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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

AMIE DOUCET, ROSSANA BORUTA, KIM ALBANO, RENEE BEAUDOIN, CHARLES BURROWS, LILLIAN CANTWELL, BRIAN COBB, TANYA (TATJANA) FEGHALI, DANIELA GIANETTI, JEFFREY GILMORE, JANET GOVER, SCOTT GRABER, PATRICIA HALL, TERRI NICOLE HART, DENISE HOOD, YVONNE JACOBS, KALLEE-AN JAKONEN, STACY MITCHELL, ANN MROUE, RUTH OEHRLEIN, REBEKAH ORR, JEFFREY SEGUIN, TESSY SKRETAS, JOHN SLATTERY, SOPHIA SOKOLOWSKI, AND TOM SUMMERS

Grievors
and

TREASURY BOARD
(Canada Border Services Agency)
Employer

Indexed as
Doucet v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Amanda Montague-Reinholdt, counsel

For the Employer: Alexandre Toso, counsel

Heard at Toronto, Ontario,
October 8 and 9, 2019.

REASONS FOR DECISION

I. Summary

[1] The group of 26 similarly affected grievors listed by name on the cover page of this decision ("the grievors") seek relief from the decision of the Canada Border Services Agency ("the employer") to recover erroneously granted and unearned vacation leave (VL) credits.

[2] The grievors did not dispute that the paid VL at issue was granted in error. Nor did they dispute that the employer had the authority to recover the VL credits. Rather, they argued that the employer did not act reasonably in exercising its management rights and that they had suffered hardship from its decision to recover the VL credits.

[3] The range of paid VL credits recovered from the grievors was 4.9 to 131.65 hours. The one grievor who appeared at the hearing testified that when the employer required her to, she elected to repay the monetary value of the 40.26 hours of VL rather than give up that amount of VL credits in the next fiscal year (FY). The repayment amounted to $100 of salary for each of 10 paycheques.

[4] Despite the detailed arguments ably presented by counsel for the grievors, I find that the grievors received paid VL credits that they had not earned and thus were not entitled to. Despite the employer's errors and at least one grievor's honest, goodwill efforts to try to rectify the erroneous VL credits she had received, I conclude that the grievors must reimburse the employer for all the unearned VL they received.

[5] The evidence presented at the hearing was insufficient to support a finding that the grievors suffered any real hardship from repaying the 4.9 ($132.95 equivalent) to 131.65 hours ($3832.54 equivalent) of paid VL. While these grievors would prefer to keep the extra and unearned VL, being required to return it or repay the equivalent monetary value is not, on its own, a hardship.

[6] This conclusion is based upon a simple need to hold parties to their collective agreements and to not allow employees to retain unearned benefits that have a cost to the government other than in very limited circumstances.

[7] These circumstances may be found worthy of relief if true hardship, such as detrimental reliance, is established in evidence. But that was not the case for the grievances before me in this hearing.

II. Background

[8] The parties helpfully provided a 41-page agreed statement of facts that was prepared after I chaired a case-management teleconference with counsel several weeks before the hearing. The teleconference discussed at length the concern that it would take a great deal of hearing time and resources to have all 40 (originally) grievors appear to give *viva voce* testimony. I expressed my strong desire for the parties to limit the need for all grievors to appear. The agreed statement of facts was the outcome of the prehearing discussions.

[9] Unfortunately, upon the presentation of opening statements and the confirmation of the plans for witnesses for the hearing, counsel for the employer stated that he would make a motion for the dismissal of all the grievances that were brought forward to the hearing, other than the one in which the grievor attended to testify, due to a lack of evidence. When I asked him when he had given notice of his intention to make such a motion to the grievors' counsel, he replied somewhat hesitantly that he had that morning.

[10] Counsel for the grievors replied that she had not yet seen the message purportedly informing her of the motion and that given this surprising turn of events, she would seek an immediate adjournment of the hearing to reschedule several more days for it so that all the grievors could appear and testify.

[11] When I rejected the employer's motion due to it being untimely, I admonished counsel for making such a motion after participating in the case-management conference weeks earlier in which the hearing had been planned, including the evidence and a witness list. I reminded him of the teleconference, during which I had specifically addressed my wish to conclude the hearing within the two days that had been booked for it months earlier.

[12] I also pointed out the complete lack of proportionality with respect to what was at stake in the grievances and the cost that would be incurred to postpone and rebook several days of hearings months hence.

[13] The parties submitted the relevant articles of the collective agreements related to leave. They noted that the collective agreements were renewed during the time at issue. However, these matters were neither contested nor put at issue in the hearing and will not be pursued further. The facts also shed light upon the continuous service rules that provide the means to calculate VL, which was found to be the cause of the errors that gave rise to these grievances. I find that the details of how the errors arose have no probative value, and they will not be explained or considered. Simply stated, the employer erred in its VL calculations for the grievors.

[14] The agreed statement of facts included, but was not limited to, the following:

- At the relevant times, the grievors were employees of the employer and were members of either the Program and Administrative Services (PA) group or the Border Services (FB) group, both of which are represented by the same bargaining agent.
- Shortly after the end of each FY, the employer prepared and provided each employee with a "Personal Leave Status Report" for the FY that had just ended. It included the VL credits brought forward from the previous FY and those credited at the beginning of the new FY and the leave taken, showing the VL used thus far in that FY. The report also showed the total of all VL remaining available for that FY.
- The grievors had to submit requests to use their VL credits, which had to be approved.
- In 2007, the employer discovered anomalies in the pay files of some employees, upon which an audit was performed of over 2000 of its employees in southern Ontario.
- The audit discovered that errors had been made due to miscalculating events impacting continuous or discontinuous service, which caused some employees to receive unearned VL and some to receive less than they had earned.
- The audit was completed in 2010. The employer then took steps to correct situations of VL credits having been erroneously granted or withheld between April 1, 2005, and March 31, 2011. No action was taken to correct VL errors from before that period.
- The employer began a series of communications to all impacted employees and reinstated VL credits for those who had been under credited. The grievors received an explanation of the audit and an accurate accounting of their VL credit balances, net of the corrections that were necessary due to the audit findings.
- The grievors were offered four options to return VL credits or repay the equivalent cash value. The repayment choices included structured options spread out over a period of future pay periods. Based upon employee feedback to the communications, the employer created a fifth option for returning the VL. The details of these options was not at issue in the hearing.

[15] The statement of facts revealed that the grievors received the following erroneous and unearned VL (and related monetary value). The grievors are listed here alphabetically by their last names:

- Albano 9.375 hours ($222.85)
- Beaudoin 31.25 hours ($928.94)
- Boruta 40.26 hours ($1130.01)
- Burrows 82.5 hours ($2331.88)
- Cantwell 23.5 hours ($499.66)
- Cobb 50 hours ($1450.75)
- Doucet 28.125 hours ($775.36)
- Feghali 30.0 hours ($938.17)
- Giannetti 4.9 hours ($132.95)
- Gilmor 87.5 hours ($2665.03)
- Gover 37.5 hours ($1153.18)
- Graber 28.125 hours ($736.12)
- Hall 12.48 hours ($248.77)
- Hart 78.125 hours ($2429.66)
- Hood 28.125 hours ($895.95)
- Jacobs 131.65 hours ($3832.54)
- Jakonen 84.375 hours ($2502.05)
- Mitchell 59.375 hours ($1698.28)
- Mroue 32.05 hours ($1012.98)
- Oehrlein 15.0 hours ($445.89)
- Orr 6.25 hours (no cash value equivalent was provided in evidence)
- Seguin 46.875 hours ($1577.91)
- Skretas 47.935 hours ($1448.59)
- Slattery 31.95 hours ($967.60)
- Sokolowski 31.25 hours ($716.09)
- Summers 12.45 hours ($406.37)

III. Analysis

[16] The grievors did not contest the employer's ability to recover the erroneously granted and unearned VL credits. However, each party argued that the ability was derived from different authorities, and each claimed that its chosen authority strengthened its case. The parties took sides such that if I accepted one party's approach, it argued that the facts fit its formula and that I should award its case.

[17] The employer argued that it had statutory authority to recover unearned VL credits due to the existence of promissory estoppel not being grounded in fact in its opinion and that there was no real hardship.

[18] The grievors countered that the employer had to rely upon the broad basket of management rights, which have been found to carry a duty to be exercised reasonably

and without causing hardship to employees. In their submissions, the employer's negligent errors, the lengthy passage of time, and the efforts of at least one grievor to correct the error that were thwarted by the employer all show that management rights were not exercised reasonably.

A. The authority to recover the unearned VL credits or their equivalent monetary value

[19] The employer pointed to the following provisions of the *Financial Administration Act* ((R.S.C., 1985, c. F-11; *FAA*) for what it argued was the statutory authority to recover the unearned VL credits:

> …
>
> *Deduction and set-off*
>
> ***155 (1)*** *Where any person is* ***indebted*** *to*
>
> ***(a)*** *Her Majesty in right of Canada …*
>
> …
>
> *the appropriate Minister responsible for the recovery or collection of the amount of the indebtedness may authorize the retention of the amount of the indebtedness by way of deduction from* ***or set-off against any sum of money that may be due or payable by Her Majesty in right of Canada to the person*** *or the estate of that person.*
>
> …
>
> *Recovery of over-payment*
>
> ***(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.*
>
> …
>
> [Emphasis added]

[20] Both parties reasonably pointed to passages in *Murchison v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 93, as support for their submissions on those sections of the *FAA*.

[21] *Murchison* found that employer efforts were made in that case to recover erroneously granted VL worth $11 564.85 (which began accumulating in FY 2000-2001; it was discovered late in 2007). Approximately five years earlier, the grievor in that case tried to alert her employer to the error. The employer was also found not to have

used all its resources to correct the grievor's VL balance. The Public Service Labour Relations Board (PSLRB) concluded that the recovery of the value of this VL created an undue hardship on the grievor, which caused the PSLRB to intervene.

[22] In this case, the grievors' counsel argued that the *FAA* was rejected in *Murchison*, in which a similar issue of the attempted recovery of erroneously granted VL credits was considered. That case found as follows:

> …
>
> *[47] Subsection 155(3) applies to overpayments of a monetary amount. The words of the clause clearly state that the employer's powers of recovery extend to "overpayments made … on account of salary, wages, pay or pay and allowances." The term "overpayment" is of significance, as are the terms "salary, wages, pay or pay and allowances." They are terms of art and denote concepts that are distinct from the concept of annual leave credits. Leave credits are not salary, wages, pay or allowances, they are credits. All of these terms (credits, pay, wages, salary and allowances) are terms of art in labour law and while salary, pay and wages may resemble each other, they are far different concepts from annual leave credits.*
>
> …

[23] In *Murchison*, paradoxically, the PSLRB first found that s. 155(3) of the *FAA* does not provide authority to recover VL credits as they were found not to be payments and so fell outside s. 155(3) (at paragraph 68), but it also concluded (as the employer noted) as follows (at paragraph 70): " … although subsection 155(3) of the *FAA* states that the Receiver General may recover any overpayments, it does not state that it must or that it shall… as such, it permits the employer to use its discretion in a given situation or circumstance."

[24] Of the other cases that the parties presented in argument, I note the more recent ones on attempted recoveries of erroneously granted VL credits. In them, the Federal Public Sector Labour Relations and Employment Board ("the Board") or its predecessors did not make a finding of or even consider from where the employer derives the authority to effect such a recovery (see *Laybolt v. Treasury Board (Department of Fisheries and Oceans)*, 2019 FPSLREB 114, *Paquet v. Treasury Board (Department of Public Works and Government Services - Translation Bureau)*, 2016 PSLREB 30, and *Prosper v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 140.

[25] However, those cases and relevant Federal Court and Federal Court of Appeal authorities (to follow) note the importance of a grievor showing detrimental reliance as an aspect of arguing that promissory estoppel applies. This shall be examined in detail later in this decision.

[26] Other than my finding that both counsel capably argued their respective presentations on this point, I need not make any further finding as there was no dispute that the employer had the authority to recover the erroneously granted and unearned VL credits.

[27] I will note Federal Court authority in support of my conclusion that the essence of the dispute before me is one of holding parties to the terms of their collective agreements. That is in essence the foundation of labour law and the most central tenet of my role as an adjudicator.

B. Detrimental reliance

[28] Counsel for the employer argued that for the grievances to succeed, I must find that the grievors detrimentally relied on the erroneous granting of the unearned VL credits and that it had not been proven.

[29] In argument, counsel for the grievors stated that they did not plead detrimental reliance and that this was not necessary for me to allow their grievances.

[30] Rather than accepting these polemic submissions, I looked beneath the surface of the many cases the parties submitted and identified the interests that informed those decisions. I will propose a more comprehensive interest-based outcome focused on determining if an injustice has occurred, given all the relevant circumstances.

[31] In *Murchison*, the PSLRB addresses the issue of detrimental reliance as follows:

> …
>
> *[44] In overpayment cases, the Board's case law holds that detrimental reliance needs to be proven by the grievor. The grievor's representative never demonstrated the presence of detrimental reliance of a financial nature on the part of the grievor and instead argued that repaying the amount calculated presented a financial hardship for the grievor. Financial hardship is not the same as detrimental reliance: detrimental reliance occurs at the time of the error and arises from the fact that the grievor relied on the statement or error of the employer and incurred a*

> *debt or acted in a manner which indicated that he/she relied on the employer's word or error. Financial hardship, on the other hand, arises from the discovery of the error and the consequent request by the employer to repay what has been given in error. This being the case, the doctrine of estoppel, as it has typically been applied in cases related to monetary overpayments, cannot be used by the grievor to found her grievance.*
>
> …
>
> *[51] If I am wrong regarding the above, and subsection 155(3) of the* FAA *applies, it is my belief that the grievor should succeed.* ***As outlined by both of the parties in their argument*** *[sic]****, the grievor needs to prove detrimental reliance.*** *The case law typically analyzes this issue by looking at the financial obligations undertaken by grievors and whether those obligations were undertaken in reliance on the employer's wage calculations. However, these cases have also concerned the classic cases of wage overpayments. In this case, the grievor has been over-credited leave credits. In her case, therefore, the issue of detrimental reliance should be analyzed from the perspective of the grievor's actions vis-à-vis those credits and the employer's assurances that they in fact had been properly credited to her. The grievor took leave in accordance with her leave bank statement and in that sense, detrimentally relied upon the assurances of her employer. She has, I find, proven detrimental reliance on her part.*
>
> …
>
> [Emphasis added]

[32] Thus, in *Murchison*, the PSLRB found that detrimental reliance is necessary and that it was proven on the evidence. The PSLRB deemed that the grievor taking leave based on the employer telling her that her erroneous VL credits were in fact accurate did amount to detrimental reliance.

[33] While the grievors in the matter before me specifically distanced themselves from pleading detrimental reliance, I note it arose in *Murchison* (at paragraph 69) where the adjudicator found that the grievor made sincere attempts to point out what she thought was an erroneously excessive allocation of VL credits to her over a period of several years totalling $11 564.85. The adjudicator then found that "… detrimental reliance can be found in the fact that the grievor took the leave that she believed she was entitled to". Counsel for the grievor also noted a similar finding to *Murchison* in *Prosper* (at paragraph 70).

[34] With respect, this finding is indeed one of reliance but I reject the conclusion in *Murchison* that it is necessarily also detrimental. I am not bound by and cannot agree

with that aspect of the PSLRB's findings in *Murchison*. I do not agree that an employee who has erroneously received unearned VL credits can show detrimental reliance by simply using the unearned credits. I will apply the relevance of this matter to the facts in the matter before me later in this decision.

[35] As noted, the cases cited by the parties also note the following guidance from the Federal Court:

> [From *Canada (Attorney General) v. Molbak*, [1996] F.C.J. 892 (T.D.) (QL):]
>
> …
>
> ***1*** *Despite the very able argument of counsel for the applicant, I have concluded that the application for judicial review must be dismissed. In particular, I cannot accept the argument that the adjudicator lacked jurisdiction to entertain the grievance and to apply the principle of estoppel in this matter. Under paragraph 92(1)(a) of the Public Service Staff Relations Act, R.S.C. 1985, c. P-35 as amended,* ***an adjudicator has jurisdiction in relation to "the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award." In my opinion, the decision of the employer to collect the overpayment of salary arose directly from the improper application of the collective agreement to the circumstances of the applicant.*** *As a result, the arbitrator had jurisdiction to hear the grievance and to apply the principle of estoppel. [See Menard v. Canada, [1992] 3 F.C. 521, 527-528 (F.C.A.); Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (1995), 27 O.R. (3d) 135 (Ont. Div Ct.)].*
>
> ***2*** *Counsel for the applicant further argued that, even if the arbitrator had jurisdiction to consider the principle of estoppel, he erred in applying it in the present case in that the respondent had failed to establish her detrimental reliance on the erroneous representations of the employer in a manner directly related to her employment relationship. In other words, he argued that the adjudicator erred in concluding that the respondent's detrimental reliance on the erroneous representations in relation to matters in her personal life was sufficient to satisfy the requirements of the principle of estoppel. I see no basis in law for restricting the application of the principle of estoppel in the manner proposed by counsel for the applicant. Indeed, counsel for the applicant candidly conceded that he had found no jurisprudence to support that argument.*
>
> …
>
> [From *Dubé v. Canada (Attorney General)*, 2006 FC 796:]
>
> …

> *[45] The doctrine of promissory estoppel was set out in* Maracle v. Travellers Indemnity Co. of Canada, *[1991] 2 S.C.R. 50. At page 57, Sopinka J. said the following:*
>
> > The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, **the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.**…
>
> …
>
> [Emphasis added]

[36] In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated as follows at page 615:

> …
>
> *It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.*
>
> …

[37] This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, 1983 CanLII 142 (SCC) at 647. McIntyre J. stated that the promise must be unambiguous but that it could be inferred from circumstances. In *Dubé*, the Federal Court stated as follows:

> …
>
> *[46] In short, according to the case law, such a promissory estoppel cannot exist unless there is an express or implied promise the effects of which are clear and precise. It is also well settled that the doctrine of promissory estoppel requires that the promise led the person to whom promise [sic] was addressed to act in some other way than he or she would have acted in other circumstances: see* The Queen v. Canadian Air Traffic Control Association, *[1984] 1 F.C. 1081 (F.C.A.), at page 1085.*
>
> *[47] In order to meet the requirements of the doctrine of promissory estoppel, the applicants must offer evidence showing that:*

> *(1) by its words or actions the Department made a promise to give the applicants priority designed to alter their legal relations and encourage the performance of certain acts;*
>
> *(2) on account of that commitment, the applicants took some action or in some way changed their positions.*

A predecessor of the Board also considered this matter in *Paquet*, in which it concluded as follows:

> …
>
> *[42] The principle of estoppel is twofold. First, a promise must have been made, in word or in conduct, to the grievor that the employer would waive granting her leave credits as set out in the collective agreement; second, based on that promise, she had to have taken leave without knowing that she was not entitled to it, which prejudiced her because she had to return it.*
>
> *[43] In* Canada (Attorney General) v. Lamothe, 2008 FC 411*, the Federal Court indicated the following about conduct or words:*
>
> …
>
> 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]*
>
> *[44] In their submissions, both parties also referred me to one of my decisions, i.e.,* Prosper*, at para. 28, which reiterates the following estoppel statements in Brown and Beatty,* Canadian Labour Arbitration*, 4th edition, at paragraph 2:2211:*
>
> The concept of equitable estoppel is well developed at common law and has been expressed in the following way:
>
> > 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 had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

One arbitrator has summarized the doctrine in the following terms:

> It is apparent that there are two aspects of the doctrine as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. **It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so**. The main situation where it would be inequitable for strict rights to be upheld would be where the party now setting up the estoppel has relied to his detriment.
>
> Thus the essentials of estoppel are: a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; **and detriment resulting therefrom**.

…

[45] Thus, it appears from that statement that a representation must be clear and unequivocal. How then can it be claimed that the employer's alleged promise in this case was clear and unequivocal when both parties agreed that until April 2012, it did not know that the annual leave credits granted to the grievor were not consistent with what the bargaining agent and the employer had negotiated?

[46] In that sense, I must point out that the period during which the error continued should not be the only element used to conclude that the employer made representations or promises to the grievor. Again, in my opinion, it must be demonstrated in this case that the employer did not know or was negligent to the point of not seeing what was evident. I do not believe that it knew that there was an error in the leave credits calculation. I also hold that the grievor never sought to check as to whether she was entitled to those days of leave by contacting the federal public service. I would also add that it must be remembered that despite the employer's error that lasted for nine years, from 2003 to 2012, ***she still***

> ***benefitted for three years from leave to which she was not entitled under the collective agreement due to the limitation period that precluded the employer from recovering more than six years.***
>
> *[47] Although the Board concluded in* Lapointe *that the employer was negligent when it took too long to react, nevertheless, the* ***doctrine of estoppel must be applied with care. It cannot be used systematically to remedy anything that seems unfair****. Note first that in* Lapointe*, another employee informed the employer of a possible error in the leave calculation and that nothing was done. That was not so in this case. I would also add that the fact that an error went on for a certain amount of time is not enough to conclude that there was a promise. Such a conclusion, in my opinion, misrepresents the true idea behind the principle of estoppel, which is that a party cannot knowingly through its actions lead the other party to believe that it will not exercise a given right in a way that misleads. Estoppel is in fact a principle that precludes a party that knowingly gives another party a sense of security about a given interpretation or practice from subsequently requiring the correct application of that clause or practice when the other party is no longer able to negotiate. Negligence by a party that does not react once informed of a potential error in my opinion would also allow the principle of estoppel to apply. That was not demonstrated in this case.*
>
> *[48] First, it must be determined that the party against which estoppel was invoked intended to waive the strict application of its rights. That was not proven in this case. The parties agreed that the dispute arose from an error made in good faith. The grievor's representative referred me to* Murchison*, in which the adjudicator allowed the grievance, based among other things on the fact that the grievor had questioned the employer several times about her rights on the issue of annual leave and because, in that context, it took about five years for the employer to decide to recover the overpayment. In that case, through Ms. Murchison's questions, the employer was confronted from the start with the issue of the amount of annual leave to which she was entitled.* ***After checking, the employer kept the grievor under a false impression. In my opinion, this case differs from*** **Murchison.** *On one hand, the issue of the application of estoppel was not raised in* Murchison*. And in this case, unlike in* Murchison*, in which the grievor inquired about her rights with respect to annual leave and in which the employer reassured her about its error, in this case, the grievor never inquired about the number of days of annual leave to which she was entitled when the employer hired her.*
>
> …
>
> [Bold emphasis added]

[38] After reading these cases, I agree with the argument presented by the employer's counsel that it was not enough for the grievors to show that an error was

made in granting the VL credits to them and that they innocently relied upon it, but rather, they had to show that some detriment then arose from their reliance and that the detriment or unjust result had to be more than slight.

[39] I share the conclusion of Adjudicator Gobeil, who found in *Paquet* that "… the doctrine of estoppel must be applied with care. It cannot be used systematically to remedy anything that seems unfair" (at paragraph 47).

[40] *Paquet* notes as follows (at paragraph 43) that the Federal Court also made a similar determination in *Canada (Attorney General) v. Lamothe*, 2008 FC 411, and 2009 C.A.F. 2 where the appeal was dismissed:

> …
>
> 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.**…
>
> [Bold emphasis added]

[41] I have considered all the cases presented on this point. On reflecting upon the passages from them that I have reproduced, I take special note of the Federal Court's guidance in *Molbak*, as it relates to this matter in essence being about the proper application of the relevant collective agreements.

[42] I also take special note of the Federal Court's decision in *Lamothe* (as cited in *Paquet*) as it frames the issue before me as one of the circumstances presenting more than a slight injustice deserving the Board's intervention to provide relief.

C. Fault

[43] I read the documentary evidence and listened to Ms. Boruta testify as to the fact that she received regular printed updates (personal leave status reports) from her employer purporting to give her an accurate and up-to-date accounting of her available VL credits. Her cross-examination on this point and the related argument sought to establish that she was required to sign those documents as an attestation that they were correct. Counsel for the grievors argued that the testimony showed that Ms. Boruta reasonably relied upon the updates for her VL plans. The updates that the

employer produced showed the erroneous VL credits that had been granted but that had not been earned.

[44] I note the most recent relevant Board decision in *Laybolt*, which dealt with an erroneous grant of VL. It determined that "… while there is some shared responsibility for leave management, the onus must primarily remain with the employer to maintain and verify employee records" (at paragraph 34). The entire paragraph reads as follows:

> *[34] In my view, it is important to note that while there is some shared responsibility for leave management,* ***the onus must primarily remain with the employer to properly maintain and verify employee records.****The employer made the initial mistake, was able to verify the records at all times and approved each of the grievor's subsequent leave requests over a period of three years. In my view,* ***the employer failed to meet its duty of care to the grievor*** *in these respects.*
>
> [Emphasis added]

[45] The grievor in *Laybolt* was found to have completely exhausted her VL credit balance for the FY at issue, but her leave report continued to state (in error) that she had 252 hours remaining, which on the facts, the Board found "… not quite as glaring as the 'obviously extraordinary and questionable' error described in *Prichard* …".

[46] Given this context, I read *Laybolt* as examining the issue of the grievors' knowledge and role in the erroneous grant and any subsequent detrimental reliance and hardship as opposed to making some finding on a record-keeping responsibility.

[47] I also note that similar to the facts in *Murchison*, the evidence before me established clearly that at least twice, Ms. Boruta made sincere and honest efforts by writing to her employer to question and request confirmation on matters related to the calculation of her VL credit entitlement. In return, she was erroneously assured that the VL credits she was being granted were accurate.

[48] I find that this matter of the leave reports and who was responsible for them has no probative value with respect to what I must determine, as outlined in my findings in each section of this decision.

[49] Germane to a finding of an unjust recovery of VL credits would be a grievor who had no knowledge of an error or like Ms. Boruta, who in fact tried to inquire as to the

potential erroneous VL grant and who additionally was able to establish in evidence that they suffered real hardship, the latter of which was not the case in the matter before me.

D. Unreasonableness, negligence, and hardship

[50] The grievors submitted that general management rights have been found to carry a concomitant duty to be exercised reasonably. They rely upon the Board's findings in *Association of Justice Counsel v. Treasury Board*, 2018 FPSLREB 38 ("*AJC*"), which in turn relied upon the Supreme Court of Canada's decision in *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, quoted as follows:

> …
>
> *[18] In unionized workplaces, labour arbitrators recognize management's residual right to unilaterally impose workplace policies and rules that do not conflict with the terms of the collective agreement (D. J. M. Brown and D. M. Beatty, with the assistance of C. E. Deacon,* Canadian Labour Arbitration *(4th ed. (loose-leaf)), vol. 1, at topic 4:1520). Often, this residual power is recognized expressly in a "management rights" clause. Clause 5.01 of the collective agreement is one such clause, as it reserves for the employer the right to exercise all management powers that have not been "specifically abridged, delegated or modified" by the collective agreement.*
>
> *[19] For federal government employers, many of these residual management rights are set out in legislation. Under ss. 7 and 11.1 of the* Financial Administration Act, *R.S.C. 1985, c. F-11, the Treasury Board is authorized to exercise a number of different powers with respect to its human resources management responsibilities. These rights include providing for the allocation and effective use of human resources (s. 11.1(1)(a)); determining and regulating the pay of employees, the hours of work and leave and any related matters (s. 11.1(1)(c)); and providing for any other matters necessary for effective human resources management (s. 11.1(1)(j)).*
>
> *[20] That said, management's residual right to unilaterally impose workplace rules is not unlimited. Management rights must be exercised reasonably and consistently with the collective agreement (Brown and Beatty, at topic 4:1520;* Re Lumber & Sawmill Workers' Union, Local 2537, *and* KVP Co. *(1965), 16 L.A.C. 73 (Ont.);* Irving, *at para. 24).*
>
> …

[51] In both Association of Justice Counsel cases, the management rights provisions of the relevant collective agreements are also analyzed. The Board and the Supreme

Court both noted those provisions, and the Board stated that the "… employer will act reasonably, fairly and in good faith in administering this Agreement" (at paragraph 193).

[52] The grievors then pointed out that in *AJC*, the Board noted as follows, citing the Supreme Court's decision (at paragraph 24, where it quotes *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34):

> *Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine* ***whether the employer's policy strikes a reasonable balance****. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive [sic] means available to address the employer's concerns, and the policy's impact on employees.*
>
> [Emphasis added]

[53] The grievors did not cite any similar management-rights section of their collective agreements. Regardless, while I do not make a finding of where the authority to recover the VL credits was derived, I will consider their submissions on the matter of the employer having a duty of being reasonable as if it applied *mutatis mutandis* to the general management rights that are routinely recognized in arbitral jurisprudence as residing in the *FAA*.

[54] In *AJC*, the Board went on at some length to consider fairness, reasonableness, and balancing interests as applied to the matters before it. In reviewing historical arbitral authorities on the matter, which originated with what is known as *KVP Co. (1965)*, 16 L.A.C. 73, it noted as follows:

> …
>
> *[200] When balancing the interests of the employer and employees to determine reasonableness, some of the factors that arbitrators and adjudicators have considered include the nature of the* ***employer's interest and its objective in introducing the unilateral policy or directive,*** *whether the measures adopted were rationally connected to the employer's objectives, whether there were less-intrusive means available to achieve the employer's purposes, and the impact of the measures on employees. (See, for example,* Irving Pulp & Paper Ltd.*; and* Peace County Health v. United Nurses of Alberta*, 2007 CanLII 80624 (AB GAA).) However, assessing reasonableness and balancing interests with respect to an exercise of unilateral management rights*

> *must be placed within the context of the parties' collective bargaining relationship and the collective agreement that they negotiated. In* Canadian National Railway Co. v. C.A.W. - Canada *(2000), 95 L.A.C. (4th) 341 at 375, as quoted in* Peace County Health*, at 37, the arbitrator Michel Picher observed as follows:*
>
> > An essential part of the balancing of interests is to determine whether an employer promulgated rule is reasonable. All of the parties before the Arbitrator acknowledge that, absent contrary language in a collective agreement, it is open to an employer to make policies and rules governing its employees, subject to certain generally recognized standards. Those standards, best articulated in [the KVP Co. decision], include the requirement, recently acknowledged by the courts, that **a policy or rule must be related to the legitimate business interests of the employer, and that it must be reasonable** (Metropolitan Toronto (Municipality) v. C.U.P.E., Local 43 (1990), 1990 CanLII 6974 (ON CA), 69 D.L.R. (4th) 268 (Ont. C.A.)). As further discussed below, an element to be considered in the assessment of reasonableness is whether a rule introduced by management is inconsistent with any substantive provision of a collective agreement, including the protection of employees against discipline or discharge without just cause.
> >
> > *[201] In the two grievances before me, the employer's unilateral assertion of its management right to require all bargaining unit members who were timekeepers to participate in the reconciliation exercise and to request, if not require, employees on long-term leave to also participate in the exercise had a direct impact on the administration and application of the collective agreement and in particular on its leave provisions.*
> >
> > …
> >
> > [Emphasis added]

[55] I distinguish these management-rights cases on their facts as they dealt with the imposition of new workplace policies that affected employee rights far beyond erroneous grants of unearned VL credits.

[56] I categorically reject that there is any balancing of interests at play in the matter before me. Rather, the erroneous grant of unearned VL credits engages the Board in holding parties to the terms of their collective agreements unless the circumstances show evidence of real hardship due to the recovery of those unearned credits that would be unjust to let stand.

[57] Counsel for the grievor also noted the PSLRB's decision in *Lapointe v. Treasury Board (Department of Human Services and Skills Development)*, 2011 PSLRB 57. That

case considered an overpayment of salary over four years amounting to $9666.56, for which the grievor had received no notice that it was in error. He was found to have relied upon the extra pay to enter into other financial commitments, which he would not otherwise have done (at paragraph 33).

[58] I note that none of these facts in *Lapointe* is present in the matters before me. Counsel for the grievor pointed out that in *Lapointe*, the PSLRB found as follows:

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

[59] As Adjudicator Paquet noted in *Murphy v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 116 (considering *Molbak*), when considering a claim of promissory estoppel, there must in fact have been a promise and detrimental reliance, and he stressed that the evidence must establish the detrimental effect on the grievor (at paragraph 27). He noted that in *Molbak*, the grievor was promised a transfer allowance of $5440.00, which she relied upon when making decisions, and that she was paid that sum, for which recovery was later sought. The evidence in that case established that the grievor would have made different decisions had the allowance not been promised to her.

[60] *Murphy* cited *Murchison* and noted that a recovery of over $11 000.00 was sought of erroneous grants of VL credits accumulated over seven years, which was found an undue hardship on the grievor. *Murphy* also cited *Defoy v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-25506 (1994), [1994] C.P.S.S.R.B. No. 131 (QL), which found that an employee relied upon the promise of a bridging loan from her employer and entered into a home mortgage, which thus placed her in a more onerous financial position. This caused the adjudicator to award in her favour in her grievance.

[61] I do not find that the cited cases, in which findings of negligence (*Murchison*) or failure of a duty of care (*Laybolt*) were made, as just two examples, provide any meaningful guidance to determining the grievances before me.

[62] "Negligence" and the related "duty of care" (I note that missing from those cases was a delineation of the standard of care) are phrases imported from private tort law. With respect, I do not see the relevance of those matters when discussing the need to hold parties to their bargain in a collective agreement and providing relief from what might otherwise be an unjust result of a party proving in evidence a true hardship that resulted from an erroneously and unearned benefit being recovered.

[63] The cases that the parties submitted, which I have analyzed, provide a detailed legal analysis of several concepts. As I have noted, my finding of where the authority to recover the VL credits is derived from is not necessary.

[64] I have sought to summarize them as follows, to provide a more pragmatic approach that I find provides a more succinct but still just outcome to the grievances before me:

- Did the employer have the authority to recover the unearned benefit?
  - This was not contested.
- Have the grievors suffered real hardship, other than simply returning the benefit, caused directly by recovering it?
  - Neither in the agreed statement of facts nor in Ms. Boruta's *viva voce* testimony was any detail provided to show any hardship other than the fact that the grievors would have rather not had to give back the erroneously granted VL credits or their cash equivalent. I note that of the many cases that the parties cited, when the Board or its predecessors intervened, it involved sums close to $10 000.00.
- Given all the relevant circumstances, such as a detrimental reliance that is demonstrable in evidence, the undue passage of time, and the grievors' efforts to rectify the mistake, would it be unjust to allow the hardship caused by recovering the benefit to endure?
  - While I am cognizant of the sincere efforts Ms. Boruta (at least) made to seek rectification of the employer's error and I acknowledge the passage of some considerable time until the matter was corrected, I do not find these factors enough to convince me to grant the grievance(s) without more evidence of real hardship. As noted earlier, I reject the notion that simply using the unearned and erroneously granted VL credits was on its own evidence of detrimental reliance. Such may establish reliance, but on its own does not necessarily establish detriment. I also note that the employer did not delay in acting to remedy the errors once discovered and also that several options for returning the credits were provided and an extra option provided by staff in feedback to the written notice was also adopted.

IV. Conclusion

[65] For the reasons I have outlined earlier in this decision, I do not find that any of the grievances are supported by evidence of true hardship rising beyond inconvenience, perhaps irritating inconvenience in the case of Ms. Boruta. While she can rightly claim to be very frustrated by her sincere, honest efforts to question and confirm a proper grant of VL credits to her, I do not find her choice to return the value of the erroneously and unearned VL credits through a repayment of $100 per paycheque over 10 pay periods hardship at a level of injustice.

[66] Whether I follow the employer submissions on the lack of evidence to support detrimental reliance or whether I look to the reasonableness of the exercise of management rights, I arrive at the same conclusion. The grievances fail.

[67] The repayment, through either an equivalent monetary value or the actual VL credits of all the grievors, is necessary to enforce the terms of the collective agreements agreed to by the parties.

[68] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[69] The grievances are dismissed.

August 4, 2020.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board