

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

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BETWEEN

**ROBERT NEVILL WEBB**

Grievor

and

**TREASURY BOARD  
(Foreign Affairs and International Trade)**

Employer

***Before:*** P. Chodos, Vice-Chairperson

***For the Grievor:*** James L. Shields, Counsel, Professional Association of Foreign  
Service Officers

***For the Employer:*** Michel LeFrançois, Counsel

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Heard at Ottawa, Ontario,  
December 4, 1998.

## DECISION

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Mr. Webb is a Foreign Service Officer who is currently employed with the Department of Foreign Affairs and International Trade in Washington. He has grieved the employer's decision to recover from him the sum of \$26,700, the amount which he had received from the Department as reimbursement for the costs associated with the sale of his family home in Brampton, Ontario. In this proceeding Mr. Webb testified on his own behalf; the employer called no witnesses.

The grievor joined the Department in December 1990. At the time of his appointment to the Public Service, Mr. Webb was living in Brampton with his wife and four children. Mr. Webb chose to reside in temporary accommodation in Ottawa and commute to Brampton on the weekends. In March 1993 Mr. Webb became aware of a vacancy within the Department in Dayton, Ohio. By letter dated May 18, 1993 (Exhibit G-2) Mr. Webb was advised by the Department that his posting to Dayton was confirmed “*conditional on the receipt of the appropriate medical certification and clearances from Health and Welfare Canada (HWC)*”.

According to Mr. Webb, upon receiving the letter of offer of May 18th, he discussed with his wife whether they should sell or rent out their home in Brampton. At that time they decided that they would likely rent the house in view of the fact that the Toronto area real estate market was depressed; Mr. Webb also noted that he was considering seeking a position with the Department in Toronto after his initial posting outside the country, particularly as two of his children were attending university near Toronto.

Shortly after obtaining confirmation of his posting, Mr. Webb received a binder of materials relating to, among other things, posting procedures. Included with these materials was a departmental form entitled *Pre-Posting/Schedule of Mandatory Appointments* (Exhibit G-3). This form sets out a list of meetings which the recipient is to attend in order to complete the pre-posting clearances, to ensure that he or she is properly briefed by a number of divisions within the Department about various matters relating to their posting. Among the divisions noted in Exhibit G-3 is “ABMR” which is responsible for dealing with “*shipment of effects / Travel Arrangements*”. It is Mr. Webb’s recollection that he met with a Marc Perrier of ABMR sometime in early June; Mr. Webb referred to his handwritten notes which he made during the course of this meeting with Mr. Perrier; these notes were recorded on the back of Exhibit G-3, as

well as at the bottom of the front page of this document. The notes cover a number of subject matters, including Foreign Service Directives (FSD) 16.0 concerning expenses incurred in the sale of a home. Mr. Webb testified that Mr. Perrier had asked him in the course of this first meeting if it was his intention to sell or rent his home in Brampton. Mr. Webb stated that he told Mr. Perrier that they were still thinking about it; however, they had basically decided to rent the house. Mr. Perrier then asked him whether he was aware that under the recently revised FSD's legal and real estate fees on the sale of a home are reimbursable. Mr. Perrier specifically made reference to FSD 16.0 in this context. Mr. Webb stated that he had previously looked at the FSDs prior to the amendments and decided that it did not apply to him at that time. He examined the provision with Mr. Perrier; he wrote down that it provided for reimbursement of legal and real estate fees on a "1 sale *per career*" (ref. back of Exhibit G-3).

Mr. Webb recalled that at this point Mr. Perrier stated that he would check with his supervisor about this part of the Directives; Mr. Perrier then left for about ten minutes; when he returned he confirmed that FSD 16.0 covers legal and real estate fees, as well as GST. Mr. Webb referred to his handwritten note at the bottom of Exhibit G-3: "*Mark Perrier - house sale Ref. to Updated FSD's Ref FSD 16.19(b) II real Est legal + GST paid*". Mr. Webb also recalled that Mr. Perrier had made his own notes in a binder during this meeting. Mr. Webb then stated to Mr. Perrier that he would discuss with his wife whether they would rent or sell. Mr. Perrier told him that at the next meeting he should bring in the listing agreement, if he should decide to sell. Mr. Perrier told him as well that he could obtain an advance on the real estate fees if he so wished. At this point, they had not set a date for their next meeting.

That weekend Mr. Webb met with his real estate agent, Mr. Mark McLean, to discuss the cost advantages of renting or selling. The following week his wife signed a listing agreement setting in motion the sale of his house. Mr. Webb stated that the determining factor in their decision to sell rather than rent was the representation by Mr. Perrier that they would be reimbursed the real estate and legal costs of selling their home.

Reference was made to two letters from Mr. McLean, the Webb's real estate agent (Exhibits E-1 and E-2); the first letter dated February 12, 1996 states the following:

*You requested I confirm in writing the circumstances related to the sale of your property through Re/Max Brampton Inc.*

*In May 1993 you requested I advise you on whether to sell or rent your home as you were due to be moved to Ohio by the Canadian Government during the summer of 1993.*

*We discussed the likely sale price of your home and the associated costs of selling. We also discussed the likely monthly rent for your property and the management fees that you would incur as you would be an absentee landlord.*

*Just before June 16, when your wife signed the Listing Agreement, you discussed with me your decision to sell rather than rent your home. You stated that after your meeting regarding your relocation at your offices in Ottawa, you had been told by the division organizing your move, that the government would re-imburse you for the Real Estate and Legal fees when selling your house, despite the house not being in the Ottawa region under new rules that had been introduced. Thus it would not make sense for you to rent your home.*

*We agreed to initially list your home at a higher price that we expected to obtain in order to test the market. On July 1 you gave me instructions to reduce the listing price of your home in order to move the house quite quickly. We agreed on \$399,900 and you signed the amended listing agreement. Your wife signed the contract for sale at this price of \$399,900 about mid July 1993.*

*If I can be of any other help, please let me know.*

On July 8, 1993 Mr. Webb had a second meeting with Mr. Perrier; he recalled the exact date of this meeting as it coincided with the second day of the training program outlined in a schedule he had been given by the Department (Exhibit E-4); on this schedule he made a notation beside the 1:30 p.m. program event for Thursday, July 8th that he had an appointment with "ABMR". On this occasion Mr. Webb again made notes of the meeting, this time on the back of Exhibit E-4. He recalled that at this time he gave Mr. Perrier a copy of the listing agreement with the real estate agent. Mr. Perrier asked him if he wanted an advance on the real estate cost. Mr. Webb

declined, in order to avoid extra paper work; he told Mr. Perrier that he would submit the final invoices when the sale would be completed.

Mr. Webb testified that he reduced the asking price to \$400,000 in light of the information from Mr. Perrier that he would recover the cost of the legal and real estate fees; as a result of the reduction in price the house sold quickly for the full asking price.

In late August Mr. Webb moved to Dayton, Ohio. Towards the end of September or the beginning of October he had received from his lawyer and his real estate broker the fee invoices. He mailed the originals to Mr. Perrier and kept copies. Toward the end of the first week of October he contacted Mr. Perrier and was told by him that he had not received the invoices. He then sent him another set by mail; a week after that he again called Mr. Perrier, who again advised him that he had not received either set. He contacted his lawyer who undertook to ensure the delivery of a third set of invoices. At the end of October, he called Mr. Perrier again who confirmed that he did receive the set of invoices from Mr. Webb's lawyer.

In early November the grievor called the Department to inquire about the cheque for the reimbursement of the fees. He was referred to a Ms. Gail Foster, who advised him that she was taking over the file, as Mr. Perrier was on long term sick leave. She indicated that the reimbursement was being processed. Sometime during the third week of November, Mr. Webb, while in Ottawa, made a point of meeting with Ms. Foster. On that occasion she explained to him that she had the documentation and had put in a request to have the payment processed. She took him to a computer terminal to demonstrate that the payment request was in the system. On or about November 30th Mr. Webb received from Ms. Foster a cheque stub (Exhibit G-5) indicating that the funds had been electronically transferred to his account. Mr. Webb stated that the funds were put into his account at the beginning of December. He also testified that he had used these funds, as well as the proceeds from the sale of the house, to buy a home in Ohio.

Mr. Webb observed that he heard nothing further about this matter until he received a form dated July 14, 1994 from the Expenditure Services, Financial Operations Division (Exhibit G-6) stating that he owed the Department \$26,700, which

represents the full amount of the real estate and legal fees which he had claimed and received from the Department. The form notes that “... *If the refund has not been received within 30 days from the date of this letter, the amount will be recovered from your salary.*” It also indicates that any questions about this matter should be referred to a J.R. Brocklebank. Attached to this form was a memorandum dated April 15, 1994 to Ms. Foster from Mr. Brocklebank, who is the Deputy Director, Foreign Service Benefits Division; the memorandum observed that under the FSDs Mr. Webb was “*not ... eligible for assistance under FSD16 with respect to sale of that home.*” (i.e. the house in Brampton, Ontario). Mr. Webb stated that he was “in a state of shock” upon receiving this claim for the \$26,700. He immediately contacted Mr. Brocklebank and explained to him that funds were not available, as he had used them to buy his house in Dayton. He also told Mr. Brocklebank that he had no previous knowledge of the April 15th memorandum. Shortly after, Mr. Webb was transferred to Detroit and subsequently was cross-posted to Washington, his current place of employment. Both Mr. Webb and his bargaining agent made numerous efforts to resolve this matter without success. Mr. Webb agreed to reimburse the amount in question on a without prejudice basis, and the money has since been repaid.

In cross-examination, Mr. Webb acknowledged that on the *Pre-posting/Mandatory appointments* form (i.e. Ex. G-3) someone from “ABMR”, that is, the division responsible for advising on travel, had signed off on August 20, 1993. Mr. Webb observed that by signing off, the division is noting only that the travel arrangements and briefings concerning those arrangements have been completed. It was Mr. Webb's recollection that his first appointment with Mr. Perrier took place in early June; however, he had not noted the exact date of this meeting. He was certain that he met with Mr. Perrier at least twice, and possibly a third time with Ms. Foster. He had advised three persons that he would be entitled to reimbursement of fees - his wife, the real estate agent, and his lawyer. Mr. Webb did not consider it necessary to confirm this arrangement; he observed Mr. Perrier making extensive notes which were apparently lost. Upon learning in July 1994 that the money would be taken back, he did not contact Mr. Perrier, but rather spoke with Mr. Brocklebank. He did attempt to contact Mr. Perrier subsequently, and discovered that he was in Korea.

Mr. Webb also acknowledged that he was aware, upon joining the Foreign Service, that he would be posted abroad, probably for the rest of his career. He

acknowledged that currently he is still outside Canada and has been so continuously for six years, and would likely remain posted outside Canada for another three years. Originally he had expected to be moving his family to Ottawa in 1990; he was told that he may not have a permanent job; accordingly, he decided to hold off moving his family to Ottawa. He agreed that he had in fact taken a house hunting trip with his wife to Ottawa, and was reimbursed for their expenses; he also received a dual residence allowance of \$7,700 while in Ottawa.

Mr. Webb also stated that he was aware that the original posting would result in his being away from Canada for three years; he agreed that his posting may have been extended. He insisted that he was prepared to rent out their home for that period of time. Mr. Webb maintained that it was his preference to return to Toronto after three years, and this was a realistic expectation since positions in Toronto with the Department were fairly easy to obtain. When Mr. Webb took up his position in Dayton on August 23, 1993, he expected to rent a property. He also maintained that prior to meeting with Mr. Perrier, he and his wife had decided to rent their house in Brampton; he agreed that he made no submissions in writing to that effect to the Department, although he insisted that he did so advise Mr. Perrier.

Mr. Webb was referred to Exhibit E-2, a letter from his real estate agent dated October 10, 1996: the text of the letter reads as follows:

*Further to my letter dated February 12, 1996, I would like to comment on the market conditions in the Brampton area prior to and during the summer of 1993, with particular reference to the sale of your residence.*

*The real estate market in our area was very active through most of the 1980's, with sales booming and prices rising. The market reached its pinnacle in February 1989 and for a variety of reasons, including a steep increase in mortgage interest rates, a bust cycle began thereafter.*

*From the peak in February 1989 through the period in which you sold your home during the summer of 1993, the price of homes in Brampton has suffered a significant deflation in value. The price of a Brampton home through this period declined on average approximately 20%. The higher priced homes, such as yours, tended to deflate even more.*

*The initial offering price of \$429,900 at which your house was listed on June 16, 1993 was higher than my suggested*

*list price, but we agreed to test the market. In my best opinion, I felt a list price of \$419,900 more accurately reflected a fair market value. After a few weeks on the market and in view of the fact that your employer would be responsible for the payment of real estate and legal fees associated with the sale of your principal residence (estimated at \$25,000 - \$30,000), you decided you could afford to reduce the listing price to \$399,900 in order to facilitate a quick sale and your family's relocation to Ohio.*

*Even in a depressed market it is possible to sell a home in a reasonable period of time provided it is listed at, very near, or even below market value. As I understand it, your decision to sell your house at a reduced price was governed by the fact that you would not have to absorb the legal and real estate fees.*

*Please advise if I can be of any further assistance.*

Mr. Webb maintained that his decision to drop the price occurred on July 1st, several weeks subsequent to his first decision to sell. He noted that at that time they had missed the best part of the market, in the Spring; furthermore, his posting was imminent. He noted that he did not put the house on the market in May because at that time he was considering renting rather than selling. He also maintained that they were prepared to sell at a lower price in view of the fact that they would not have to pay the fees associated with selling. He initially listed the house at a higher price in order to test the market. He dropped the price after two weeks to \$400,000 which was the lowest price they could accept. He agreed that the fact that time was running out in respect of his impending transfer to Dayton was also a factor in lowering the price. He did consider that renting could be a headache, but he was assured by his agent that for a fee a management company could handle all renting issues.

Mr. Webb was referred to a form signed by him on July 8, 1993 (Exhibit E-3). This form outlines a number of steps relating to physical transfers to a post. He agreed that the form appeared to refer to various subject-matters which he had covered with Mr. Perrier on July 8th. He observed that in his earlier meeting with Mr. Perrier in June, there were several matters which Mr. Perrier wanted to revisit with him in a subsequent meeting; he noted for example that in July he could not confirm his moving date.

Argument

Counsel for the grievor submitted that this case is based purely on the principle of promissory estoppel. Mr. Shields reviewed the grievor's testimony, which he submitted, was uncontradicted; in particular, counsel noted that Mr. Webb had testified that he originally had made plans to rent his residence in Brampton, prior to the first meeting with Mr. Perrier in June 1993. Counsel maintained that Exhibits G-3, E-1, and E-3 corroborate his testimony that the date of the first meeting was in the earlier part of June. The evidence also demonstrates that Mr. Webb decided to reduce the price on his house on July 1st, several days before his second meeting with Mr. Perrier of July 8th.

As a result of Mr. Perrier's representations the grievor changed his course of action and decided to sell his house in a soft market, because he believed that he would be reimbursed for the fees associated with the sale. Again, this was corroborated by correspondence from his real estate agent i.e. Exhibits E-1, E-2. The grievor then used the proceeds of the sale and the reimbursement of the fees to purchase a property in Dayton, instead of pursuing his original intention to rent a house in that location. Thus, there was detrimental reliance on the part of the grievor, in that he incurred a significant financial loss by listing his house in a soft market, agreeing to reduce the selling price, and using all the proceeds to buy a property in Dayton. Neither of these events would have occurred but for the representations.

Mr. Shields argued that this case is on all fours with several other decisions of the Board which have upheld the doctrine of promissory estoppel. The three essential elements of estoppel - the making of representations which is intended to be relied upon, the reliance by the recipient of the representations, and a detrimental result - are all present in this case. In support of his submissions, Mr. Shields cited the decisions in *Molbak* (Board file 166-2-26472), as well as the Federal Court decision upholding the *Molbak* award, i.e. *Canada v. Molbak* (Court File No. T-2287-95); *Defoy* (Board file 166-2-25506) and *Sorensen* (Board file 166-2-25062).

Counsel for the employer submitted that this case hinges on whether there has been detrimental reliance by the grievor in response to the representations made by Mr. Perrier. Mr. LeFrançois maintained that the evidence does not support the

conclusion that the alleged representations were in fact made to Mr. Webb prior to the grievor having decided to sell his home.

Counsel for the employer observed that the grievor has the burden of demonstrating that the representations were made to him prior to the listing of his home, and that he was induced to so act to his detriment. Counsel pointed out that nowhere in Mr. Webb's notes of his alleged first meeting with Mr. Perrier is there any notation that would indicate the date of that meeting. Furthermore, counsel maintained that Mr. Webb was in fact evasive when cross-examined on whether he actually relied on the representations in changing his mind about renting. Mr. LeFrançois maintained that the grievor's evidence on this matter is entirely self-serving, and runs counter to logic and reason. There was every likelihood that he would not be coming back to Toronto, that is, he would either be cross-posted abroad or would be transferred back to Ottawa following his stay in Dayton. In view of this likelihood, it is highly improbable that in the Spring of 1993 he would still be thinking of renting out his home; there was no basis for him to assume that the market would improve down the road, nor is there any evidence as to why it would have been more advantageous to rent at the time.

Mr. LeFrançois submitted Mr. Webb suffered no loss as a result of this transaction. It is merely conjecture on his part that he lost out by selling at the time, given the absence of evidence as to what it would cost him to rent, and factoring in the possibility that the house might remain vacant. While there is no case law that dissects the question of what constitutes detriment, it is clear that the burden of proof to demonstrate detriment rests with the grievor, and he failed to meet that burden. At best, Mr. Webb's decision to put the house on the market was due only in part to Mr. Perrier's representations; it is simply not credible to conclude that this was the sole factor, particularly given the likelihood that he would be outside the country for at least three years.

Counsel urged that the doctrine of promissory estoppel should be applied with caution, and only where it is clear that there has been detrimental reliance. In support of his submission, counsel referred to the text *Evidence and Procedure in Canadian Labour Arbitration* by Gorsky, Usprich and Brandt (Carswell, 1994) at page 2-21 and the following.

Reasons for Decision

It should be noted that in correspondence to the Board prior to this hearing the employer had formally raised an objection concerning the timeliness of the grievance. In the course of the hearing counsel for the employer advised that this objection is not being pursued and accordingly, it is not addressed in this decision.

Both counsel are in agreement that this case turns on the application of the doctrine of promissory estoppel. There is no dispute that under a proper interpretation of the FSD 16.0, the grievor is not entitled to reimbursement for the fees associated with the sale of his house in Brampton. What is at issue here is whether an erroneous interpretation of this provision was given to Mr. Webb by persons acting on behalf of the employer, and whether he relied on those representations to his detriment.

Certainly since the Federal Court decision in *Canada v. Molbak* (supra), it is clear that this doctrine can have application to labour relations issues in the federal Public Service. It is perhaps useful to recall that the purpose and intent of the doctrine is to ensure equity and fairness in the relations between parties in a contractual context. As Lord Denning succinctly stated in *Amalgamated Investment and Property Co. Ltd. v. Texas Commerce International Bank Ltd* [1981] 3 ALL E.R. 577, at page 584:

*The doctrine of estoppel is one of the most flexible and useful in the armoury of the law ... At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of facts or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*

In my view, it cannot be seriously disputed in this case that there were representations made to Mr. Webb which were intended to be relied upon. There is no

doubt that as part of the standard pre-posting briefings Mr. Webb was required to see Mr. Perrier so that Mr. Perrier could provide him with relevant information respecting his impending transfer out of the country. That of course is exactly the purpose behind the form entitled *PRE-POSTING/SCHEDULE OF MANDATORY APPOINTMENTS* (Ex. G-3) - to ensure that persons such as Mr. Webb receive information from persons such as Mr. Perrier. In light of Exhibit G-3, it would simply be ludicrous to suggest that the Department does not intend that employees rely upon the advice they receive from these briefings. Furthermore, the fact is that someone with the requisite authority in the Department must have approved the erroneous interpretation of FSD 16.0, otherwise Mr. Webb would not have received the reimbursement in the first place.

The more contentious issue is the timing of these representations and its impact on Mr. Webb's decisions respecting his house. It was Mr. Webb's unequivocal testimony that his first meeting with Mr. Perrier, during which these representations were first made, took place shortly before June 16, 1993, the date on which Mr. Webb's wife entered into a listing agreement with their real estate agent. To some degree at least, his testimony in this regard is corroborated by Exhibit E-1, a letter from the real estate agent to Mr. Webb, apparently prepared at Mr. Webb's request, dated February 12, 1996. It was also Mr. Webb's testimony that prior to his meeting with Mr. Perrier it was his intention to rent the property rather than sell it; again, there would appear to be some corroboration of Mr. Webb's version of these events in Exhibit E-1. In any event, notwithstanding that Mr. Webb has the burden of proof in these proceedings, his assertion under oath as to these matters is certainly relevant and cogent evidence; in the absence of any evidence from the employer which would serve to contradict Mr. Webb's testimony, or impugn his credibility (and in my view no such evidence was forthcoming) I see no reason to question Mr. Webb's statements in this regard. This is equally true with respect to his testimony that as a result of Mr. Perrier's representations he had lowered the asking price for his property significantly, and in fact below the amount suggested by his real estate agent (see Exhibit E-2). With all due respect to counsel for the employer, I do not agree that this was in any way an unreasonable response in the circumstances, or one lacking in credibility.

Counsel for the employer has also referred to the statement in *Evidence and Procedure in Canadian Labour Arbitration* (supra) that "*The case law generally supports the restrictive approach to the use of equitable estoppel*". However, a careful reading of this passage reveals that the authors are commenting on the utilization of the doctrine to "*compel the continuation of the practice*". This concern has no relevance to the instant case, which addresses an incident that has no ongoing consequences for the contracting parties.

Accordingly, I find that the elements of doctrine of promissory estoppel have been made out in this case. In the words of Lord Denning, "*it would be unfair or unjust*" to allow the employer to evade the consequences of its representations. The employer is therefore directed to reimburse the grievor the sum of \$26,700 which represents the amount it had originally reimbursed Mr. Webb for the real estate and legal fees from the sale of his house, and which it had subsequently recovered from him.

Counsel for the employer had requested that, if I find in favour of the grievor, this decision reflect the fact that my determination flows from the employee's entitlement under FSD 16.0; in other words, these circumstances should in effect be considered to constitute an exercise by the grievor of the one time entitlement under that provision. I agree. I would note therefore that, in my view, by relying and acting on the representations with respect to FSD 16.0, the grievor is disentitled from invoking that provision on any subsequent occasion, in respect of reimbursement of fees on the sale of a house.

Accordingly, for the reasons noted above, this grievance is upheld.

**P. Chodos,  
Vice-Chairperson.**

OTTAWA, December 21, 1998.