File: 166-2-28191

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

HAROLD WARREN MARTIN

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Marguerite-Marie Galipeau, Deputy Chairperson

For the Grievor: Peter Barnacle, Counsel, Canadian Air Traffic Control Association

For the Employer: Harvey Newman, Counsel

Heard at Ottawa, Ontario,
April 6 and 7 and September 15, 1998.

This decision follows the hearing of a grievance referred to adjudication by Harold Warren Martin, air traffic controller (AI-06), employed as an operational requirements officer, at NAV Canada ("NAVCAN") since 1996.

The grievor filed the present grievance while still employed at Transport Canada. In his grievance, he requests "that the appropriate action be taken to pay the missing severance pay for the 9 years (approximately) of military time that were not paid on leaving the military to transfer to Transport Canada".

The severance pay provision of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Code: 402/91) (Exhibit B-2) reads as follows:

ARTICLE 18

SEVERANCE PAY

18.01 Under the following circumstances and subject to clause 18.02, an employee shall receive severance benefits calculated on the basis of his or her weekly rate of pay:

..

(a) Lay-Off

(i) On the first lay-off after March 21, 1979, two (2) weeks' pay for the first complete year of continuous employment and one (1) week's pay for each additional complete year of continuous employment with a maximum benefit of thirty (30) weeks' pay.

(ii) On second or subsequent lay-off after March 21, 1979, one (1) week's pay for each complete year of continuous employment with a maximum benefit of twenty-nine (29) week's pay, less any period in respect of which he or she was granted severance pay under 18.01(a)(i) above.

**

(b) Retirement (Effective January 1, 1991)

On retirement, when an employee is entitled to an immediate annuity or entitled to an immediate annual allowance under the Public Service Superannuation Act, one (1) week's pay for each complete year of continuous employment with a maximum benefit of thirty (30) weeks' pay.

**

(c) Death

If an employee dies, there shall be paid to his or her estate, one (1) week's pay for each complete year of continuous employment to a maximum of thirty (30) weeks' pay, regardless of any other benefit payable.

**

(d) Release for Incapacity

An employee released from employment under Section 31 of the Public Service Employment Act for incapacity shall on termination of his or her employment be entitled to severance pay on the basis of one (1) week's pay for each complete year of continuous employment with a maximum benefit of twenty-eight (28) weeks' pay.

**

18.02 Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit by the Public Service, a Federal Crown Corporation, the Canadian Forces, or the Royal Canadian Mounted Police. Under no circumstances shall the maximum severance pay provided under 18.01 be pyramided.

18.03 The weekly rate of pay referred to in the above clauses shall be the weekly rate of pay to which the employee is entitled for the classification prescribed in his or her certificate of appointment on the date of the termination of his or her employment.

Evidence

The grievor's evidence can be summarized as follows.

The grievor joined the military (Department of National Defence (DND)) in 1971. In 1989, he moved from Cornwall to DND Headquarters in Ottawa. He participated in 1989 in a competition for a position (AI-NOP-05) at Transport Canada and he received, on January 16, 1990, an offer of employment at Transport Canada. In 1989, he was two years away from receiving a pension from the military.

Before accepting the offer, the grievor considered the fact that he would "lose" 50 percent of his severance pay if he left without attaining 20 years in the military and thus becoming eligible for full pension.

In the military, at the time, the rules were that if one left the military prior to completing nine years of service, one received no severance pay. If one left after having completed nine years of service but before completing 20 years of service, one received 50 percent of severance pay. (Thus, if one left after 19 years of service, one received 19 weeks' pay divided in half.) If one left after having completed 20 years or more, one received full severance pay, that is, 20 weeks of pay if one had been in the service for 20 years. The grievor was approaching his 19th year of service.

The grievor spoke to his future supervisor, Don Maclean, Superintendent of Flight Data Processing, at Transport Canada. The grievor also spoke to the personnel advisor, Ginette Leroux, at Transport Canada, who had offered him (Exhibit B-3) the appointment to the position with the Air Traffic Services at Transport Canada.

After having discussed the issue with Mr. Maclean and Ms. Leroux, the grievor decided to take the "penalty" of approximately $10,000 of severance pay by leaving the military before the 20-year point because both Mr. Maclean and Ms. Leroux assured him that he would not lose the $10,000 (approximately) and would get it upon his leaving Transport Canada. Ms. Leroux told the grievor that at the end of his career, Transport Canada would give him full severance pay and that if his career ("continuous employment") spanned 30 years, he would receive 30 weeks' pay minus the number of weeks for which he had been paid at DND.

The grievor spoke to Céline Tougas, the pay clerk under the supervision of Lina Canonico, Supervisor, Pay and Benefits, APRAB, to whom he was referred by Ms. Leroux. She also confirmed that the severance pay amount to which he would be entitled would be calculated by subtracting the number of weeks he had been paid by DND.

Having received these assurances, the grievor phoned Ms. Leroux and accepted the position at Transport Canada. He was employed at Transport Canada from May 1990 to November 1996 when he became employed at NAVCAN.

The grievor testified that, if he had been told that he would not receive, as part of his severance pay from Transport Canada, the severance pay which he did not receive by leaving DND earlier than the 20-year mark, he would have done "some serious thinking about taking the job at Transport and it is possible that he would have stayed at DND". The grievor also testified that the Transport Canada position appealed to him because it offered the advantage of a permanent home.

In May and June 1991 (Exhibits B-4 and B-5), the grievor became aware that his understanding of the severance pay to which he would be entitled upon leaving Transport Canada was not the same as the Department's.

On or about May 29, 1991, the grievor phoned Céline Tougas upon receiving a memorandum (Exhibit B-4) from her and seeing that it did not deal with severance pay:

> *This is to advise you that Superannuation Division have confirmed that your RCAF pension funds have been transferred. For your information attached is form DSS 2097, Elective Service Notice. It should be noted that your service with the RCAF does not count for leave purposes.*
>
> *Trusting the above is satisfactory.*

Céline Tougas' interpretation of his severance pay entitlement was different from what she had told him before he joined Transport Canada. She told him his entitlement would be calculated just as if he had "come in off of the sidewalk".

However, on July 26, 1991, Lina Canonico, Supervisor, Pay and Benefits (Aviation Group), informed (Exhibit B-6) Harold Martin that his "continuous service" would be calculated as starting on November 3, 1971. In her memorandum, she did not deal directly with the severance pay issue. Harold Martin phoned Lina Canonico and discussed this subject with her. He made a note (Exhibit B-6) of what Ms. Canonico told him, as follows:

> *Ms. Canonico confirmed by phone that severance pay at end of career will be total severance pay for total years of service minus the number of weeks paid by the military on termination of military service.*

This conversation with Ms. Canonico confirmed the grievor's understanding of the matter and he "laid the matter to rest and never thought of it for two or three years".

When the time came to consider becoming employed at NAVCAN, employees obtained pension "read-outs". The grievor thought his pension "read-out" was incorrect. He phoned Mona Roy, APBA, discussed the matter with her and subsequently received a memorandum (Exhibit B-8) dated June 6, 1996 in which she wrote:

> *This is to confirm that your severance pay will be calculated for total service since 03 Nov. 1971 minus, if any, paid by DND. I have faxed a request for confirmation from DND.*
>
> ...

Later, Mona Roy phoned the grievor to tell him that after having spoken to her supervisor, she had to inform him that she had made a mistake. The grievor then spoke to Mona Roy's supervisor, Lucie Cheff, on October 15, 1996. Lucie Cheff, APRBC, Compensation Operations, responded (Exhibit B-10) with the following:

> *This is in response to your memorandum concerning the above mentioned issues.*
>
> *Concerning the government service, while employed with the CAF, you should keep in mind that you were hired under the National Defense Act and were a contributor to the Canadian Forces Superannuation Act.*
>
> *When you commenced employment in the Public Service you were hired under the Public Service Employment Act and had to elect to transfer and/or surrender your CAF service to the Public Service Superannuation Plan (PSSA). Since you elected to contribute for your CAF service under the PSSA this service is considered continuous employment for the calculation of severance pay. However, this period of service will still be listed in the election part of the pension estimate.*
>
> *In regards to the severance pay entitlement, as stated above, it has been determined that your period of service with DND counts as continuous employment. The Treasury Board Manual, Pay Administration, Volume 15, Article 3.4.1 stipulates that "**the severance pay entitlement is arrived at by determining the number of completed years of continuous employment to the maximum authorized, less any period of service in respect of which a severance***

> ***benefit has previously been paid".*** *Therefore, only the period of service for which severance pay was paid is considered when calculating the severance pay entitlement regardless of the amount of weeks previously received as a benefit.*
>
> *I regret not being able to give you a more favorable answer. Should you still have concerns regarding this issue, you may want to contact your Union as we have no authority to change a regulations* (sic) *or a collective agreement.*

Upon receiving this memorandum, the grievor became angry and decided to grieve. The grievor had anticipated that he would receive as severance pay 16 weeks of severance pay, that is 25 weeks' pay minus the nine weeks' pay he had received upon leaving DND. More precisely, 17 weeks' pay since one received two weeks' pay for the first year (clause 18.01 of the collective agreement) of one's continuous employment. However, he only received six weeks' pay.

The grievor underlined that if he had left the military before the end of nine years, he would not have received severance pay and that if he had left the military after 20 years of service, he would have received 20 weeks of severance pay but that because he had left after 19 years of service, he had been penalized.

Under cross-examination, the grievor agreed that he received a higher salary (from $54,000 at DND to $63,000 at Transport Canada) by going to Transport Canada. He added that he could have stayed another 11 years in the military (mandatory retirement being at age 55). He explained that his decision to accept the Transport Canada position was a lifestyle choice allowing for better opportunities for his son.

The grievor emphasized that he was 11 months short of 20 years' service when he left the military to go to Transport Canada. He stated that he could not say what he would have decided had he been told what his severance pay would be upon leaving Transport Canada because having received assurances, at the time, he did not have to make a choice between staying in the military, at the very least up to the 20-year mark and receiving the full severance pay, or moving to Transport Canada in his 19th year in the military.

His own recollection is that he spoke with Céline Tougas (Transport Canada, Pay and Benefits Clerk) prior to leaving Transport Canada and afterwards. He also spoke to a Bettie Murdoch in August 1990 and she told him that he would not lose the benefit of a grand-fathering clause or his vested rights.

The evidence of the grievor's second witness can be summarized as follows.

Serge Paquin is an air traffic control instructor (AI-05) at the training institute in Cornwall, Ontario. He has been there since November 1, 1996. He started his employment at Transport Canada on May 22, 1990. Prior to this date, he was an air traffic control instructor at the military school of DND. He started at DND on August 24, 1974.

His military termination date was October 3, 1990. As severance pay he got half of 16 weeks' pay, that is, eight weeks' pay (Exhibit E-1). At Transport Canada, his military time was deemed part of his "continuous employment".

His CATCA representative, Larry Varin, told him that he had continuous service and that his severance pay upon leaving Transport Canada would be the pay for his total years of service minus the severance pay he had received from DND. Mr. Varin wrote to a Ms. Pugh, a financial advisor at Transport Canada, about the matter (Exhibit B-12). At a meeting between Ms. Pugh and the witness in late September 1990, Ms. Pugh confirmed Mr. Varin's understanding of the witness' entitlement. She told Mr. Paquin to keep his stub of the amount of pay he had received from DND because he would need it to claim his severance pay at retirement (Exhibit E-1).

At a second meeting, Ms. Pugh said that Mr. Paquin's severance pay would be calculated by adding his "military time to his Transport time less the amount paid by DND".

The issue of severance pay arose once more at the time of Mr. Paquin's transfer to NAVCAN. The calculations of Mr. Paquin's severance pay from Transport Canada did not include the 16 years which he had spent with DND.

The evidence of the grievor's third witness can be summarized as follows.

Lorne MacAulay has been employed at NAVCAN since November 1, 1996 as a research analyst and operational specialist in the Air Traffic Services Simulation Centre (AI-ONOPS-6). Prior to 1996, he held the same position in Moncton, N.B., at Transport Canada and prior to this, he spent 12 years in the military. He left the military in August 1972. Upon joining Transport Canada, he transferred his service time for pension purposes. He received 42 days of severance pay (Exhibit B-13), that is, half of full severance pay, which would have been 84 days if he had been in the military 20 years or more.

Prior to transferring to NAVCAN, the witness received from Transport Canada an outline (Exhibit B-14) of his entitlements in matters of pension benefits, death benefits and severance pay. His severance pay entitlement was indicated as being 24 weeks (thus including his military time in the calculation) at the rate of his weekly rate of pay.

However, in October 1996, he only received 17.72 weeks of severance pay (Exhibit B-15). He was told that his military time did not count. Mr. MacAulay phoned Mona Roy who told him that the calculation was wrong in that his severance pay should only have been reduced by six weeks (i.e. to reflect the severance pay he had received in the military) instead of 12 weeks (his military service was 12 years and 102 days). In the end, Lorne MacAulay was paid the maximum severance pay which he could receive, that is, 30 weeks (since his total service was 36 years, that is, from 1960 to 1996) minus 12 weeks and one-third's pay, that being the period he spent in the military, with the result that he was paid 17.72 weeks of severance pay. Lorne MacAulay is of the view that only six weeks' pay should have been deducted from the 30 weeks maximum to which he was entitled. Lorne MacAulay also filed a grievance.

The testimony of the grievor's fourth witness can be summarized as follows.

Gordon Sorochan retired from Transport Canada on July 30, 1995. At the time of his retirement, he was air traffic control supervisor at the Calgary Terminal Control Unit (TCU). He had 23 years' service with Transport Canada. Prior to his employment at Transport Canada, he spent 16 1/2 years in the Canadian Armed Forces. He joined Transport Canada in November 1972. Upon leaving the military, he received eight

weeks' pay (or 56 days' pay) as severance pay, that is, half of full severance pay which would have been 112 days, that is 16 years multiplied by seven days.

Upon receiving a memorandum (Exhibit B-18) dated August 14, 1975 from A. Chapman, the regional personnel services officer, the grievor contacted Ken Charman, the Moncton Centre Unit Manager, to discuss this memorandum which to him was not clear. Ken Charman told him, "when you leave the Public Service you will get your full gratuity as described here". He assured Gordon Sorochan that he had received one-half of his entitlement. Gordon Sorochan did not confirm this conversation in writing. Gordon Sorochan concluded that since he was receiving eight weeks' pay as severance pay, he was entitled to another eight weeks' pay when he would leave the Public Service.

In 1992, Gordon Sorochan was contemplating retiring. He asked for an estimate of his benefits. He obtained one (Exhibit B-19) which, in his view, contained a mistake (Exhibit B-19, page 4). His severance pay was estimated at being 13 weeks' pay and thus did not include the eight weeks for which he had not been paid in the military.

Gordon Sorochan phoned the pay and benefits Edmonton spokesperson, Effie Yau (CR-05). Their conversation confirmed that it was a mistake. He concluded from this conversation that upon retiring, he would receive another eight weeks' pay as severance pay.

Before retiring in July 1995, he received another estimate (Exhibit B-20). The estimate showed that he would receive 22 weeks' pay as severance pay. The calculation confirmed the conversation he had had with Effie Yau as well as his own understanding of his entitlement.

However, subsequent to his leaving, he received approximately 13 weeks' pay, $19,019.82 (Exhibit B-21) instead of the expected $31,018.25 as per the last estimate (Exhibit B-20) which had indicated his entitlement as being 22 weeks' pay. Again he phoned Effie Yau. She informed him that since their last conversation, she had learned that because he had been paid eight weeks' pay as severance pay for his time in the military, it constituted the 16 years' gratuity to which he was entitled for the time spent in the military. Shortly after, he received a call from Benoit Chartrand,

regional labour relations advisor, who told him that he had received full severance pay for his time in the military. Gordon Sorochan decided to grieve.

Under cross-examination, Gordon Sorochan stated that he accepted the eight weeks' pay on the basis of assurances he received before joining the Public Service. He feels that he was shortchanged because he could have opted for 16 weeks and carried them over to the Public Service. He came out of the conversation with Ken Charman believing that upon leaving the Public Service, he would receive the other eight weeks' pay.

In the end, Gordon Sorochan chose not to grieve because he thought he was outside of the time frame to do so and, as well, for medical reasons. However, he will never forget the conversation with Benoit Chartrand whom, he feels, tried to intimidate him into not filing a grievance.

The testimony of the employer's first witness can be summarized as follows.

Since July 1997, Benoit Chartrand has been coordinator: negotiations and special project, and between 1993 to 1997, was regional labour relations advisor with Transport Canada in Edmonton, Alberta.

He does not recall phoning Gordon Sorochan nor ever having had a conversation with him. Benoit Chartrand is not an expert in compensation and benefits. His understanding of severance pay entitlements of employees who leave the military to join the Public Service is that their military time counts toward "continuous service" and that the severance pay they receive upon leaving the military is deducted from the severance pay they receive upon leaving Transport Canada.

The employer's second and last witness was Madeline Grierson. Her testimony can be summarized as follows.

Madeline Grierson is Chief of Compensation Operations at the Department of Transport. She manages the national capital region pay and benefits office and also "plays a national role" in issues of compensation. Her duties are to supervise the compensation staff and to ensure that this staff is aware of compensation rules, terms and conditions of employment and relevant acts and regulations. Between 1990 and

1995, she dealt with compensation issues related to the transfer of operations to NAVCAN.

Betty Murdoch was one of her employees as well as Mona Roy. Betty Murdoch was a compensation specialist. She retired one year ago and was rehired under a six-month contract. Both in April and August of this year (1998) she worked for the Department. She left in August 1998 and Madeline Grierson believes she is now in Saskatchewan or in Vancouver. Mona Roy was a pay and benefits specialist during the 1980's and early 1990's.

Madeline Grierson's understanding of severance pay entitlements is uncertain. She testified that she does not work on this subject every day, and that she would have to look up the pay administration manual before giving definite answers.

This completes the evidence of the employer. Both counsel agreed to stipulate that it was Betty Murdoch (Exhibit B-5) to whom Harold Martin spoke and not Céline Tougas.

Arguments

The argument of counsel for the grievor can be summarized as follows.

The method used to calculate the grievor's severance pay at the time of his lay-off from Transport Canada, at the end of October 1996, was improper and inconsistent with the collective agreement, the relevant directives and past practices as well as the interpretation given to the grievor.

The language of clause 18.02 supports Harold Martin's claim that the severance pay to which he was entitled upon leaving Transport Canada was the severance pay based on the years of his "continuous employment" resulting from the addition of years spent in the military as well as at Transport Canada minus the severance pay he received upon leaving the military.

The language used in clause 18.02 contains a patent or a latent ambiguity. As well, there was an ambiguity in the employer's own interpretation of clause 18.02.

In the alternative, there were specific representations made to the grievor that his own understanding of his entitlements would be the interpretation. These representations were made before he joined Transport Canada. The grievor relied on them and the employer is estopped from altering his position on the matter. Therefore, the grievor should be paid the nine or nine and one-half weeks of severance pay which he was not paid.

The grievor's testimony is uncontradicted. Both before and after joining Transport Canada, he received responses from the employer's representatives confirming his interpretation of his entitlements.

The interpretation is based on common sense. Otherwise, someone leaving the military with nine years' service to join Transport Canada would be in a better position than someone leaving the military with 10 years' service and then joining Transport Canada.

The real concern under clause 18.02 is to ensure that a person not exceed a maximum of 30 years' continuous employment and that he not pyramid severance pay.

It would not make sense to say that the intent of clause 18.02 is to not recognize the service of someone who has had 11 years in the military and has only been paid five and one-half weeks of severance pay upon leaving the military but to give full credit for severance pay purposes for all his service time to someone who has been in the military for nine years. This cannot be the purpose of clause 18.02. One should also note the incongruity that time be deducted from pay under clause 18.02.

All three employees, Messrs. Martin, Paquin and Sorochan, had the same understanding of the severance pay they would receive upon their departure from Transport Canada.

The purpose of clause 18.02 is not to shortchange employees who have spent between 10 to 20 years in the military. Had Harold Martin known that the employer would not pay him the severance pay in accordance with the representations made to him, he could have decided to stay in the military until he reached the 20-year mark and then go work for Transport Canada.

In addition to receiving verbal assurances, before leaving the military, Harold Martin raised the issue in 1991 (Exhibit B-5); he received assurances from Lina Canonico (Exhibit B-6); he received the same interpretation from Mona Roy in 1996 (Exhibit B-8), and even the compensation directive (Exhibit B-9) confirms this interpretation in the sample letters it contains (Exhibit B-9, "Severance Pay", page 3). The grievor's interpretation, which was confirmed by the employer's assurances, is consistent with a purposeful interpretation of clause 18.02 and treats in the same manner people who before joining Transport Canada have spent nine years or between 10 and 20 years or 20 years and above in the military.

It should be noted that there is one individual (Mona Roy) who within three months (Exhibits B-8 and B-16) changed positions.

The consistency of the testimony of the grievor's four witnesses should be noted as well as the failure of the employer to challenge their evidence.

The grievor's entitlement to severance pay arose in 1996 when he left Transport Canada. Clause 18.02 is based on two concepts: claw back to prevent double payment of severance pay and the prohibition against pyramiding severance pay and thus exceeding the 30 weeks maximum entitlement to severance pay.

The grievor's interpretation does not affect these two purposes. The following cases were quoted: *Canadian Air Traffic Control Association and Treasury Board* (Board file 161-2-302); *Le Noury and Reid* (Board files 166-2-22228 and 166-2-22243); *Deniger and Miller* (Board files 166-2-21583 and 21584); *Ennis* (Board file 166-2-13608); and *Knapman* (Board file 166-2-16247).

The argument of counsel for the employer can be summarized as follows.

The only issue is the interpretation of the collective agreement and more particularly Article 18. The grievor was deemed to have been laid-off under the legislation creating NAVCAN. The grievor had the burden of proof. The burden has not been discharged either on the basis of the collective agreement or of the equitable doctrine of estoppel.

The grievor worked approximately 19 years in the military before working at Transport Canada. He had "continuous employment". Under clause 18.01, he was entitled to a maximum of 30 weeks pay upon leaving Transport Canada.

Upon leaving the Canadian Forces, he received a termination benefit. What he received is immaterial. The collective agreement does not concern itself with any particular amount. The period for which he was granted severance pay was the whole period which he spent in the Canadian Armed Forces. Therefore, on the plain words of the collective agreement, the department was required to deduct that period of time from his continuous employment for the purpose of calculating his severance pay upon lay-off. It is the "period" which reduces the severance benefits.

Severance pay is based on continuous employment. The severance pay has to be reduced by any period in respect of which one has received payment. An employee is eligible to severance pay only for that period for which he has not received any kind of benefit.

If the grievor had not received any severance pay upon leaving the military, he would be entitled to the inclusion of all the years of continuous employment in the calculation of his severance pay. The grievor received his severance pay based on his full period of military service, approximately 19 years. The *Goodine* case (Board file 166-2-15874) supports the proposition that the "period" of military service has to be deducted in the present case in order to calculate the severance pay.

As for the application of the doctrine of estoppel, one should consider that the grievor did not make an unequivocal statement that he would have turned down the Transport Canada job had he known that his severance pay would be lower than expected. In addition, the evidence is not clear that a promise was made to the grievor that if he accepted a job at Transport Canada, he would get the severance pay which he expected upon leaving Transport Canada. There is no documentary evidence except a cryptic note (Exhibit B-6) by the grievor himself in 1991. The grievor did not produce Ms. Canonico. The conversation with Ms. Tougas did not take place. Rather, it took place with Ms. Betty Murdoch who did not testify. At best, the grievor had a misunderstanding of what his benefits would be. There is no credible evidence of a promise made to him intended to affect the legal relations between the parties. We are

dealing with ghosts, the mist of the past. The witnesses produced by the grievor did not add anything: Serge Paquin received a certain interpretation through his union representative (Exhibit B-12) and not from the employer's representative, Maryse Bélanger, and the final word from the Department (Exhibit B-12) was a quotation from the collective agreement. Lorne MacAulay was not told anything that would be in the nature of an unequivocal representation. The value of Gordon Sorochan's evidence is uncertain and he did not produce any written confirmation of his allegations.

In deciding this matter, one should assume that the grievor would have accepted the Transport Canada position whatever the interpretation of his severance pay entitlements. The job came up at a propitious time and place. It offered several advantages, one of which was a substantial increase in pay. Even if the grievor had stayed one more year in the military in order to attain the 20-year mark before joining Transport Canada, he would still have been behind financially if one considers that he received this substantial increase in pay.

The grievor was not induced to take the job; no promise was made to him; he took the job regardless of the severance pay; he suffered no detriment because he was not entitled to more money from the military at the time since he would have had to stay another year to attain 20 years of service in the military and thus receive 20 weeks' pay as severance pay. It should be assumed that he would not have turned down the job if someone had told him the time spent in the military would be deducted from his severance pay. In short, the collective agreement has been applied correctly; there is no basis for promissory estoppel and the grievance should be dismissed. The following cases and authors were quoted: *Goodine* ((supra) and Federal Court of Appeal file A-741-86); *Hicks* (Board file 166-2-27345); *Molbak* (Board file 166-2-26472); *Wilson* (Board files 166-2-27330 and 149-2-165); *Long v. Canada (Treasury Board)* [1990] 1 F.C. 3; *The Queen v. Canadian Air Traffic Control Association* [1984] 1 F.C. 1081; *Hicks* (Board file 166-2-27345) and *Canadian Labour Arbitration* by Donald J.M. Brown, Q.C. and David M. Beatty.

In reply, counsel for the grievor added the following.

Although the burden of proof rested with the grievor, it shifted to the employer during the grievor's evidence. The employer did not call any evidence to contradict the grievor's specific claims. In assessing the grievor's evidence, it should be remembered that the grievor has produced evidence of similar statements as those of Ms Roy, Ms. Canonico and Ms. Murdoch, made to other employees in other regions.

The burden of proof is the balance of probability. Although events go back in time, it is clear that the testimony of the grievor's witnesses is consistent with the documentary evidence.

A manifest unfairness was done to the grievor. Betty Murdoch could have been subpoenaed by the employer. The employer had full disclosure of the grievor's particulars. The employer's representatives should have made notes of the advice they gave.

In Gordon Sorochan's case, there can be no dispute as to Effie Yau's statements.

In the grievor's case, the supervisor of Betty Murdoch did not know what had been Ms. Murdoch's advice to the grievor.

In applying the doctrine of estoppel, one should remember that a "promise" is another word for "representation", that this representation can be by word or conduct and that one does not need to find evidence that the words "I promise" were pronounced in order to conclude that representations were made. It is sufficient that the intent was that the person rely on the conduct or the words used.

In the instant case, one should ask: what would a reasonable person have taken from the employer's representations?

Reasons for Decision

This grievance is granted for the reasons that follow.

I am satisfied that the grievor has met the burden of establishing his right to the severance pay which he claims.

There is no dispute that the years spent by the grievor in the military are included in "continuous employment". Therefore, upon leaving Transport Canada and in conformity with paragraph 18.01(a) the grievor was entitled to "two (2) weeks' pay for the first complete year of continuous employment and one (1) week's pay for each additional complete year of continuous employment with a maximum benefit of thirty (30) weeks' pay".

The grievor was entitled to this severance pay "subject to clause 18.02" as one can read from clause 18.01.

In interpreting and applying clause 18.02, one has to be mindful of its purpose. I agree with counsel for the grievor that the purpose of clause 18.02 is to prevent double payment of severance pay and pyramiding. I am mindful of this purpose in interpreting clause 18.02. I note that the interpretation proposed by counsel for the grievor does not offend this purpose and in fact is in keeping with this purpose.

A literal reading of clause 18.02 suggests that "severance benefits... be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit by ... the Canadian Forces, ...".

Although each word of clause 18.02 is not in and of itself ambiguous, a literal application of these words is unfeasible, both at the conceptual level and at the practical level. How does one subtract time, i.e. "a period of continuous employment", from money, i.e. "severance benefits"? The wording of this sentence contains an inherent illogicality and an absurdity which requires the reader to seek the intent of the parties. As well, it contains a latent ambiguity which becomes apparent when one attempts to apply it.

Firstly, the intent of the parties is that employees receive "one (1) week's pay for each complete year of continuous employment" as well as "two (2) week's pay for the first year of continuous employment". This intent emerges from paragraph 18.01(a) and this intent must be respected in interpreting and applying the language of clause 18.02 which, as I have said, contains a premise not founded on logic.

The intent of the parties (one week's pay per year of continuous employment) and the purpose of clause 18.02 (to prevent double payment of severance pay and pyramiding) can both be respected by applying an interpretation of clause 18.02 which is founded on a logical premise, that is, that pay is deducted from pay and cannot be deducted from time. Therefore, the grievor's severance pay should have been calculated by reducing the amount of severance pay owed to him and calculated on the basis of his continuous employment by the amount of severance pay which he received upon leaving the military. This result is in keeping both with the intent of the parties and the purpose of clause 18.02.

The interpretation proposed by the employer would create classes of employees: employees of 19 years' service who did not take any severance pay upon leaving the military and joining Transport Canada would receive one week's pay for each year of continuous employment including the 19 years spent in the military but employees such as the grievor with the same number of years in the military would not be credited the same number of years as continuous employment for the reason that they have already accepted severance pay for a number of those years. The interpretation proposed by the employer would also entitle employees who have spent nine years and less in the military to more severance pay upon leaving Transport Canada than employees who have spent between 10 and less than 20 years in the military if these employees accept some severance pay upon leaving the military. I do not believe that this was the intention of the parties.

It is true that if the grievor had simply left the military without joining Transport Canada, he would only have been entitled to the severance pay which he received and which was calculated on the basis of his having been in the military between 10 and less than 20 years. This was the military scheme on severance pay. However, by going to work for Transport Canada, the severance pay scheme devised in the collective agreement was fully applicable to the grievor and his severance pay should have been calculated on the basis that he was entitled to one week's pay for each year of continuous employment minus the severance pay he had already received from the military.

Having said this, and should I be wrong in my interpretation of clause 18.02, then, in the alternative, I believe that I can rely on the evidence produced by the grievor to conclude that, before leaving the military, the grievor was given assurances upon which he relied to his detriment that he would receive another nine weeks' pay in severance pay upon leaving Transport Canada. The detriment which he has suffered is that, by relying on the employer's assurances, he was precluded from assessing the choices that were open to him had he been told from the outset that he would not be entitled to the other nine weeks' pay and in addition he was denied nine weeks' severance pay upon leaving Transport Canada. I can also conclude from the evidence that eventually even the employer's representatives disagreed amongst themselves on the interpretation of clause 18.02.

Having heard the grievor and assessed the coherence of his testimony, I have concluded that he is a credible person and that his testimony is truthful. I accept his evidence even if it is not corroborated by the persons who gave him the assurances (Maclean, Leroux, Murdoch and Canonico and initially Mona Roy) both before and after joining Transport Canada. If I do so, it is because: (1) the grievor is credible, (2) the assurances which he was given are consistent with assurances given to some of his colleagues in other regions, and (3) the employer did not produce the persons who could have contradicted his testimony, that is, Maclean, Leroux, Murdoch and Canonico. Furthermore, the employer's own compensation directive (Exhibit B-9) contains a sample of a letter to be sent to employees which, at the last paragraph, is consistent with the representations which the grievor claims to have received. It reads:

> *SEVERANCE PAY*
>
> *According to Article _____ of the _____ collective agreement, severance pay is based on years of "continuous employment". In order for your former (CF; RCMP) service to count as "continuous employment" you must:*
>
> - *be performing duties of a continuing nature (ie: not as a casual employee);*
> - *have no break in employment of more than three months from the date of honourable release from the (CF; RCMP) and the date of appointment to the Public Service; and*
> - *make, or have made, a valid election to contribute for the (CF; RCMP) service under the Public Service Superannuation Act.*

> *An election to contribute for the (CF; RCMP) service under the PSSA, in this context, means that the entire period of service with the (CF; RCMP) must be elected. An employee who elects for only a portion of his/her former (CF; RCMP) service cannot count this service for severance pay purposes.*
>
> *The _____ collective agreement also provides for a reduction to the severance payment by any period of continuous employment in respect of which the employee was already granted any type of termination benefit (ie: severance pay, cash gratuity, retiring leave, rehabilitation leave, etc.). An employee who elects for a portion of his/her former (CF: RCMP) service cannot count this service for severance pay purposes and is therefore not affected by this reduction.*
>
> *Should you decide to elect for all of your former service with the (CF; RCMP), your continuous employment date for severance pay purposes will be . Your severance pay entitlement will, however, be reduced by any termination benefit your may have received upon leaving the (CF; RCMP).*
>
> [emphasis added]

In short, having given these assurances to the grievor, I believe the employer is now precluded from altering its position and withholding the nine weeks of severance pay.

Finally, I wish to add that the *Goodine* case (supra) is not helpful in deciding this matter since in that case both the adjudicator and the judges of the Federal Court considered whether "rehabilitation leave" constituted "severance pay" and they did not address a different question, that is the quantum of the entitlement and the method by which it is calculated.

In summary, I am of the view that the right to severance pay arises at the time of departure from Transport Canada, that the amount of severance pay is arrived at by multiplying one week's pay for each year of "continuous employment" (up to a maximum of 30 weeks' pay, which includes two weeks' pay for the first year of continuous employment) and that the resulting amount of pay is reduced by the severance pay received by the grievor upon his departure from the Canadian Forces.

For these reasons, the grievance is allowed and the employer is ordered to remit to the grievor the amount of pay he would have received if his severance pay had been calculated on the aforementioned basis.

Marguerite-Marie Galipeau,
Deputy Chairperson

OTTAWA, October 29, 1998