of their period of continuous employment. Representative for the grievors, Harinder Mahil, said that the evidence showed that the parties' intention had been to integrate the employees transferring from provincial employment to the CRA into the complement of CRA employees. He noted that both the HRA (Exhibit U-1, Tab 6) and the amended HRA (Exhibit U-1, Tab 8) contemplated that in addition to the existing benefits specified, the recognition of prior service with the B.C. government would apply to "future entitlements." While the HRA referred only to the collective agreement between the CRA and the PSAC, the amended HRA acknowledged the agreement between the CRA and the PIPSC, along with the MOU (Exhibit U-1, Tab 7) between them. He also suggested that the personal leave status reports placed in evidence (Exhibit U-1, Tabs 11 and 14) demonstrated that the CRA had agreed with that interpretation until after the new collective agreement was signed in 2012.

[59] Mr. Mahil referred me to several cases dealing with interpreting collective agreements. In the decision in *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637 (QL), at para 27, the arbitrator laid out the following principles for interpreting collective agreement provisions:

> 1. *The object of interpretation is to discover the mutual intention of the parties.*
>
> 2. *The primary resource for an interpretation is the collective agreement.*
>
> 3. *Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.*
>
> 4. *Extrinsic evidence may clarify but not contradict a collective agreement.*
>
> 5. *A very important promise is likely to be clearly and unequivocally expressed.*

> 6. *In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.*
>
> 7. *All clauses and words in a collective agreement should be given meaning, if possible.*
>
> 8. *Where an agreement uses different words one presumes that the parties intended different meanings.*
>
> 9. *Ordinarily words in a collective agreement should be given their plain meaning.*
>
> 10. *Parties are presumed to know about relevant jurisprudence.*

[60] In the same paragraph, the arbitrator also stated the following: "Not all rules of interpretation are rigidly binding. Common sense and special circumstances must not be ignored."

[61] Mr. Mahil also referred me to *Hydro One Inc. v. Society of Energy Professionals*, [2007] O.L.A.A. No. 37 (QL); *Martin v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-28191 (19981029); *Nigel Services for Adults with Disabilities Society v. Construction and Specialized Workers' Union, Local 1611* (2013), 230 L.A.C. (4th) 400; and *Bingham Memorial Hospital v. CUPE, Local 2558* (1991), 20 L.A.C. (4th) 434. While none of those cases deals directly with the specific issue raised in these grievances, they do provide examples of arbitrators and adjudicators seeking to uncover the parties' intentions through interpreting a collective agreement.

[62] Mr. Mahil argued that the grievors' situation falls into the category of special circumstances that the arbitrator in *Pacific Press* alluded to and that clause 19.05 of the collective agreement, as it applies to the grievors, can be understood only by examining those special circumstances.

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

[63] Counsel for the employer argued that the term "continuous employment" must be interpreted within the framework of the collective agreement. The definition in the agreement refers to the employer's "Terms and Conditions of Employment Policy" (Exhibit E-3), which in turn refers to the *Public Service Superannuation Act* (R.S.C., 1985, c. P-36; *PSSA*). In all those documents, continuous employment is

discussed only in terms of employment with the federal public service or with other specified employers like the RCMP and the Canadian Forces.

[64] Counsel for the employer pointed to the decision in *Katchin and Piotrowski v. Canadian Food Inspection Agency*, 2011 PSLRB 70, at para 108 to 110, as a reminder that extrinsic evidence may be admitted or relied on only when there is an ambiguity in the collective agreement, which is not so in this case. The collective agreement is the law governing the parties' relationship, and the parties are bound by its terms. From the documents referred to in the collective agreement that provide the definition of continuous employment, it is clear that periods of service for a provincial government are not to be part of the service used as the basis for calculating the severance benefit.

[65] Counsel for the employer argued that the two versions of the HRA (Exhibit U-1, Tabs 6 and 8) and the MOU between the CRA and the PIPSC (Exhibit U-1, Tab 7) fall into the category of ancillary documents. She referred me to *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2010 PSLRB 85, at para 57, as support for the proposition that ancillary documents do not become part of the collective agreement unless they are included as part of the agreement or incorporated into it specifically by reference. The HRA was not an agreement to which the bargaining agent was privy, and if there were any violations of its terms, enforcement must be through whatever mechanisms exist under the HRA, not the collective agreement. The MOU was directed to some of the implementation aspects of the harmonization project and not to modifying the collective agreement.

[66] Furthermore, counsel for the employer argued that the issue of the grievors' severance pay had already been fully disposed of. As they had resigned from the B.C. public service, they were not entitled to severance pay under their terms of employment there. At the time, there were severance provisions under the collective agreement between the CRA and the PIPSC; these were among the benefits listed in the HRA, and none of them applied to the grievors. With respect to clause 19.05, agreed to in 2012, the employer did not deny that the grievors are entitled to a payment under that provision. The CRA's position is that the amount of that payment is based on the length of employment in the federal public service — in the grievors' case, the length of their employment with the CRA.

[67] It is not appropriate to apply some idea of estoppel to prevent the employer from relying on the true meaning of the clause in the collective agreement. In *Canada (Attorney General) v. Lamothe*, 2008 FC 411, at para 42, the Federal Court alluded to the following classic definition of estoppel, given in *Combe v. Combe*, [1951] 2 K.B. 215:

> *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. . .*

[68] Counsel for the employer referred me to *Pronovost v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 93, and *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112. These cases make it clear that the only assurances or commitments that can be the subject of an estoppel are those made between the parties to the collective agreement. Any understandings between individual grievors and agents of the employer cannot rise to the level of commitments between the only parties who have authority to assume such obligations — the bargaining agent and the employer.

[69] Thus, if the grievors heard statements made or entered into conversations with individual managers, such statements or conversations did not have the power to alter the terms of the collective agreement or to impose upon the employer an interpretation it had not agreed to. For example, Ms. Cole's statements in her email to Mr. Simundic (Exhibit U-5) cannot be binding on the employer, and the vague statement that there would be a seamless transition from employment at the provincial level to employment with the CRA did not amount to a specific commitment.

[70] One of the requirements for estoppel is a finding that the party to whom a promise was made relied on the promise to take some action — what is often referred to as the requirement of "detrimental reliance." Counsel for the employer referred me to *Dubé v. Attorney General of Canada*, 2006 FC 796, as an example of this principle. As in that case, she argued, there is no evidence in this case that the grievors made any changes to their positions as a result of the employer's alleged commitment to recognize their provincial service. There was no evidence that they would not have

moved to the federal public service in the absence of such a commitment; indeed, the grievors' evidence was that their employment in the provincial public service would likely have ceased to exist, so there were strong incentives for them to transfer.

C. Grievors' rebuttal

[71] Representative for the grievors, Simon Cott, pointed out that although the payment in clause 19.05 of the collective agreement is referred to as a severance payment, it does not involve separation from employment; payments were to be made to all employees in the bargaining unit at the time the collective agreement was signed.

[72] With respect to the reference in the employer's Terms and Conditions of Employment Policy (Exhibit E-3) to the *PSSA*, the adoption of the employer's interpretation would mean that the grievors' service in the B.C. government would not count towards their public service pensions, which was clearly not what the parties envisioned. Section 40 of the *PSSA* contemplates that the federal government can enter into an agreement with an "approved employer" to recognize entitlements under a pension plan outside the federal public service. Some relevant parts of section 40 read as follows:

> ***40.*** *(1) In this section, "approved employer" means an employer for the benefit of whose employees there is an established superannuation or pension fund or plan approved by the Minister for the purposes of this Part, and includes the administrator of any such superannuation or pension fund or plan established for those employees.*
>
> *(2) The Minister may, with the consent of the Governor in Council and on terms approved by the Treasury Board, enter into an agreement with any approved employer under which, in consideration of the agreement of that employer to pay into the Superannuation Account or the Public Service Pension Fund an amount determined in accordance with the agreement in respect of any employee of that employer who becomes or has become employed in the public service, the Minister will pay to that employer, for the purpose of any superannuation or pension fund or plan established for the benefit of employees of that employer, an amount determined in accordance with subsection (3) and (4) in respect of any contributor who has ceased or ceases to be employed in the public service to become employed by that employer. . .*
>
> *. . .*

> *(11) When an employee of an approved employer with whom the Minister has entered into an agreement pursuant to subsection (2) has ceased to be employed by that employer to become employed in the public service and becomes a contributor before April 1, 2000, any service of that employee that, at the time he or she left that employment, he or she was entitled to count for the purpose of any superannuation or pension fund or plan established for the benefit of employees of that employer may, if the agreement so provides, be counted by him or her as pensionable service for the purposes of subsection 6(1) without contribution by him or her except as specified in the agreement if, within one year from the time when he or she becomes a contributor under this Part or within the further time that is specified in the agreement, the employer pays into the Superannuation Account the amount that is required under the agreement to be paid by that employer in respect of the employee.*

[73] Article 16 of the HRA appears to refer to such a "Pension Transfer Agreement": "The existing Pension Transfer Agreement will apply to BC employees joining the CRA."

[74] Mr. Cott acknowledged that an adjudicator does not have jurisdiction to give effect to the provisions of the HRA and said that the bargaining agent is not asking for that. Rather, the bargaining agent argued that the commitments the CRA made in several forums, including both the terms of the HRA and the MOU, are relevant to determining what clause 19.05 of the collective agreement means.

V. Reasons

[75] The grievances before me involved a rather unusual situation. The grievors transferred from their employment with the B.C. government to employment in the federal public service as part of an initiative that in the case of B.C., was aborted by the referendum that reversed the course of the HST project in 2011. As a result of this dramatic event, the majority of the employees who had moved to the CRA from the provincial public service returned to their B.C. government jobs. However, the grievors, along with a number of the other affected employees, elected to remain with the CRA. One of the grievors, Mr. Leung, continues to be employed there, while Ms. Robson and Mr. Clough have retired.

[76] The grievances revolve around the proper interpretation to be given to the term "continuous employment" for the purposes of clause 19.05, which was added to the collective agreement in 2012 to provide a one-time payment to all indeterminate

employees in place of payments previously contemplated on resignation or retirement. The employer argued that the meaning of "continuous employment" in clause 19.05 is clear from the agreement itself if the reference to the employer's Terms and Conditions of Employment Policy and the *PSSA* are followed through.

[77] On the other hand, the bargaining agent argued that the term "continuous employment" in clause 19.05 of the collective agreement is ambiguous and that it is necessary to augment those words with an understanding of the developments that led to the transfer of the B.C. government employees and the grievors' inclusion in the bargaining unit represented by the PIPSC.

[78] At the time of the transfer, both the government-to-government agreement represented by the HRA (Exhibit U-1, Tab 6) and the amended HRA (Exhibit U-1, Tab 8) and the MOU concluded between the CRA and the PIPSC (Exhibit U-1, Tab 7) made a firm commitment to the group of employees of which the grievors were part that their previous service for the B.C. government would be fully recognized and taken into account in relation to all terms and conditions of their CRA employment.

[79] Counsel for the employer made a number of points that cannot be contested. It is certainly true that the primary resource in the first instance for an adjudicator called on to interpret a collective agreement must be the language in the collective agreement. This language has been formulated carefully, and often with difficulty, by the parties, and it must be taken to represent the agreements they have made with each other. If either party is disappointed with the results of the drafting to which its representatives have contributed or would prefer that the agreement said something other than what it does, the recourse must be to further rounds of collective bargaining; the disaffected party cannot simply ask an adjudicator to ignore what the collective agreement states and substitute something more helpful.

[80] In addition, collective agreements are working documents that many must interpret in their day-to-day interactions. Not all interpretations of the words in a collective agreement by bargaining agents, their members or employees will be faithful to what the parties to the collective agreement intended to agree to, and it must be accepted that a single manager or shop steward cannot necessarily bind his or her principal by putting forward a deviant interpretation of the agreement.

[81] On the other hand, there are times when the terms used in a collective agreement cannot be sensibly interpreted without referring to documents or interchanges outside the four corners of the agreement itself. I have concluded that this is such a case. The term "continuous employment" (which appears in clause 19.05) is defined in the agreement only in relation to an outside document, the employer's Terms and Conditions of Employment Policy. In that document, Appendix B defines continuous employment as "one or more periods of service in the public service, as defined in the *Public Service Superannuation Act."* There is a somewhat extended discussion of continuous employment in item 24 of the policy. That discussion is not directed at the severance pay issue as such, and that issue does not seem to be specifically mentioned in the policy.

[82] The *PSSA* does not contain an explicit definition of "continuous employment." Section 6 of the Act uses the term "pensionable service," which is not a term used in the collective agreement. Interestingly, the definition of the term in section 6 is not by its language restricted to federal public service pension plans. Clause 6(1)(*b*)(iii)(J), for example refers to periods of service covered by agreements made under section 40, discussed above at paragraph 72.

[83] Given that the purported definition of "continuous employment" in the collective agreement leads into this thicket of policy and statutory provisions, I do not think it can be said that there is no ambiguity about the term as it relates to the grievors' employment. I allowed the HRA, the amended HRA and the MOU to be admitted on that basis, along with Mr. Gray's evidence concerning the MOU's evolution.

[84] When this evidence is taken into account, it becomes clear that when the grievors were transferred from the B.C. provincial government to the federal government, the intention was that there should indeed be a seamless transition for this group of employees, that their previous service in the B.C. government would, as far as possible, be the basis of any calculation of their entitlements, and that in future, they would be treated like other employees covered by the collective agreement. It would be difficult to read the statement in the briefing slides (Exhibit U-7), referred to in paragraph 46 above, and other way. This position did not represent errant statements from individual managers but a sustained commitment by the employer undertaken to advance the harmonization project.

[85] In Mr. Gray's account of the developments surrounding the transfer — and the employer did not call any evidence to contradict his account — it is evident that the idea of introducing a number of new employees into the PIPSC's bargaining unit, who would be bringing their advanced seniority levels with them, did not initially go down well with existing PIPSC members, and they rejected the first agreement reached by their bargaining representatives and the employer on the terms of the transfer. For some of the employees who were considering the transfer option, the alternative — inclusion in the bargaining unit represented by the PSAC and placement in one of the job classifications listed in the PSAC collective agreement — was not attractive.

[86] At that point, it appears that the employer placed pressure on the PIPSC to reach a new agreement to include a group of employees (of which the grievors were part). In discussing the basis for that agreement, the PIPSC understood that the recognition of the prior B.C. government service of those employees would have to be agreed to, and the PIPSC ultimately did succeed in convincing its membership to accept the agreement embodied in the MOU.

[87] Once the MOU had been concluded, it was necessary to revise the HRA to account for the inclusion of some of the employees in the PIPSC bargaining unit. In both the original and the revised versions of the HRA, explicit reference was made to the recognition of prior service, both in relation to a list of existing benefits and to future entitlements.

[88] In light of these documents, and the account provided by Mr. Gray of the history of the MOU, it is impossible to escape the conclusion that the parties agreed that the prior service of the transferring employees should be comprehensively recognized and that it would be taken into account in the context of present and future entitlements under the collective agreement.

[89] Indeed, the employer's documents, which are the personal leave status reports in Exhibit U-1, Tabs 11 and 14, suggest that the employer saw continuous employment for those employees as beginning with their start dates with the B.C. government, not their CRA start dates. Mr. Morin's explanation as to why those dates were altered in 2012 was that the original dates had been a "mistake." His recollection was that the change was linked to the period in which a large number of employees transferred back to the B.C. government after the collapse of the harmonization initiative in 2011. The employer took the position that since the original basis on which those employees

had come on board was no longer applicable, they should not be entitled to count their previous service with the B.C. government when determining the basis on which they would leave the CRA after such a short period there.

[90] In cross-examination, Mr. Mahil pointed out that the leave reports were altered after the new collective agreement, containing clause 19.05, was concluded and intimated that the change might have come about in an effort to deny the transferred employees full severance payments under the new clause. He acknowledged that the changes did occur after the new collective agreement was concluded but said that he could not comment on whether there was a connection between those events.

[91] I do not find it necessary to draw a conclusion about which explanation is correct for altering the dates. If it was linked to the process of returning employees to the service of the B.C. government, then it has hardly any relevance to the grievors' situation. Whatever the merits — on which I make no comment — of shifting the level of commitment to employees who would no longer work for the CRA, if the employer's stance concerning employees going back to the B.C. government was that it was under no further obligation to observe the HRA or the MOU with respect to those employees, then it does not have any bearing on how service should be calculated for the grievors. They continued to be CRA employees and, in my view, were entitled to the full benefit of the agreements that had been reached about the terms of their transfers.

[92] If the explanation for the alteration was specifically tied to the formulation of the employer's then-current position on the meaning of clause 19.05 of the collective agreement, then the reasons I have given in this decision should make it clear that I have concluded that the employer's position is incorrect about the meaning of continuous employment for the grievors.

[93] I have concluded that the bargaining agent has succeeded in showing that the employer did make a commitment to recognize the grievors' service with the B.C. government for all purposes connected with their CRA employment and that this includes the calculation of the severance payment to which all employees became entitled with the addition in 2012 of clause 19.05 to the collective agreement.

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

(The Order appears on the next page)

VI. Order

[95] The grievances are upheld.

[96] I order that the employer recalculate the severance payment under clause 19.05 of the collective agreement to recognize the grievors' prior service with the B.C. government.

[97] I order that the grievors' start dates with the B.C. government be used on any employer documentation indicating the start of continuous employment for the purposes of the collective agreement.

[98] I remain seized of the grievances for a period of 90 days from the date of this decision to permit the parties to reach agreement on implementing this decision. In the event they are unable to reach an agreement, either party or both may place unresolved issues before me.

May 22, 2015.

Beth Bilson,
adjudicator