Federal Court  Cour fédérale

Date: 20160517

Docket: T-499-15

Citation: 2016 FC 553

Ottawa, Ontario, May 17, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

LES PLUMADORE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. OVERVIEW

[1] This is an application for judicial review brought under section 18.1 of the *Federal Courts Act* against the decision on March 30, 2015 of Susan Harrison, Director General of Workplace Management, (DGWM) in her capacity as the decision-maker at the third and final level of the grievance process under the *Public Service Labour Relations Act* (PSLRA). Ms. Harrison dismissed the Applicant's grievance against the actions of the Department of National Defence (DND) to collect $145,447.88 of overtime payments made to him between June 2010

and October 2013 because they categorize the payments as salary overpayments rather than overtime.

[2] In this 41-month period, the Applicant worked a total of 1785.5 hours overtime, at the request of his supervisor, for which he was paid in full up to August 27, 2013. He was not paid overtime for the period between August 27 and October 30, 2013 because, on November 4, 2013, he was informed by DND (Capt. Page) that he was not entitled to overtime. His position had been reclassified in April 2010 as being excluded from the bargaining unit. DND demanded the Applicant repay the overtime. That "request" was the subject matter of the grievance and, once the grievance was denied, it resulted in this review application.

[3] There is no dispute that the Applicant was asked by his superiors to work overtime, did work the hours, filled out and submitted the correct forms after they were approved by his superiors, then received payment for the hours worked. The Respondent says the Applicant was never entitled to the overtime and it must be repaid.

[4] The Applicant says he was not told until November 4, 2013 that his position had been reclassified. Until then, he had no reason to believe it had been as he had previously twice made specific inquiries as to whether his position was properly classified. On both occasions he received assurances that it was properly classified.

[5] The DGWM found the "Treasury Board Directive on Terms and Conditions of Employment for Certain Excluded/Unrepresented Employees" is clear that the Applicant was not entitled to overtime pay. She also stated that subsection 155(3) of the *Financial Administration Act* (FAA) allows the employer to recover any overpayment and section 32 of the *Crown*

Liability and Proceedings Act (CLPA) establishes a prescription period of six years for recoveries. Her conclusion was that "the Department of National Defence is acting within the scope of the FAA and CLPA by proceeding with the recovery of the monies owed by you".

[6] The Applicant raises a number of issues based in contract including change of circumstances, estoppel and that the limitation period is not six years but rather it is either two years (Ontario) or three years (Quebec).

[7] The Respondent says the decision is reasonable and the limitation period is six years.

[8] The Applicant seeks to quash the decision of the DGWM and asks this Court to remit his grievance to DND to be allowed in accordance with the reasons of this Court.

II. **BACKGROUND FACTS**

[9] The Applicant had worked in the federal public service since 1996. He was an employee of DND when he accepted the position of Section Head Comptroller Business Management Services on December 18, 2007. The position was a deployment, a lateral appointment. His commencement date in the new position was January 7, 2008.

[10] The position had been reclassified on November 1, 2006 to the FI-04 level because certain duties, including "management of services in the areas of human resources management and administration" were no longer performed by the position as a result of an update to the work description. The HR Corporate Advisor, DCCO reviewed and signed off on the reclassification on November 14, 2007. One month later the position was offered to the Applicant who accepted it that same day.

[11] Following his appointment to the position, the Applicant in February 2009 and June 23, 2009 raised with his HR department and his supervisor respectively the question of whether the position was properly classified or ought to be excluded. He was assured it was not excluded.

[12] On April 15, 2010, the Public Service Labour Relations Board (PSLRB), on application by the Treasury Board, initiated by DND, declared that the Applicant's position was managerial or confidential. The application was unopposed by the bargaining unit.

[13] On April 23, 2010, the Director of Labour Relations (DLRO) advised the Applicant's HR Service Centre that his position had been approved for exclusion and that union dues deductions were to stop effective June 1, 2010. They were told to advise the Applicant by letter that he was eligible for certain employment coverage that he was now subject to the TBS Directive on Excluded Employees, and was to be provided with the Policy Governing Employees in Managerial or Confidential Positions.

[14] The Respondent says the Applicant should have known of the change for various reasons including his expertise in the grievance process, the fact that he stopped paying union dues, and that he became entitled to performance pay. The Applicant states he had no reason to believe he could not receive both overtime and performance pay. He adds that in the course of these proceedings he has discovered that others, in the LA class, have received both performance pay and overtime.

III. **ISSUES**

[15] The Applicant proposes four issues to be considered:

i. What is the appropriate standard of review?

ii. Was the Applicant entitled to receive overtime pay until he was informed of the change to the terms and conditions of his employment on November 4, 2013?

iii. Is DND estopped from collecting the alleged overpayment amount from the Applicant?

iv. Is DND prevented from collecting the alleged overpayment by virtue of a limitation period?

[16] The Respondent submits there are only two issues:

i. Is the decision reasonable?

ii. Is the decision's determination of the six-year limitation applying to Crown debts correct?

[17] Between them I find both parties have identified the relevant issues. I will first look at standard of review and then consider whether the decision is reasonable in terms of the jurisprudence determining what makes a decision reasonable. I will examine the Applicant's entitlement to overtime and whether promissory estoppel is available as a defence followed by whether the decision that the limitation period is six years is correct.

IV. **STANDARD OF REVIEW**

[18] The parties agree that the standard of review for determining the applicable limitation period in this matter is correctness. They disagree as to the standard of review for the other issues with the Applicant favouring correctness for all issues and the Respondent saying they are subject to reasonableness review.

[19] The Applicant relies on *Assh v Canada (Attorney General)*, 2006 FCA 358 [*Assh*] and *Appleby-Ostroff v Canada (Attorney General)*, 2011 FCA 84 [*Appleby-Ostroff*] to say that the lack of independence of the DGWM points to a standard of review of correctness on questions of law outside the expertise of the DGWM. The Applicant also argues that the facts are not disputed, there is no issue of credibility, and the materials before the decision-maker and the Court are all in writing so there is nothing to which deference would necessarily apply since the Court is in as good a position as the DGWM to make the decisions. These factors all point to a lack of deference and a standard of review of correctness.

[20] The Respondent agrees the standard of review of correctness applies to the limitation period question but otherwise says where a decision involves interpretation of TBS policy or labour relations policies or procedures within the expertise of the decision maker it is reviewable on a standard of reasonableness (see *Hagel v Canada (Attorney General)*, 2009 FC 329, *affirmed* in 2009 FCA 364 and *Marszowski v Canada (Attorney General)*, 2015 FC 271).

[21] On the face of the decision, it is a simple application of the TBS Directive on Terms and Conditions of Employment for Certain Excluded/Unrepresented Employees (TBS Directive) and the application of subsection 155(3) of the *Financial Administration Act* (FAA) together with section 32 of the *Crown Liability and Proceedings Act* establishing a six-year limitation period. However, in order to apply the TBS Directive and the FAA, the DGWM was required to address the underlying issues raised by the Applicant. If the Applicant succeeded in the contract law argument then the "debt" to be recovered does not arise. If the requirements of promissory estoppel were made out then it is a complete defence to the recovery. Until there is a debt the legislation referred to in the decision does not apply.

[22] Regrettably, neither the contract law issue nor promissory estoppel was referenced in the decision so it is not clear what consideration, if any, was given to them by the DGWM. Although there is no reviewable decision with respect to the estoppel and contract issues, I will consider them as they were extensively argued by the parties. It is unnecessary to address the appropriate standard of review because, although argued, they are not addressed at all in the decision.

[23] For the reasons that follow, whether the standard of review is reasonableness or correctness, I have determined the decision rendered by the DGWM does not meet the criteria laid down in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] or the elaboration of *Dunsmuir* that was provided by *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Nfld. Nurses*]. I will therefore look at the overall decision itself from the point of view of whether it was reasonable other than the limitation period issue, which will be reviewed on the standard of correctness. As mentioned I will also address the contract law and promissory estoppel arguments made by the Applicant.

V. **IS THE DECISION REASONABLE?**

[24] The overall reasonableness of any decision is determined by whether the outcome is defensible on the facts and law and whether the decision-making process itself was justifiable, intelligible, and transparent. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of possible, acceptable outcomes, the

Dunsmuir criteria are met (see *Dunsmuir* at paragraph 47; Bergeron *v Canada (Attorney General)*, 2015 FCA 160 at paragraph 58).

[25] The decision rendered on March 30, 2015 purports to have considered all the circumstances of the grievance including submissions made by both the Applicant and his counsel. The decision is very brief. It recites the most basic facts and states the applicable legislation. There is no analysis or discussion of the submissions made by and on behalf of either the Applicant or the Respondent. It fails to mention the legal arguments made by the Applicant's counsel with respect to estoppel and contractual change.

[26] In this respect, *Nfld. Nurses* at paragraph 15 advises that "courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome." There is a limit as to how far a reviewing court can go in order to determine the reasons for a decision. As stated by Mr. Justice Rennie, as he then was, in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at paragraph 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue.

[27] The certified tribunal record (CTR) produced for this application indicates the DGWM had before her an affidavit from the Applicant attesting to various matters including his relevant employment history, personal life and financial circumstances, and the details of how he came to work overtime as well as the forms he completed to claim it. The affidavit also addresses issues raised by the Respondent regarding whether the Applicant knew or should have known his position was excluded, the performance pay agreements he signed and the failure to advise him

of the change of his employment to be excluded. The Applicant was not cross-examined on the affidavit so there was no reason to question his sworn testimony.

[28] I have reviewed the record to try to understand why the determinations in the decision were made and why the Applicant's arguments were apparently rejected out of hand. Unfortunately, as the record is over 400 pages long, reviewing it is an onerous task. It contains internal memos and notes, the grievance decisions at each level, the Applicant's first affidavit and related documents. I find I am unable to discern the reasons for the decision without engaging in speculation.

[29] For example, the issue of promissory estoppel was a significant argument in the grievance process. The record shows there are references to and copies of case law on promissory estoppel, including from the PSLRB, this Court, and the Supreme Court of Canada. The second level grievance and the final level grievance both had the estoppel issue put before them. If it was considered by the DGWM then, given the importance of the issue, I would have expected some acknowledgment of it and at least a sentence or two as to why it was rejected. The record contains jurisprudence and arguments that can be applied both for and against finding promissory estoppel. Without engaging in speculation, I cannot determine by reference to the record the reasons that could have been given in support of the decision that the debt recovery ought to begin and promissory estoppel did not apply. There is no evidence of *why* that determination was made by the DGWM.

[30] Similarly, the record contains a copy of the Applicant's contemporaneous handwritten notes of the third-level hearing and his affidavit evidence with explanations of why he did not realize his position had been excluded despite the non-payment of union dues (it was only $25

per month), his re-appointment as a grievance officer (he received the verbatim identical letter in 2008, 2009, and 2010) and his Performance Agreement (nothing in it said he could not receive overtime as well; he subsequently learned others, in the LA group, received both overtime and performance pay). Again, given the importance of the evidence, with no reference made to it at all, I can only speculate that it was disbelieved, despite being sworn evidence or, it was found unimportant for some reason.

[31] Speculation leads to the Court "supply[ing] the reasons that might have been given or mak[ing] findings of fact that were not made" and that is not the role of a reviewing court (see *Canada (Citizenship and Immigration) v Grdan*, 2014 FC 187 at paragraph 11).

[32] Without knowing what facts were accepted and what determinations were made about the legal arguments and jurisprudence, it is not possible to say the decision falls within the range of possible, acceptable outcomes defensible on the facts and law. In that respect, the decision is neither transparent nor intelligible. It is therefore unreasonable and must be set aside.

VI. **ENTITLEMENT TO OVERTIME PAY**

A. *DND Obtains an Order Excluding the Applicant from the Bargaining Unit*

[33] The Applicant's offer letter dated December 18, 2007 (the letter) forms the basis of the contractual arrangement between DND and the Applicant. The third sentence of the letter says:

> Your salary will be determined in accordance with the Public Service Terms and Conditions of Employment Regulations.

[34] At the end of the letter the Applicant signed to indicate his acceptance which is worded as follows:

> I accept this offer of deployment and related terms and conditions of employment.

[35] At the time of this employment agreement, the position of the Applicant, FI-04, was part of the bargaining unit. He was entitled to receive overtime pay and he did receive it starting in 2009. As a result of the Order reclassifying the position in April 2010, the governing terms of the Applicant's employment became the TBS Directive on Terms and Conditions of Employment for Certain Excluded/Unrepresented Employees (TBS Directive). Under those provisions the unrepresented FI-4 position was not entitled to overtime pay.

[36] Section 72 of the PSLRA requires the employer to provide to the bargaining agent a copy of the application made to the Board seeking to declare that any position of an employee in the bargaining unit is a managerial or confidential position. The Applicant was, at the time of the application to reclassify his position, represented by the Association of Canadian Financial Officers as his bargaining agent. They did not oppose the application, therefore the Board was required to issue the Order pursuant to section 75 of the PSLRA.

[37] On April 15, 2010, a letter from the PSLRB was hand delivered to the bargaining agent and to the employer enclosing the Order. But, as a result of the Order, the bargaining agent no longer represented the Applicant. The testimony of the Applicant is that he was not provided with or made aware of the Order at any time prior to November 4, 2013. That testimony was not contradicted. Other evidence in the record, referred to below, also supports the Applicant's testimony.

B. *Did the Applicant Know His Position was Excluded or, Should He Have Known?*

[38] A critical question is whether the change of classification had to be communicated to the Applicant in order to be effective. The Applicant argues that he had to be informed by the employer of the change to his terms of employment in order to be bound by it. The Respondent

says there were indicators of the change and he ought to have known of the change to his employment contract.

[39] It appears that DND intended to advise the Applicant of the Order but did not do so. They had been sent a letter to deliver to the Applicant to advise him of the change. The Applicant denies having received any such letter or letters. After the issues under review occurred, the Applicant obtained by way of an Access to Information Request a lot of material including a copy of an internal email from the HR Manager, Mr.Samuel Roy, to Capt. Page and others at DND sent November 20, 2013. In it Mr. Roy confirms:

> We did not find any copy of the letter in our file – it's therefore possible it was never issued.

[40] The Respondent says the Applicant should have known his position had been reclassified because of various "indications". For example, letters sent in 2008, 2009, and 2010 appointing the Applicant as a grievance officer should have alerted him says the Respondent. The evidence is that the letters were identical in each year. In February and June of 2009, the Applicant sought confirmation of whether his position ought to be excluded. He was assured on both occasions that it was not excluded. There was no reason provided by the Respondent as to why, on receipt of the third identical letter, the Applicant should know his position was now excluded. Receipt of the third letter did not put the Applicant on notice to check again nor could it reasonably be said to support the fact that he ought to have known he was no longer part of the bargaining unit. There is no reference in any of the letters to the position being excluded.

[41] Capt. Wood and Mr. Roy signed the initial form requesting the Applicant's position be excluded from the bargaining unit. Capt. Wood then signed overtime approvals for the Applicant from June 2010 to April 2011. If there were "indicators" of which the Applicant

ought to have been aware, surely those same indicators should have been seen by someone at DND? Capt. Page, Capt. Wood, and Capt. Halle at various times signed the forms to approve payment of the Applicant's overtime. Why should the Applicant be more knowledgeable than his employer, who had his position excluded, with respect to the terms of his employment?

[42] Similarly, the Performance Pay agreements the Respondent says should have alerted the Applicant were signed with Capt. Page for the employer. There was no indication in the agreement nor any given by Capt. Page to the Applicant that overtime could not also be collected. The amounts are significantly different. The performance pay earned by the Applicant totalled $17,207 in 2011 to 2013. How should that have put the Applicant on notice that he was not entitled to overtime pay? Why would Capt. Page sign off on both performance pay and overtime if the Applicant was not entitled to it? Are those actions not more likely to confirm to the Applicant that he is entitled to overtime pay rather than alert him to the contrary?

[43] The Respondent also says the Applicant should have noticed he was no longer paying union dues and that should have alerted him to the change in his position. The Applicant's testimony was that he did not notice union dues were not deducted because they were only $25 per month and he had also received a pay increase at about the same time. That is a reasonable explanation.

[44] Under all the circumstances, I am satisfied the Applicant did not know his position had been reclassified. He had been informed twice that his position was properly classified. He was never told otherwise. He was never advised that DND was seeking to reclassify his position or that the Order was granted. He was asked by DND to work overtime and he did so. In the

overall context of the events that transpired, there were no indicators that ought to have alerted the Applicant to believe his position was excluded.

C. *Could this Employment Contract be Altered without Advising the Applicant?*

[45] The Guidelines for Managerial or Confidential Exclusions for Civilian Employees (Civilian Guidelines) in the record outlines the process to be followed for establishing managerial or confidential positions within the DND. When an order is obtained from the PSLRB the stipulated process is:

> . . . TBS informs the department in writing of the decision date and the effective date union dues are to cease (first day of the second month following the decision). DGLRC advises the LR SME and HRO, the HRO then informs the manager/incumbent and the Compensation Advisor of the exclusion status of the position and the cessation of union dues.

[46] The DGLCR is the Director General Labour Relations and Compensation. HRO is Human Resources Officer. Clearly the process after an exclusion order is granted is to inform both the manager and the incumbent of the change to the position. The process was not followed in the Applicant's case.

[47] The Respondent says that doesn't matter. The overpayment to the Applicant was contrary to TBS policy and the policy was triggered not by contract but by the PSLRB Order.

[48] The Applicant relies on the decisions of the Supreme Court of Canada in *Wells v Newfoundland*, [1999] 3 SCR 199 [*Wells*] and in *Dunsmuir* to say that the relationship between the Applicant and DND is contractual. In addition to establishing the principles of standard of review for administrative decisions, *Dunsmuir* reviewed the law with respect to public

employment. In doing so, it considered *Wells* at some length and the effect of it was summarized at paragraph 97:

> [97] The effect of *Wells*, as Professors Hogg and Monahan note, is that
>
> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships.

[49] In private employment contracts both parties must to agree to a change of the terms. This contract is somewhat different as Treasury Board has the unilateral right to make changes under the FAA. That, however, does not mean the changes, in this particular case, were effective without being communicated to the Applicant.

[50] The Court of Appeal in *Appleby-Ostroff* at paragraph 30 acknowledged that the Treasury Board has considerable authority under the FAA to provide terms and conditions of employment but observed that:

> In the absence of specific legislation to the contrary, because these terms and conditions of employment established by the Treasury Board become part of the employee's contract of employment, it would be inconsistent with principles of fairness and good faith to empower the Treasury Board to determine these terms and conditions without disclosing them to the concerned employee, particularly in the event of a dispute as to the scope of their application.

[51] DND recognized that the terms and conditions of employment must be communicated to the Applicant. The original terms and conditions of employment were disclosed to the Applicant when he received his offer of employment letter. There is no reason to believe subsequent significant changes to those employment terms did not have to be similarly communicated in light of *Appleby-Ostroff* and the Civilian Guidelines.

[52] In fact, the HR Officer received a letter to be delivered to the Applicant advising him that his position had been excluded. Unfortunately for all concerned, neither the Order nor the letter were given to the Applicant. It was less than one year before the Order was obtained that DND confirmed to the Applicant for the second time that his position was not excluded. They cannot in good conscience subsequently fail to advise him the position had shortly thereafter become excluded and ask him to work overtime then claim repayment of the overtime payments. As stated in *Appleby-Ostroff*, those actions are "inconsistent with principles of fairness and good faith".

D. *Conclusion*

[53] I find that in the unusual circumstances of these facts, the change in the Applicant's position was not effective until it was communicated to him. As a result, he was entitled to be paid the overtime he worked up to November 4, 2013, the date he was told his position was excluded.

VII. **ESTOPPEL AS A DEFENCE TO COLLECTION OF THE DEBT**

A. *Is Estoppel Available to the Applicant as a Defence?*

[54] As a preliminary matter, the Respondent alleges the Applicant did not raise the issue of promissory estoppel until the third-level grievance so it ought not to be considered. The Applicant objects to the Respondent adding an argument as to "change of circumstances" that was not raised at any level of the grievance procedure.

[55] The issue of estoppel was clearly raised at the third-level grievance. It was also clearly raised at the second level but was not referred to in the second-level decision. The "Regional Grievance Report" prepared at the time of referral to the third level grievance outlines what

occurred at the second level. It states the Applicant "raised the principle of Estoppel and referred to the Lapointe decision". In the first level grievance, the Applicant referred to the payment as an "erroneous payment" that could also support estoppel. I am satisfied from this that the issue was raised no later than the second-level grievance. I also note the decision-makers at each of the first two levels had no authority to determine the matter or provide the relief requested, regardless of the arguments they heard. The first time there was an opportunity to address a decision-maker with authority to give the redress that was sought was at the third-level grievance hearing. The issue of promissory estoppel was clearly before the grievance adjudicators at the second and third level. It can be considered in this application.

[56] The Applicant has raised the issue of promissory estoppel as a defence to the Respondent's collection attempts. The Respondent says the defence is more properly a change of circumstances because there is no "clear and unambiguous promise". The Applicant replies that the Respondent is raising change of circumstances for the first time on judicial.

[57] The Respondent did not raise this argument at either the second level or final level of the grievance. Judicial reviews of administrative decisions are normally conducted on the basis of the record before the decision-maker because otherwise the review becomes a form of trial *de novo* (see *Ochapowace First Nation (Indian Band No 71) v Canada (Attorney General)*, 2007 FC 920 at paragraph 10). For that reason I will not consider the change of circumstances argument as it was not before the decision-maker. I do note though, as discussed below, that there was a clear and unambiguous promise made to the Applicant.

B. *Can Estoppel Apply against the Crown in this Circumstance?*

[58] The essence of estoppel is put very simply by Professor Bruce MacDougall at the opening paragraph of his book *Estoppel* (LexisNexis, 2012):

> Estoppel is the general legal term for the doctrines whose basic effect is to hold a person to his or her word. If one of these doctrines applies, then a person is prevented ("estopped") from resiling from what he or she has said. . . . [T]he doctrine is based on the principle of justice that may be colloquially referred to as "you cannot send someone out on a limb, and saw that limb off."

[59] The Applicant relies on the decision in *Kenora (Town) Hydro Electric Commission v Vacationland Dairy Co-operative Ltd,* [1994] 1 SCR 80 [*Kenora*] for authority that estoppel can arise against the Crown (or, in the case of *Kenora*, a municipal authority) even when there is a mistake of payment.

[60] In *Canada (Attorney General) v Adamoski*, 2004 BCCA 625 [*Adamoski*] at paragraph 17, in answer to the Crown's argument that promissory estoppel could not apply "where the effect was to prevent the Crown from carrying out a statutory duty", the British Columbia Court of Appeal found that the federal Crown was estopped from collecting on an outstanding student loan because the Crown had no statutory duty to keep trying to collect student loans as they were not *required* to collect. In other words, there was a discretionary element to the collection proceeding.

[61] The Applicant submits that the Crown's ability to recover the overpayment is discretionary because subsection 155(3) of the *Financial Administration Act* states:

> (3) The Receiver General may recover any overpayment made out of that he 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 overpayment was made.

[62] The PSLRB has recently found in *Anthony v Treasury Board (Department of Veterans Affairs)*, 2015 PSLREB 38 [*Anthony*] that subsection 155(3) "permits the employer to use its discretion in a given situation or circumstance" (see paragraph 26). Although decisions of the PSLRB are not binding on this Court, when it is reviewing legislation that it is often required to consider the decisions are noteworthy.

[63] The Respondent cites *Schenkman v Canada (Attorney General)*, 2010 FC 527 [*Schenkman*] as authority for the proposition that estoppel cannot be claimed against operation of law. They say that because the Order of the PSLRB changed the employment definition under the PSLRA to be managerial, the Applicant was no longer an employee represented by an employee organization and by operation of law he was not entitled to the overtime payments. Promissory estoppel was not argued in *Schenkman* and the facts were significantly different. It is distinguishable on that basis.

[64] I find based on *Kenora* and *Adamoski* that the defence of estoppel is available to the Applicant provided that he can make out all the necessary elements.

C. *Are the Necessary Elements of Estoppel Proven?*

[65] The elements required to prove promissory estoppel are set out in the leading cases of *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 [*Maracle*] and *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 [*Mount Sinai*]. In *Mount Sinai*, Mr. Justice Binnie summarized *Maracle* at page 310:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on

> the representation, [4] he acted on it, or in some way changed his position.

(1) Was a Promise made to the Applicant by Words or Conduct?

[66] The following representations were relied upon by the Applicant as being the "clear and unambiguous promise" that he was entitled to overtime pay:

i. At the time of the employment offer he was entitled to overtime pay;
ii. When he twice enquired whether his position was excluded, he was told it was not;
iii. He was told to use a new form to claim overtime at the start of April 2010;
iv. He was paid overtime each month, which was an ongoing course of conduct that meets the requirement of a representation based on *Lapointe v Treasury Board (Department of Human Resources and Skills Development),* 2011 PSLRB 57 at paragraph 31.

[67] To the Applicant's list I would add the following:

i. His supervisors asked him to work overtime after the Order was made;
ii. DND, including Capt. Wood, who signed the initial form requesting reclassification gave written approval of the Applicant's overtime payment requests 11 times between April 2010 and July 2011 after which other supervisors provided their written approval.

[68] The request to work overtime and the promise to pay for it coupled with the repeated approval of the forms and payment of the amounts claimed is a clear and unambiguous repeated representation to the effect that "if you work extra hours we will pay you". Written approval was made following the verbal request. There is no ambiguity – the hours and amount claimed are recorded on the forms approved by the Applicant's superiors and the amount claimed was paid.

(2) Was it Intended that the Applicant would Act on the Promise?

[69] The request would not have been made unless it was intended that the Applicant act on it. The Applicant had the legal right to leave work at the conclusion of his normal work day. That

was the legal relationship between the parties. Because of the request to work overtime, coupled with the continuing promise to pay for those hours, the legal relationship was altered once the Applicant acted on the request and remained at work beyond his regular hours.

[70] The first two elements are established. There was a clear, unambiguous promise made to the Applicant both in words and conduct, that was intended to affect the legal relationship and be acted upon.

(3) Did the Applicant Rely on the Promise?

[71] The Applicant worked over 1785 extra hours in almost three-and-one-half years. His uncontradicted evidence was that if he had been told he was not eligible for overtime pay of approximately $45,000 per year he would have declined the change in his position. If that had been denied, he would have obtained a deployment into a unionized position. His evidence in the grievance was that a number of such positions were available in DND or in other departments in 2010 as "there were notoriously high vacancy rates in the FI classification."

[72] In *Ryan v Moore*, 2005 SCC 38 at paragraph 69, Mr. Justice Bastarache writing for the Court explains reliance and detriment as two separate concepts:

> Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and detriment. The former requires a finding that the party seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his or her legal position. If the first step is met, the second requires a finding that, should the other party be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change from his or her assumed position.

[73] It should go without saying that giving up personal family time of almost 600 hours per year to stay at work past normal working hours is evidence of the reliance on the promise of

payment. The Applicant changed his conduct and altered his legal position by staying at work when he was not required to be there.

(4) Was the Reliance made to the Detriment of the Applicant?

[74] The Applicant put forward various examples of the personal and financial detriment he suffered as a result of the overtime promise made to him:

i. He did not look for employment in a position that did pay overtime of which he testified there was opportunity to obtain within DND or elsewhere as a financial comptroller.
ii. He would have sold his house earlier and moved to rental accommodation as he did in early 2014 after being apprised in November 2013 of the overtime issue.
iii. He would not have paid approximately $15,000 per year for his son to play competitive hockey as a goalie unless he was receiving the overtime pay.
iv. He would not in 2011 have purchased a $25,000 car for his sons and paid the approximately $5,000 annual operating expenses.
v. He worked the extra hours instead of leaving work and enjoying leisure time.

[75] The PSLRB decision in *The Treasury Board Secretariat of Canada v The Association of Canadian Financial Officers*, PSLRB File No 585-02-49, 2013 CanLII 96719, heard on April 5, 2013, confirms the Applicant would have had the option of seeking unionized employment elsewhere within the federal government as a financial officer. The PSLRB found that wage rates for more experienced financial officers did not compare well to the private sector wages and seven departments, identified in the decision, all reported difficulty attracting and holding qualified financial officers.

[76] The Applicant would not have worked the overtime hours at DND without compensation – he changed his position from leaving work to staying at work because he was told he would be paid, as he always had been. In ordinary contract law, if the contract did not provide for such payment the claim would be based on the equitable concept of *quantum meruit*. As the

Applicant has in fact been paid, he is not suing for such payment rather he is trying to retain the payment he earned and was paid. To do so, he is relying on the equitable concept of promissory estoppel. In this case it is essentially the flip side of *quantum meruit*.

[77] The Applicant has made out all the elements necessary to raise promissory estoppel as a defence. If we return to the basic premise of estoppel the purpose is to hold a person to his or her word. The Applicant kept his word by working. The employer should similarly keep their word by not resiling from the payment they made to the Applicant after requesting he perform the work.

VIII. **MANAGEMENT LEAVE**

[78] I wish to add as *obiter* that although this is not strictly a case where balancing the equities arises, there is evidence in the record that there is no detrimental effect to DND arising from the payment to the Applicant. One of the documents obtained by the Applicant was a one page document called "Grievance Review #6185: Meeting Points 10 March 2014". The final paragraph states:

> In reviewing the applicable policy, procedure and jurisprudence, acknowledge [sic] there is no loss to the crown to be recorded in the Public Accounts as result [sic] of this administrative error as both Overtime and Management Leave are available as "paid leave".

[79] The document also admits HR made administrative errors in that DND Human Resources officials "failed to ensure MEPM Management, encumbered employee, DND HR system and PWGSC Pay System were aware and updated of the changes this exclusion had to the Terms and Conditions of Employment". It notes that stating the case is an "over-payment" implies the work was not completed and there was a "failure to recognize the TBS Directives on Terms and

Conditions of Employment, which states, "a person appointed to the core public administration is entitled to be paid, for services rendered, the appropriate rate of pay in the relevant collective agreement or the rate approved by Treasury Board for the group and level of the person's classification."""

[80] Although the memo says the management leave offsets the overtime payment, the Applicant has been told there is no administrative policy on management leave. Essentially, DND does not know how to administer it. However, the memo concludes with itemized steps of how "to correct the 907 forms duly signed under FAA s32, 34, & 33", which ends with the paragraph referred to above that there is no loss to the crown as both Overtime and Management Leave are available as "paid leave".

[81] If in fact the management leave offsets the overtime that was paid to the Applicant surely that is a cleaner, simpler and preferable solution than to continue with court proceedings with a view to recovering over $145,000 from the Applicant only to then turn around and pay it back to him? I urge the parties to give serious consideration to this option as a possible solution.

IX. **THE APPLICABLE LIMITATION PERIOD**

[82] The DGWM held that a prescription period of 6 years was found in section 32 of the *Crown Liability and Proceedings Act* (CLPA) and that it applied. Section 32 states:

> 32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in the province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within 6 years after the cause of action arose.

[83] The DGWM finding is reviewable on a standard of correctness. The Applicant relies on *Canada v Parenteau*, 2014 FC 968 [*Parenteau*] where Mr. Justice Beaudry reviewed section 32 in deciding the appropriate limitation period when suing for payment under a promissory note signed by a member of the Canadian Forces. Noting the issue was a contractual one he found it was necessary to determine where the cause of action arose. Canada argued the limitation period was six years because the cause of action arose in more than one province. Mr. Justice Beaudry found on the facts of the case that it arose only in Quebec. This resulted in a three year limitation period.

[84] It appears on reading section 32 that it exists to resolve what limitation period to apply – federal or provincial – when the Crown is involved in a proceeding. It does so in two ways. One, is to say if the cause of action arose in more than one province rather than choose which provincial limitation period to apply, the federal limitation period applies. The other is to say that if Parliament has passed specific legislation establishing a limitation period then the specific legislation overrides the general provision found in section 32. The Supreme Court of Canada in *Markevich v Canada*, 2003 SCC 9, held that statutory collection proceedings by the Crown are "proceedings" within section 32. Therefore, the only consideration that arises is whether the cause of action arose in more than one province. The other matters addressed in these reasons are not affected by the limitation period determination.

[85] The Applicant says this is a breach of contract case and the cause of action first arose when the employer paid him overtime in June 2010. They say that the Respondent has said the Applicant was not entitled to that payment therefore he was in breach of his employment

contract. The Respondent is trying to recover all the overtime money paid to the Applicant since June 2010.

[86] The Applicant submits the limitation period is either in Ontario (2 years) or Quebec (3 years) and regardless of which one applies, the Respondent is out of time because the limitation period runs from the date of breach as established in *Robert Simpson Co v Foundation Co of Canada* (1982), 36 OR (2d) 97.

[87] The Respondent's focus is on the collection proceeding itself under subsection 155(3) of the FAA. They rely on *Gardner v Canada (Border Services Agency*), 2009 FC 1156 [*Gardner*] for authority that section 32 of the CLPA is a general provision that applies unless it is in conflict with another Act of Parliament. The issue in *Gardner* was whether there had been an extension of the limitation period as a result of correspondence between the parties over the years. The application of section 32 was not argued in terms of where the cause of action arose or whether a provincial limitation period applied. Ultimately it was determined the limitation period had not been extended and the recovery attempts were statute barred.

[88] The contract of employment upon which the Respondent relies was formed by DND mailing the offer letter to the Applicant at his home address in Ontario. The Applicant received and signed the letter then returned it by mail, to an office in Gatineau as stipulated in the contract letter. The Order amending the contract and excluding the Applicant from the bargaining unit was made by the PSLRB, located in Ontario.

[89] Contracts are usually formed in the place where the offeror receives acceptance. But, the postal acceptance rule says the contract was formed in Ontario because the acceptance was, in

keeping with the requirements of the offer letter, mailed by the Applicant in Ontario. Although it was sent to an office in Gatineau, Quebec the rule stipulates that acceptance occurs at the time and place of mailing. That means the contract was formed in Ontario. We also know that by the PSLRB Order, the terms of employment were altered in Ontario, regardless of the effective date.

[90] The only remaining question is where did the cause of action arise? The work, including overtime, was performed in Gatineau, Quebec. Overtime was claimed by submitting paperwork in Gatineau. The material facts upon which recovery is being made are that DND is recovering money from the Applicant under a contract made and amended in Ontario but breached in Quebec. As the cause of action arises in more than one province, section 32 of the CLPA applies and the limitation period under which the Respondent can demand recovery is 6 years.

X. **CONCLUSION**

[91] For the reasons provided I find the decision is unreasonable and will be set aside. It will be returned for redetermination considering these reasons for judgment.

[92] Pending such redetermination, given my finding with respect to promissory estoppel, no steps should be taken with respect to collection of the alleged overpayment.

[93] The Applicant has been successful and is entitled to costs, which he seeks on a solicitor-client scale. If the parties are not able to agree as to the amount of costs, they may make brief written submissions on costs within 20 days from the date of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The decision dated March 30, 2015 by Susan Harrison, Director General of Workplace Management, is set aside and the matter is remitted for redetermination considering the reasons contained in this judgment.

2. The Applicant is entitled to costs. If the parties are not able to agree as to the amount of costs, they may make brief written submissions on costs within 20 days from the date of this judgment.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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