Federal Court  Cour fédérale

Date: 20120911

Docket: T-456-11

Citation: 2012 FC 1074

Vancouver, British Columbia, September 11, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

CATHERINE LAWTON

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Catherine Lawton, joined the federal public service in July 1976. As of September 1997, she commenced working with the predecessor of the Respondent, Canada Revenue Agency (CRA) in an executive position as Director, Human Resources (Pacific Region) (EC-2), a position she held until May 2004. After May 2004, the Applicant continued to be an indeterminate employee who was placed in an administrative holding position within the CRA. For the majority of that time, she was on an interchange assignment with the Public Service Human Resources Management Agency of Canada (PSHRMAC, now known as the Canada Public Service Agency, or CPSA). On June 26, 2008, the CRA purportedly terminated the Applicant's

employment. The Applicant filed a grievance. The person hearing the grievance, Cheryl Fraser, gave a decision dated November 18, 2009 denying the grievance. This is a judicial review of that grievance decision.

[2] The Applicant requests that the Court quash or set aside the grievance decision and refer the matter back in accordance with appropriate directions. For the reasons that follow I am dismissing the application.

CONTRACTUAL RELATIONS BETWEEN THE APPLICANT, CRA and PSHRMAC

[3] A series of contracts entered into between the Applicant Lawton, CRA and PSHRMAC form the heart of the matters before this Court.

[4] On May 3, 2004, Roderick Quiney, signed an agreement, referred to in these proceedings as a flex status or SAPP agreement, on behalf of the CRA. Ms. Lawton signed that agreement on May 11, 2004. While the difference of eight days is readily calculated, we do not know when the document was presented to or received by Ms. Lawton for signature or how much time she had to contemplate its terms and conditions.

[5] The covering letter from the CRA forwarding the agreement to Ms. Lawton for signature stated, *inter alia*:

> *I am pleased to offer you a lateral move against the flexibility complement as Special Projects Advisor to the Assistant Commissioner, Regional Operations – Pacific Region, at level one of the Executive Group (EX-1). This flex position will begin on April 1, 2004 and will end on October 12, 2007, at which time you have*

> *agreed to resign from the Canada Customs and Revenue Agency (Canada Revenue Agency) for the purpose of retirement.*

[6] The agreement itself included, among other terms, the following:

> *For administrative purposes, you will be laterally moved to position number 30118689, using a flexibility authority effective April 1, 2004 to October 12, 2007, at the latest. At the end of the assignment period, you will retire from the Canada Customs and Revenue Agency (Canada Revenue Agency).*
>
> . . .
>
> *Signatories*
>
> *I certify that I understand and accept this lateral move against the flexibility complement and accept the terms and conditions described above. I agree, that in signing this agreement, the Assistant Commissioner, Mr. Rod Quiney, Regional Operations – Pacific Region, accepts my resignation to retire, and I will cease to be an employee of the Agency, no later than the end of the day on October 12, 2007.*
>
> *"C.A. Lawton"* _____ *"May 11, 2004"* _____
> *Cathy Lawton* *Date*
>
> *I confirm my understanding and acceptance of all the terms and conditions of this agreement. I accept Ms. Cathy Lawton's resignation from the Canada Customs and Revenue Agency (Canada Revenue Agency), for the purpose of retiring, to take effect no later than the end of the day on October 10, 2007.*
>
> *"R. Quiney"* _____ *"May 3, 2004"* _____
> *Mr. Roderick Quiney* *Date*
> *Assistant Commissioner*
> *Regional Operations*
> *Pacific Region*

[7] It is common ground between the parties that the date of October 10, 2007 as it appeared in typewriting in the letter and agreement was changed in handwriting and initialled to read

October 12, 2007 so as to accommodate Ms. Lawton's fifty-fifth (55th) birthday, which occurred on October 11, 2007. Ms. Lawton's pension benefits would thereby be improved.

[8] This agreement has been referred to in argument as SAPP #1.

[9] Thereafter, Ms. Lawton, Mr. Quiney on behalf of CRA, and two persons on behalf of PSHRMAC signed an agreement in June and July 2005, called IAA #1 by the parties in argument before me. This agreement provided for the secondment of Ms. Lawton from CRA to PSHRMAC. It contained, among other provisions, the following:

LETTER OF AGREEMENT

> *The following sets out the agreed terms and conditions covering the assignment of Ms. Catherine Lawton from the Canada Revenue Agency, Vancouver, British Columbia to the Public Service Human Resources Management Agency of Canada, Ottawa, Ontario. Ms. Lawton will be working out of Vancouver, British Columbia.*
>
> *It is agreed that the assignment will take effect on June 27, 2005 until September 2, 2005 with provision for extension subject to the agreement of all parties or early termination with one (1) month's notice in writing from any of the parties.*
>
> . . .
>
> *It is agreed that at the end of the assignment, Ms. Lawton will return to a position equivalent to her current one and at a rate of remuneration of not less than her present salary plus any increases that may become due to her during the period of the assignment according to the Canada Revenue Agency's salary system unless other arrangements have been agreed to by all parties concerned. If the Canada Revenue Agency is subject to workforce reduction during or at the end of this assignment, Ms. Lawton will remain subject to the terms and conditions of employment or the collective agreement applicable to her and will be accorded the same treatment and entitlements as all other employees of the Canada Revenue Agency.*

[10] As can be seen, this agreement IAA #1 would have expired September 2, 2005 (that is, before the October 12, 2007 date provided for in SAPP #1) but provision was made for extension of the time stipulated in the IAA #1 agreement. In fact, there were five such extensions. The first, referred to as IAA #2, extended the period to December 30, 2005. The extension terms provided:

> *The Canada Revenue Agency and the Public Service Human Resources Management Agency of Canada are in agreement to extend the assignment of Ms. Catherine Lawton until December 30, 2005, under the same terms and conditions stipulated in the original agreement, which was scheduled to terminate September 2, 2005.*

[11] The second extension, IAA #3, extended the term to 31 March 2006. The third extension, IAA #4, extended the term to December 31, 2006. The fourth extension, IAA #5, extended the term to December 31, 2007. This is, as can be seen, beyond the October 12, 2007 date provided for in the SAPP #1 agreement. The wording of all these agreements was the same except for the dates.

[12] In March 2007, CRA sent to Ms. Lawton a document purporting to be a draft agreement, with blank signatures, to extend the term covered by SAPP #1 to December 28, 2007. The covering letter stated, in part:

> *I am pleased to confirm the extension of the Executive/Cadre (EC) flexibility authority for your position as Special Projects Advisor to the Assistant Commissioner, Regional Operations, Pacific Region, at the EC-2 group and level, from October 13, 2007 to December 28, 2007.*

[13] The draft agreement provided, in part:

> 1. *This agreement outlines the terms and conditions of the extension of the Executive/Cadre (EC) flexibility authority for your position as Special Projects Advisor to the Assistant Commissioner,*

> *Regional Operations, Pacific Region, from October 13, 2007 to December 28, 2007.*
> *Please note that this will constitute the last extension granted for this flex agreement. At the end of this period, your retirement from the Canada Revenue Agency will take effect on December 28, 2007 and as stipulated in the terms and conditions of the original agreement.*

[14] This draft is sometimes referred to by the parties in argument as SAPP #2.

[15] Ms. Lawton refused to sign this draft agreement particularly because it provided for her resignation as of December 28, 2007. She returned it on March 23, 2007 to Mr. Quiney's assistant with a note:

> *As discussed, I'll wait for the revised flex agreement to sign. Thanks*

[16] Apparently, CRA did nothing until September 13 and 14, 2007, when Mr. Quiney's assistant sent an email to Mr. Quiney's superior's assistant saying:

> *...she (Lawton) is not prepared to sign it until the retirement date of Dec. 28th, 2007 is removed from the agreement.*

[17] The document SAPP #2 was never amended and was never signed.

[18] Notwithstanding the foregoing, or perhaps ignorant of or neglectful of the foregoing, CRA, together with PSHRMAC and Ms. Lawton did sign a further extension of the IAA agreement, called IAA #6, which extended the term of the IAA to June 26, 2007. It said:

> *The Canada Revenue Agency and the Canada Public Service Agency are in agreement to extend the assignment of Ms. Catherine Lawton until June 26, 2008, under the same terms and conditions stipulated*

> *in the original agreement, which was scheduled to terminate December 31, 2007.*

[19] The state of mind of CRA is most probably reflected in an email dated May 8, 2008 from Quiney to his superior which says, in part:

> *…I had the impression we had extended, which might imply I signed for the extension to June and gave it to Cathy to sign. Rosa might know where the paperwork stands, although we both must have forgotten if Cathy says she still has the original. Rosa is likely not coming in to the office today.*
>
> *Happy to talk, but I guess Cathy has two choices. Not sign and be paid her pension from its effective date in 2007 or sign and be paid salary until June. I think I was very fair and again if she can get an extension from PSC I would have no trouble extending, but I understand she has run out of work with them?*

[20] I have omitted from this narrative references to the many discussions that Ms. Lawton had with Mr. Quiney and others at CRA from before the signing of the first of the agreements, SAPP #1, through to the end of June 2008.

[21] At some time prior to June 2008, another person, Darrell Mahoney, took over Mr. Quiney's position at CRA. He entered into correspondence with Ms. Lawton. On June 4, 2008, Mahoney wrote to Ms. Lawton stating that effective June 26, 2008, she would cease to be an employee of CRA. The text of the letter is as follows:

> *Dear Ms. Lawton:*
>
> *This is to acknowledge receipt of your letter of May 30, 2008 directed to my attention. I have read your letter and have given due consideration to your perspective in this matter. I have also researched the matter at length with the Executive Personnel Programs Directorate (EPPD) of the Canada Revenue Agency*

(CRA) in order to ensure that I have a complete understanding of all the facts surrounding your situation.

Based on my discussions with EPPD, you entered into an agreement to resign from the Canada Revenue Agency (CRA) by signing the original pre-retirement flex agreement dated April 27, 2004. In that agreement, you committed to resign from the CRA for the purpose of retirement October 12, 2007. Your resignation was accepted in writing by Mr. Rod Quiney, Assistant Commissioner, Pacific Region on May 3, 2004.

I think it is important to note that at no time was there any indication nor evidence in the file to support your contention that you were pressured or forced into resigning.

I wish to reiterate that from the initial implementation of this pre-retirement agreement, the Canada Revenue Agency has acted in good faith and has made every effort to accommodate you.

In addition, in my previous correspondence dated May 14, 2008, I provided you with the opportunity to sign and return the June 26, 2008 pre-retirement agreement extension. Since you have failed to do so, the condition of the original flex agreement providing that you would resign from the Canada Revenue Agency at the end of the pre-retirement agreement will come into effect. Accordingly, you will cease to be an employee of the Canada Revenue Agency on June 26, 2008 (end of business day).

Yours Sincerely,

[22] It is common ground that up until June 26, 2008 Ms. Lawton continued to be paid by CRA and, according to CRA's Counsel that her pension, as it now stands, is calculated on the basis that she was a CRA employee until June 26, 2008. Counsel for CRA stated at the hearing before me that CRA has no intention to seek repayment of any monies so paid or to recalculate Ms. Lawton's pension benefits.

THE GRIEVANCE

[23] Solicitors acting on behalf of the Applicant Ms. Lawton submitted a formal grievance to CRA respecting the decision to terminate her employment, by way of a letter dated July 10, 2008. That letter requested that the grievance *"be remitted directly to the final level for a hearing"*.

[24] Since Ms. Lawton occupied an executive position (EC-2) within CRA, her situation is not governed by an agreement such as one that might be found with respect to unionized employees. The *Canada Revenue Agency Act*, SC 1999, c. 17, section 51(1) (g) and (i) provides that CRA *may* provide for termination of employees, and related matters. Section 54 provides that CRA *must* develop a program, including recourse for employees. These provisions state:

51. (1) The Agency may, in the exercise of its responsibilities in relation to human resources management,	*51. (1) L'Agence peut, dans l'exercice de ses attributions en matière de gestion des ressources humaines :*
. . .	. . .
(g) provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;	*g) prévoir, pour des motifs autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur et préciser dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces mesures peuvent être appliquées, modifiées ou annulées, en tout ou en partie;*
. . .	. . .
(i) provide for any other matters that the Agency	*i) prendre les autres mesures qu'elle juge nécessaires à la*

considers necessary for effective personnel management, including terms and conditions of employment not otherwise specifically provided for in this subsection.	*bonne gestion de son personnel, notamment en ce qui touche les conditions de travail non prévues de façon expresse par le présent paragraphe.*
. . .	. . .
54. (1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.	*54. (1) L'Agence élabore un programme de dotation en personnel régissant notamment les nominations et les recours offerts aux employés.*
(2) No collective agreement may deal with matters governed by the staffing program.	*(2) Sont exclues du champ des conventions collectives toutes les matières régies par le programme de dotation en personnel.*

[25] It is common ground between the Counsel for each of the parties that there are no *Regulations* or Guidelines or Policy Statements which govern how a grievance requested by a person in an executive position within CRA is to be governed. There is nothing to say who shall hear the grievance or how the grievance is to be conducted. These matters appear to be governed by custom and analogy. I am advised that customarily, a grievance is heard by an Assistant Commissioner within the CRA. Customarily, the grievor, perhaps assisted by Counsel, would present their case in writing or orally or both, supported by such documents and other materials as the grievor believed to be relevant. No evidence under oath would be received. Normally, the CRA would not make submissions.

[26] In the present case, the grievance was heard by Assistant Commissioner Fraser. There is no allegation that she had any previous connection to the matter. Ms. Lawton, through legal Counsel,

presented extensive written submissions supported by a large binder containing several documents. Her Counsel made oral submissions. The CRA was not represented at the hearing, although a person with legal training was present, presumably to assist Ms. Fraser. There is no transcript of the hearing. The record before me indicates that Ms. Fraser essentially remained silent, except to ask Ms. Lawton where she was working now.

[27] A number of issues were raised on behalf of Ms. Lawton at the grievance hearing. Some are no longer being pursued. Two issues that remain as live issues before this Court are:

1. Was Ms. Lawton under undue duress when she signed SAPP #1 such that the agreement cannot be considered to be binding upon her?

2. Having regard to the conduct of the parties, including the continued extension of the IAA agreements beyond the term stipulated in the SAPP #1 agreement, do the subsequent agreements have the effect of nullifying any agreement by Ms. Lawton to terminate her employment with the CRA?

[28] The result sought by Ms. Lawton was to set aside the purported termination of her employment and have her continue, for an indefinite term, as a CRA employee.

[29] Ms. Fraser gave a decision respecting the grievance by a letter directed to Ms. Lawton's Counsel dated November 18, 2009. The grievance was denied. The relevant portions of that letter respecting the issues that are still live, are:

Dear Mr. Snyder:

I am responding to the formal grievance hearing held on October 16, 2009 in the matter of Ms. Catherine Lawton and the grievance you submitted on her behalf in respect of her employment cessation with the Canada Revenue Agency (CRA), and the denial of performance pay arising from the Initial Agreement for a Lateral Move Against the Flexibility Complement dated May 3, 2004.

I have fully reviewed the particulars of her case and after careful deliberation, have concluded the following.

With respect to Ms. Lawton's first grievance concerning involuntary cessation of employment, it is Ms. Lawton's contention that: 1) she was pressured or forced into resigning from the CRA; 2) [not at issue] and 3) the CRA unlawfully terminated Ms. Lawton's employment effective June 26, 2008.

> *1) Ms. Lawton was pressured or forced into resigning from the CRA.*

It is clear from the wording of the pre-retirement flex agreement that Ms. Lawton's intention was to retire at the end of the term of the flex agreement ("I agree that in signing this agreement, the Assistant Commissioner, Mr. Rod Quiney, Regional Operations – Pacific Region, accepts my resignation to retire…"). Ms. Lawton signed the flex agreement on May 11, 2004 committing to retire on October 12, 2007 while Mr. Quiney signed the agreement on May 3, 2004. Ms. Lawton had at least eight days to decide whether or not to sign this agreement. In my opinion, this gave her ample opportunity to carefully consider the pre-retirement flex agreement that Management offered her including the requirement to tender her resignation.

Given her position as an executive and Director of Human Resources, Ms. Lawton would have been familiar with the terms of the CRA Policy Framework for the Executive Cadre including the requirement that an executive entering into a pre-retirement flex must make a written commitment to retire and the delegated manager must accept the resignation in writing on a specified date. In addition, Ms. Lawton changed the effective date of the resignation from "October 10, 2007" to "October 12, 2007" and then initialled the change.

By her actions, it does not appear that Ms. Lawton had any concern with the resignation clause of the pre-retirement agreement flex in

light of the fact that she modified the effective date of the resignation thereby demonstrating that she specifically put her mind to this condition of the pre-retirement flex agreement.

Ms. Lawton's assertions that she told Mr. Quiney on March 30, 2004 prior to signing the pre-retirement flex agreement that she did not want to commit to resign and wanted to work past the age of 55 and that Mr. Quiney told her "not to worry" are solely based on Ms. Lawton's testimony. The only evidence Ms. Lawton provided to support her allegation is the notes of her personal calendar which are not corroborated by any other evidence. These assertions are also inconsistent with the explicit terms and conditions of the pre-retirement flex agreement which Ms. Lawton voluntarily signed on May 11, 2004 in which she formally agreed to resign at the expiration of this agreement.

In this case, I am of the opinion that the onus is on Ms. Lawton to demonstrate that she was forced or pressured to resign by Mr. Quiney. Ms. Lawton's assertions that she felt pressured by Mr. Quiney to sign the flex agreement and that he threatened her by stating he would not support her if she was to return to her substantive position is not corroborated by any other evidence and is solely based on Ms. Lawton's testimony.

There is no evidence in the file or anywhere else suggesting that Mr. Quiney did not behave appropriately towards Ms. Lawton. Ms. Lawton never filed a harassment complaint nor ever voiced any concerns regarding the conduct of Mr. Quiney. Furthermore, there is no indication in the file that Ms. Lawton was suffering from an illness which may have impaired her judgment at the time she signed the pre-retirement flex.

The fact that the length of the pre-retirement flex was extended from years to 3 ½ years does not mean that Management wanted to force Ms. Lawton to retire. Management simply wanted to accommodate Ms. Lawton by ensuring that the agreement last until she reached age 55, which allowed her to retire with a (reduced) pension.

I have also taken into consideration the fact that Ms. Lawton waited until 2007 to bring forward her allegations that she was pressured to retire. The fact that she waited 2 ½ years before bringing her allegations to the attention of Management calls into question the credibility of these allegations.

In light of the above, I do not believe that Ms. Lawton has demonstrated that she was pressured or forced to resign from the CRA. I am satisfied that management acted appropriately and that Ms. Lawton voluntarily signed the pre-retirement flex agreement.

2) [not at issue]

. . .

3) The CRA unlawfully terminated Ms. Lawton's employment effective June 26, 2008.

While it appears evident that in January 2007, a request to extend the interchange assignment with CPSA to December 31, 2007 was put forward, the preponderance of evidence on file clearly indicates that while Management was prepared to allow Ms. Lawton to continue her interchange assignments with CPSA, they never agreed to rescind the retirement clause of the original pre-retirement flex. This is supported by the various briefing notes to Commissioner Baker, communications between Caroline Williams from Executive Personnel Programs Directorate (EPPD) and Ms. Lawton, in addition to letters from Commissioner Baker to Ms. Lawton dated March 19, 2007 and November 16, 2007 confirming the agreement of Management for the extension of the pre-retirement flex agreement. Each letter was accompanied by an extension agreement which included a statement indicating that at the end of the extension period, Ms. Lawton's retirement would take place (respectively December 28, 2007 and June 26, 2008).

The above-mentioned letters from Commissioner Baker to Ms. Lawton and the other evidence in the file indicate that while Management was prepared to postpone the retirement date of Ms. Lawton while she was pursuing her interchange assignment opportunities with CPSA, Management always required that Ms. Lawton's resignation at the end of the interchange assignments be formally documented by way of a formal extension agreement to the pre-retirement flex.

It is clear that the pre-retirement flex agreement was the only legal instrument setting the terms and conditions of Ms. Lawton's employment tenure with CRA pursuant to the CRA Policy Framework for the Executive Cadre. The interchange agreement with CPSA could not alter the terms and conditions of the pre-retirement flex agreement. The Commissioner of CRA was the only one with the delegated authority to modify the terms and conditions

of the pre-retirement flex agreement including the requirement that Ms. Lawton retire at the end of the pre-retirement flex. The fact that Ms. Lawton may have been under the impression that CRA was no longer expecting her to retire is not sufficient. The pre-retirement flex including the retirement clause could only be rescinded or modified by mutual agreement which did not exist here as only one party, Ms. Lawton, wished to change the retirement clause.

Decision

Case law indicates that the decision for an employee to resign is a decision which is personal to the employee and cannot be forced upon the employee by the employer. Resignation consists of an intention plus some objective evidence of an intention to resign. Accordingly, the onus is on the employee to demonstrate that he or she lacked the subjective intention to resign.

In this case, I am satisfied that Management acted appropriately and within its authority under the CRA Policy Framework for the Executive Cadre. There is no evidence that Ms. Lawton's resignation was not voluntary or that CRA ever forced her to resign. There is no indication that Management (including Mr. Quiney, Ms. Williams, Mr. Mahoney, Ms. Gauvin or Mr. Baker) ever discussed or contemplated the possibility that Ms. Lawton's original agreement to resign from the CRA would be rescinded.

On the contrary, from the initial implementation of the pre-retirement agreement, the CRA acted in good faith and made every effort to accommodate Ms. Lawton's career aspirations by promptly approving the extensions to the interchange assignment with CPSA with the understanding that Ms. Lawton would agree to sign an amendment to the pre-retirement flex agreement confirming the new retirement date. Furthermore, the information in the file supports this fact indicating clearly that Management always required that Ms. Lawton sign the amended pre-retirement flex agreement reflecting a new retirement date.

In view of the foregoing, Mrs. Lawton's grievance concerning involuntary cessation of employment is hereby denied.

[not at issue]

Yours sincerely,

"C. Fraser"
Cheryl Fraser

Assistant Commissioner
Human Resources Branch

cc. Darrell Mahoney, Assistant Commissioner, Pacific Region

OTHER LEGAL PROCEEDINGS

[30] On July 8, 2008, Ms. Lawton filed an application for judicial review of the decision of Mr. Mahoney dated June 4, 2008 to terminate her employment with the CRA. This is identified by Court number T-1040-08. By an Order of this Court dated February 17, 2011 Justice Blanchard dismissed those proceedings with costs and provided for an extension of time so that a Notice of Application could be filed for judicial review of the grievance decision of Ms. Fraser. Thus, the present application, T-456-11, was filed. Justice Blanchard gave brief reasons stating that, in awarding costs in the present proceedings, consideration may be given to the fact that much of the preparatory work had been already done in T-1040-08.

[31] Ms. Lawton has also commenced a civil claim in the Supreme Court of British Columbia against the CRA, filed March 18, 2011. The status of that proceeding is unclear from the record before me. Ms. Lawton moved for stay of the present proceedings in view of the British Columbia claim. Justice Simpson of this Court, by Order dated April 28, 2011, dismissed that motion.

THE ISSUES

[32] While the fundamental issue before me is whether the grievance decision should be quashed and returned for redetermination with or without directions, the issues that have been raised by the Applicant in order to determine the matter are:

ISSUE #1: Was the finding respecting undue pressure or duress upon Ms. Lawton when she signed the SAPP #1 agreement correct or within the acceptable limits of reasonableness?

ISSUE #2: Did the person hearing and determining the grievance breach the duty off fairness and natural justice in failing to consider relevant evidence, and improperly considering other evidence?

ISSUE #3: Was the purported termination of Ms. Lawton's employment with CRA lawful?

GENERAL PRINCIPLES AND THE GRIEVANCE STANDARD OF REVIEW

[33] It is useful to begin with an examination of just what is at issue. Fundamentally, Ms. Lawton wishes to have the purported termination of her employment with the CRA set aside and return to that agency for an indeterminate period of time. That was the objective of her grievance. She failed. Before this Court, she is seeking to set aside the decision given on the grievance, hopefully with directions or suggestions that would guide the person hearing the grievance anew to reach a result favourable to Ms. Lawton.

[34] The core issue in the grievance rests upon the application of the relevant facts to the provisions of contract law. First, can SAPP #1 be determined to be void for undue duress? This requires an examination of contract law relevant to undue duress and an examination of the relevant facts to determine if there was undue duress within the meaning of that law.

[35] The second issue is whether SAPP #1 was terminated, or was its term extended, or was it simply invalidated in the circumstances of this case? Again, contract law must be applied to the relevant facts.

[36] Each of these issues involves a mixed question of fact and law.

[37] Turning to the grievance. It bears little resemblance to an adjudicative process. The person hearing the matter is part of the higher executive level at CRA; there is nothing in the record to suggest legal training. There was no presentation of evidence under oath, simply oral and written submissions by Ms. Lawton's Counsel, only. Materials constituting documents from Ms. Lawton's file and internal documents from CRA's files obtained by Ms. Lawton's Counsel after making a formal request for disclosure. There was no active participation by CRA. Essentially, a senior CRA executive was asked to review a decision made by a more senior CRA executive. I view this grievance essentially as part of the CRA administrative process and not as a quasi-judicial or independent review.

[38] What is at stake here is Ms. Lawton's continued right to meaningful employment with CRA. Dawson J (as she then was) of this Court in *Anderson v Canada (Customs and Revenue Agency),* 2003 FCT 667, considered a situation such as this emphasizing that where continued employment was at stake, there was a duty of fairness owed to the individual. She wrote at paragraphs 38 and 42:

> *38 Consideration of these arguments must begin from the well-settled premise that the concept of fairness is variable and contextual, not abstract or absolute. In Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at page 837 and following, the Supreme Court confirmed that the factors which are to*

> *be used in determining what procedural rights the duty of fairness requires in any given set of circumstances are:*
>
> *i) the nature of the decision being made and the process followed in making it;*
>
> *ii) the nature of the statutory scheme, and the terms of the legislation pursuant to which the decision-maker operates;*
>
> *iii) the importance of the decision to the affected individual;*
>
> *iv) the legitimate expectations of the person challenging the decision; and*
>
> *v) the choice of procedure made by the decision-maker, particularly where the legislation leaves to the decision-maker the ability to choose its own procedures.*
>
> . . .
>
> *42 Turning to the third factor, the importance of a decision of this type to an individual is significant on a personal level. However, a decision as to whether one meets the pre-requisites for a position does not impact upon a person to the same extent as a decision where the right to continue in employment is at stake. An applicant generally has no right to fill a new position, and may apply for the same or a different position in the future. When one is found not to meet the relevant pre-requisites what is lost is the right to be assessed against the qualifications for the position, along with all others who meet the pre-requisites for the position.*

[39] Justice O'Keefe of this Court considered circumstances where the grievance was conducted by a person connected with the management of a government agency in *Appleby-Ostroff v Canada (Attorney General)*, 2010 FC 479. He determined, after a review of decisions of the Supreme Court of Canada, that public employment is for the most part viewed as a regular contractual employment relationship and the general law of contract will apply unless specifically superseded by explicit terms in a statute or the agreement, and that a decision at a final grievance level by an internal management person is afforded less deference. He wrote at paragraphs 44 and 52:

> *44 The Supreme Court of Canada has held that public employment is for the most part now viewed as a regular contractual employment relationship and the general law of contract will apply unless specifically superceded by explicit terms in a statute or the agreement (see Dunsmuir above, at paragraph 95, Wells v. Newfoundland, [1999] 3 S.C.R. 199, [1999] S.C.J. No. 50 (QL) at paragraphs 29 and 30.) The applicant employee here, like the applicant in Assh above, is faced with the unilateral assumption of policies into the terms and conditions of their contract of employment, in this case issued by the Treasury Board. This ability to effectively make unilateral changes to the contract of employment is expressly provided for by various statutes I will refer to later. In any event, and for the purposes of this analysis, the applicant and respondent both agree that the relevant policy became part of the terms and conditions of employment, regardless of whether it was the EET policy or the WFAD policy. In my view then, either policy can be seen as a subset of the terms and conditions to the employment contract.*
>
> . . .
>
> *52 In my view, the lack of an independent arbitrator under the final level grievance process is a strong indicator that such decision makers are to be afforded less deference. Persons who decide such grievances do so as part of their managerial functions. They are not selected for their subject matter expertise or legal expertise. Indeed, in the present case the CTA Chair, a manager with specific expertise in transportation, was effectively sitting in judgment of his own underlying decision.*

[40] Therefore, in the circumstances of this case, I find that a review of the grievance decision is to be determined applying the following standards:

- there is a high duty of fairness required
- factual findings are to be determined on a standard of reasonableness with a low level of deference
- determinations of law are to be reviewed on a standard of correctness

ISSUES #1 AND #2

ISSUE #1: Was the finding respecting undue pressure or duress upon Ms. Lawton when she signed the SAPP #1 agreement correct or within the acceptable limits of reasonableness?

ISSUE #2: Did the person hearing and determining the grievance breach the duty off fairness and natural justice in failing to consider relevant evidence, and improperly considering other evidence?

[41] Ms. Lawton's Counsel essentially argued ISSUES #1 and #2 together. I will consider them in the same manner.

[42] First, in respect of the law. Ms. Fraser did not set out the applicable law in her decision; instead, she simply went to a number of factual matters that led her to conclude that Ms. Lawton was not pressured or forced to sign SAPP #1. That is the agreement which included a provision that she was to resign as of October 12, 2007.

[43] The original concept of duress was established in the common law to permit the Court to set aside a contract where a party was compelled to execute it by the application of a threat of physical violence. Equity expanded upon that concept so as to enable a Court to set aside or not require performance of a contract where wrongful pressure had been brought to bear so as to compel a party to sign or enter into the contract. As Professor Fridman wrote in his book, *The Law of Contract in Canada*, 6th ed., Carswell, 2011, at page 306:

> *The essential idea behind the plea of duress is that improper, wrongful pressure has been brought to bear by one person upon another so as to make the latter unwillingly do something against his interest.*

[44] However, as Professor Fridman goes on to write at pages 309-310, citing the Privy Council decision in *Pao On v Lau Yiu Long*, [1979] 3 All ER 65, it is material to inquire whether the person had alternatives and, after signing the contract, what steps did the person take? He wrote:

> *…The test for economic duress, as accepted in that case, was the test laid down by the Privy Council in Pao On v. Lau Yiu Long. Once again the issue related to a threat to break a contract, this time in order to compel or force the other party to sign a guarantee that the price of certain shares, which were the subject-matter of the main transaction, would not be less than a stipulated price on a particular material date (requiring the defendants to indemnify the plaintiffs should the shares fall below such price). The Privy Council held that the defence of duress had not been established. However, while doing so, the Board also: (i) recognized the existence of a plea of economic duress; (ii) set out the nature of the pressure that constituted such duress; and (iii) identified the underlying notion of duress in such instances.*
>
> > *Duress, whatever form it takes, is a coercion of the will so as to vitiate consent…in a contractual situation commercial pressure is not enough. There must be present some factor which could in law be regarded as a coercion of his will so as to vitiate his consent….In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it.*
>
> *These various factors have long been recognized, in England and in Canada, as the essential ingredients of a valid claim for recovery of money paid under duress, or compulsion, in a restitutionary action. They have now been accepted as the true bases for a valid plea of duress involving threats of an economic or commercial kind, without any suggestion of physical harm to a person or his property. As the Privy Council said: "…there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act."*

[45] An application of these principles can be seen in the decision of Himel J of the Ontario Superior Court in *Segal v Qu*, [2001], OJ No 2646 at paragraphs 58 and 59:

> *58 Traditionally, duress at common law requires a "threat of death or serious physical injury": R. v. Mena (1987), 34 C.C.C. (3d) 304 (Ont. C.A.). The threats must be made with the intention of inducing someone to enter into an agreement against his or her will such that the coercion vitiates the consent to the agreement: Byle v. Byle (1990), 65 D.L.R. (4th) 641 (B.C. C.A.). The decision of Sills J. in Clutchey v. Clutchey, [1995] O.J. No. 889 (Gen. Div.) emphasizes coercion broader than physical violence including "coercion, intimidation or the application of illegitimate pressure".*
>
> *59 Undue influence is intended to capture abuses of power that are more subtle than actual duress, but the focus is similarly on the sufficiency of consent. Although some relationships raise a presumption of undue influence, there is no such presumption between husband and wife: Bank of Montreal v. Stuart, [1911] A.C. 120 (P.C.). To establish undue influence in circumstances such as this case, the plaintiff must prove "the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power": Geffen v. Goodman Estate (1991), 81 D.L.R. (4th) 211 (S.C.C.) per Wilson J. The past relationship of the parties must be examined for dominance that continues through the time the contract was signed.*

[46] Thus, in considering undue duress, influence or coercion, the Court must consider the relationship between the parties and circumstances at the time, as well as the subsequent conduct of the person seeking to set aside the contract.

[47] In the present case, Ms. Fraser examined the circumstances at the time of signing. In that regard, Counsel for Ms. Lawton argues several points, among them:

- Ms. Fraser stated that Ms. Lawton had eight days to consider whether to sign, whereas the record does not indicate when Ms. Lawton was presented with the contract
- Ms. Fraser did not have sufficient regard to Ms. Lawton's uncontradicted evidence that she "felt pressured" to sign
- Ms. Fraser ignored Ms. Lawton's assertions that she was advised by Mr. Quiney that she could secure employment elsewhere in the Public Service
- Ms. Fraser ignored evidence as to entries made by Ms. Lawton at the time in her calendar such as an entry that Quiney said "anything can happen in 4 years" and "not to worry"

[48] Filed in the Court proceedings, but not in the grievance proceedings, are affidavits from colleagues of Ms. Lawton stating that she had stated to them that she felt pressured, and recounting certain things that Ms. Lawton was told by Mr. Quiney. I give these affidavits no weight. What Mr. Quiney may have told Ms. Lawton as recounted by those witnesses is hearsay. Whether Ms. Lawton told these witnesses at or about the time that she signed the agreement as to whether she felt pressured was not before the person hearing the grievance.

[49] Ms. Fraser is not obliged to refer to every piece of evidence. She is permitted to give weight to assertions made to her by Ms. Lawton's Counsel. Ms. Lawton did not appear as a witness, nor did she file an affidavit or like evidence. Ms. Fraser was asked to look at the documents and take into account assertions that Ms. Lawton felt pressured. I find that Ms. Fraser's conclusions are reasonable and are conclusions that I, too, would have reached given the record before her. The

record leads to a reasonable conclusion that while Ms. Lawton may have preferred not to sign an agreement including a provision for her resignation as of a certain date, she did so. It was reasonably open to Ms Fraser to find that Ms. Lawton was not subjected to any duress, pressure, coercion or the like, that was undue to the extent that would make the agreement void or voidable.

[50] In her decision, Ms. Fraser also makes findings as to the conduct of Ms. Lawton subsequent to the signing of the agreement. Counsel for Ms. Lawton takes objection to some of what is said, including:

- that Ms. Lawton never filed a harassment complaint, whereas there is nothing on the record one way or the other on this point
- that there was no indication on the record that Ms. Lawton was suffering from an illness that would have impaired her judgment
- that Ms. Lawton waited 2 ½ years before bringing forward allegations that she was pressured to retire; whereas if this was of concern to Ms. Fraser, Ms. Lawton should have been advised of it and given an opportunity to respond

[51] Counsel for Ms. Lawton argues that Ms. Fraser should have put these matters to Ms. Lawton before reaching the conclusions that she did. I agree that there is no basis, one way or the other, for the statements made by Ms. Fraser as to whether or not a harassment claim was filed or whether or not Ms. Lawton suffered an illness. However, I am satisfied that the evidence that is in the grievance record shows that Ms. Lawton took no steps in a timely manner to raise concerns as to whether she was pressured into signing the agreement. Ms. Fraser made a reasonable factual determination on

the evidence before her that Ms. Lawton took no active steps to raise an issue as to undue pressure for some two and a half years.

[52] Counsel for the CRA points out an email from Ms. Lawton to Mr. Quiney dated June 28, 2004 in which Ms. Lawton dismisses the fact that it is *"…approx 3 years until retirement"* without asserting that her agreement to retire was improperly obtained or unenforceable. Ms. Lawton's Counsel argues that this email was relied upon at the grievance in support of an argument made in support of a matter not at issue before me and must be ignored. I will not do so. The email was part of the entire bundle filed by Ms. Lawton at the grievance. Ms. Fraser was entitled to look at all the material. Her mind is not to be artificially compartmentalized.

[53] I find that Ms. Fraser's conclusions correctly follow the applicable law, even though she did not state that law, and that her factual findings are reasonable. There is no basis for setting aside her decision on the basis of Issue #1 or #2.

ISSUE #3

> **ISSUE #3**: Was the purported termination of Ms. Lawton's employment with CRA lawful?

[54] In support of this issue, Ms. Lawton's Counsel essentially argues that:

- the SAPP #1 agreement had come to an end and was supported by the IAA series of agreements under which, in effect, Ms. Lawton was employed by CRA for an indefinite term
- the conduct of CRA, including Mr. Quiney and statements made by Mr. Quiney to Ms. Lawton, effectively waived the termination provision in SAPP #1

[55] Ms. Fraser in her grievance decision found that the IAA agreements did not eliminate Ms. Lawton's obligation to retire, and that only the Commissioner of the CRA could modify the terms of Ms. Lawton's agreement to retire. Ms. Lawton could not unilaterally change the retirement clause.

[56] Ms. Fraser's decision does not set out or review the applicable law as to modification or revision of a contract. Again, I refer to Professor Fridman, supra. Where he wrote at pages 121 – 122 of his textbook citing *Hughes v Metropolitan Railway Co* (1854), 5 HL Cas 185, Lord Cairns in the House of Lords:

> *…Indeed it has been stressed that even to vary an existing contract or to produce a valid waiver of contractual rights which would result in a kind of variation of the original contract between the parties, the common law requires that there be consideration for such new arrangement to be valid and binding.*
>
> *This common-law position has been affected by the equitable doctrine enunciated by Lord Cairns in Hughes. This was stated in these words:*
>
> > *…but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or*

> *with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who might otherwise have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between parties.*
>
> *The effect and function of the doctrine in Hughes was to allow courts some flexibility when dealing with strict legal rights arising out of contract where the conduct of the parties could be interpreted so as to make such flexibility legitimate. The courts gave effect to the language and intentions of the parties, not to some equitable doctrine that could permit a court to distort contractual rights and obligations if it were reasonable to do so. The language of Lord Cairns in Hughes does not suggest that the courts of equity have the power to override the strict common-law requirement of consideration in order to create contractual rights and obligations where none might have existed. Such equitable estoppel, in the words of a Canadian judge, might be "a means of circumventing the common-law requirement of consideration to make a promise binding." However, historically, "the concern has been to avoid going so far as to grant relief in situations where a plaintiff not in a legal relationship with the defendant acts to his detriment upon a promise made by the defendant and then sues the defendant because of the promise."*

[57] The Ontario Supreme Court discussed these principles in *Tudale Explorations Ltd v Bruce, et al* (1978), 20 OR (2d) 593 where Grange J., for the Court, wrote at paragraphs 13 and 14:

> *13 It is my view that the doctrine to be applied whether it be called waiver or promissory estoppel or variation of the contract or simply binding promises, stems from the words of Lord Cairns in Hughes v. Metropolitan R. Co. (1877), 2 App. Cas. 439 at p. 448:*
>
> > *... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results--certain penalties or legal forfeiture--afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the*

> *person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.*
>
> *That principle was accepted by the Supreme Court of Canada in Conwest Exploration Co. Ltd. et al. v. Letain, [1964] S.C.R. 20 at p. 28, 41 D.L.R. (2d) 198 at p. 206, and in numerous other Canadian cases. In Central London Property Trust Ltd. v. High Trees House Ltd., [1947] 1 K.B. 130, Denning, J., traced the principle first to justify an oral variation of a written contract including one required to be in writing to a representation without consideration and to a representation not just of an existing fact but to one as to the future. The essential features are an unambiguous representation which was intended to be acted upon and indeed was acted upon. The present rule is now expressed by Snell in his work Snell's Principles of Equity, 27th ed. (1973), p. 563, as follows:*
>
> > *Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.*
>
> *14 It will be seen that the rule as so stated depends in no way upon consideration or formality and it matters not at all whether the effect of the promise is to create a variation of contract nor whether the original contract was within or without the Statute of Frauds, R.S.O. 1970, c. 444.*

[58] Thus, the law with respect to variance requires that one of the parties has to act in a manner so as to lead the other party to suppose that certain obligations of that party will not be enforced. However, a Court should be cautious in overriding the strict contractual terms of a contract, particularly in circumstances where the affected party has not acted to his or her detriment.

[59] A further consideration here is that one of the parties, the CRA, is not an ordinary person; it is a government agency. This agency has established a "Policy Framework for the Executive/Cadre (EC) Group". With respect to a flex position, the Policy provides that a lateral move does not result in a change of tenure. Such a position (here the transfer of Ms. Lawton to PSHRMAC) would normally be for a period of two to three years, and used for pre-retirement purposes. I repeat the relevant provisions of section 5.2:

> ***Appointments to a Flex Position***
>
> - *An EC may be moved laterally to an unclassified position – i.e. a flex position. This does not result in a change of tenure. The Commissioner must approve all assignments to the flex for EC-2 to EC-6s. The Commissioner is also the sole authority to create EC flex positions.*
>
> - *For an EC-1 flex, the Commissioner must approve the use of a flex. Delegated managers may then sign the letter of offer for the flex agreement.*
>
> - *A flex is always at the substantive level of the employee and may not be used to promote an employee.*
>
> - *A flex position may not be used to give acting pay to an employee who replaces an employee on a flex as the work has not been evaluated and the position is unclassified. As a result, a salary range has not been attributed to the work being performed.*
>
> - *The duration of a flex is normally two (2) to three (3) years. The flex agreement must specify a start and end date as well as a statement with reference to alternate arrangements at the end of the flex (i.e. retirement, lateral move to classified position, or extension of flex).*
>
> - *A flex may also be used for pre-retirement purposes. In these cases, the executive must make a written commitment to retire and the delegated manager must accept the resignation in writing on a specified date.*

- *An employee's consent is normally required for an appointment to a flex except in special situations such as conflict of interest, harassment, or incapacity.*

- *When business needs indicate a need to recruit quickly, a "special recruitment flex" may be used to make an external appointment to an unclassified position. The tenure of a flex appointment may be term or indeterminate and must be specified in the letter of offer.*

[60] The Policy, section 10.4, makes provision as to Resignation:

> ***10.4 Resignation***
>
> - *All resignations from the CRA, including resignation for the purpose of retirement, shall be in writing to the immediate manager. Resignations must be accepted in writing by the immediate manager (or higher) and must specify the date in which the resignation will take place. The resignation shall take effect on the date indicated by the immediate manager.*

[61] Much argument was presented by both Counsel as to whether this Policy had the force of law or could be considered to have the stature of a statute or regulation. I find this to be irrelevant since the Policy, at the least, served to inform each of the parties as to the framework in which they were operating and would have alerted Ms. Lawton, herself a human resources person, to expect more than casual statements or delays before considering that the CRA had, in effect, agreed to rescission or variance in Ms. Lawton's obligations to resign.

[62] I repeat some of the written submissions provided by Ms. Lawton's Counsel at the grievance to indicate her position in this respect:

> *98. The strength of QUINEY'S implied commitment to LAWTON during their 30 March 2004 meeting to facilitate her*

continued employment in the Public Service beyond the flex agreement expiry date is evidenced by his continued support and execution of the CPSA Interchange Assignment Extension Agreements (Tabs 15 & 19) even in the absence of any co-existing executed extensions to her initial flex agreement.

99. *As of 5 May 2008, LAWTON continued to work on CPSA interchange assignments supported by QUINEY notwithstanding the expiry of her FA#1 effective 12 October 2007. Notwithstanding LAWTON's continued refusal to sign 2 flex extensions to her FA#1 which would have committed her to retire on specified dates (Tabs 16 & 21) and EPPD's repeated insistence that such extensions had to be signed, QUINEY's statement to WILLIAMS on 5 May 2008 was telling of his support for LAWTON's continued employment in the public service:*

> *...I think I was very fair and again if she can get an extension from PSC, I would have no trouble extending, but I understand she has run out of work with them? (Tab 25).*

100. *It is to be recalled that QUINEY earlier advised WILLIAMS on 10 September 2007 that he fully supported LAWTON'S CPSA assignment extensions since the Public Service "ha[d] invested in Cathy for many years, and this is a very cost-effective use of that investment. She is fulfilling a valued role with [CPSA], and we are doing this for the broader public service" (Tab 20).*

101. *The evidence confirms that the CRA had the opportunity to extend LAWTON'S interchange assignment with the CPSA past the date upon which LAWTON was terminated at no cost to itself. MAHONEY's refusal to do so and to otherwise honour QUINEY'S commitment to facilitate LAWTON's continued employment in the Public Service is at best, a repudiation of this implied commitment upon which LAWTON reluctantly executed the FA #1 and at worst, a demonstration of mala fide CRA conduct.*

102. *The Agency's assertion that it had "acted in good faith and ha[d] made every effort to accommodate [LAWTON] (Tabs 30 & 35) is one that is clearly unsupported by the evidence and is without foundation. To the contrary, its treatment of LAWTON culminating in her dismissal was unlawful. The*

> *actions of the CRA in general, and QUINEY'S conduct in particular, evidence pre-meditation in the removal of LAWTON from her substantive position and ultimate dismissal. Such conduct constituted nothing less than an abuse of authority resulting in LAWTON's having signed the FA #1 under duress. The document is invalid on the basis of unconscionability and should be so viewed by the CRA.*

[63] Ms. Lawton's Counsel, relying on an authorization of the Commissioner entitled "Delegation of Human Resources Authority", argued that the Commissioner had delegated to persons such as Mr. Quiney the power to accept resignations from persons such as Ms. Lawton; and, by inference, that Mr. Quiney had the power to extend or waive an obligation to resign. I reject this argument; a delegation of power such as this is not to be construed more broadly than what is precisely stated here; *acceptance* of a resignation. This does not extend to variance or rewriting of an agreement to resign.

[64] There was, in fact, no document signed by the parties which varied or waived the provisions of the SAPP #1 agreement. There was conduct; the various extensions of the IAA agreements - particularly #5 and #6 - to which CRA was a signatory, which extended Ms. Lawton's secondment beyond the term provided for Ms. Lawton in the SAPP #1 agreement. There was the refusal of Ms. Lawton to sign the SAPP #2 agreement, which provided for Ms. Lawton's resignation at a later time than provided in the SAPP #1 agreement. This points to acquiescence by CRA to an extension of the date of resignation by Ms. Lawton to the latest date provided in the IAA #6 agreement dated June 28, 2008. To that extent, I reject the submissions by Counsel for CRA that the payment of Ms. Lawton's salary to June 28, 2008, and calculation of her pension based on that date, was either "illegal" or simply a "good deal". The SAPP #1 agreement had been waived to the extent that the

applicable resignation date was moved to June 28, 2008, but the obligation to resign had not been waived.

[65] I agree with the approach taken by Justice Russell of the British Columbia Supreme Court in *Green-Davies v Canada (Attorney General),* 2005 BCSC 1321 where she wrote at paragraphs 21 to 26:

> *21 I will begin with the question of whether Ms. Green-Davies gained indeterminate status with the IRB since it appears important to consider the merits of Ms. Green-Davies' case whether or not I find it to be one in which this Court should decline to exercise its residual jurisdiction.*
>
> *22 The fact that Ms. Green-Davies performed the duties of the Regional Human Resources Manager for 5.5 years may have led her to believe she had an entitlement to the position but the facts are clear that at all times while she performed those duties, she was covered by the terms of the Secondment Agreement and several extensions. She remained an employee of the Public Service of Canada, seconded from the DVA.*
>
> *23 She could not gain indeterminate status in her seconded position with the IRB by a kind of "adverse occupation".*
>
> *24 As well, the Secondment Agreement and following extensions are clear that during her secondment Ms. Green Davies remains attached to the DVA in the sense that she would return to the DVA at the end of her secondment "unless other arrangements have been agreed by all concerned".*
>
> *25 Ms. Green-Davies argues that there were "other arrangements" agreed to by her immediate boss, when he promised her the job, and by the Regional Director and that she accepted their offer to become an indeterminate employee of the IRB as Regional Personnel Manager.*
>
> *26 Even assuming the promise was made to Ms. Green-Davies and accepted by her, and the process to appoint her undertaken, the difficulty with this position is that the promise itself is unenforceable in light of the failure to complete the comprehensive appointment procedures contained in the relevant Federal Statutes and*

> *Regulations containing the terms and conditions of her employment and which include the PSEA. Unless the appointment is formalized according to the procedures set out in the PSEA, there is no appointment. Here see Farrell v. Canada (2002), 225 F.T.R. 239, 2002 FCT 1271 which states at paras. 9 and 10 on p. 241:*
>
> > *[9] It is well settled that an individual cannot become an employee of Her Majesty in Right of Canada without a specific appointment made in accord with procedures established in accord with these statutes ...*
> >
> > *[10] The principle that an appointment to employment in the public service is required to be made in accord with statutory authority is of long standing. Employment as a public servant does not arise by other means [and] it may not be inferred from the facts alleged, unless those include facts alleging that the authorized process has been followed.*

[66] I agree with the result expressed by Ms. Fraser in her grievance decision that SAPP #1 could only be rescinded or modified by mutual agreement, which did not exist here (except to the extent indicated above to extend the term to June 28, 2008) as only one party, Ms. Lawton, wished to change the retirement clause, the CSA did not.

CONCLUSIONS AND COSTS

[67] As a result, I find that while there have been certain discrepancies in the factual findings in the grievance decision, the ultimate factual findings were reasonable except to extend the termination date to June 28, 2008. As a practical matter, CRA, through its Counsel, has assured the Court that CRA is acting as if the date has been so extended. I also find that while the decision did not expressly consider legal principles, it acted in accordance with such principles.

[68] Given the fact that the CRA has already been awarded its initial costs by Justice Blanchard's Order of February 17, 2011 in T-1040-08 previously referred to, I will award costs in this proceeding to the CRA fixed in the sum of $1,500.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The Respondent is entitled to costs fixed in the sum of $1,500.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CATHERINE LAWTON v CANADA REVENUE AGENCY
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APPEARANCES:

Ronald M. Snyder	FOR THE APPLICANT
Valerie J. Anderson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling Lafleur Henderson LLP Ottawa, ON	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT