Federal Court  Cour fédérale

Date: 20130204

Docket: T-815-12

Citation: 2013 FC 122

Ottawa, Ontario, February 4, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

DAVID SALIE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Five months after the Government of Canada paid David Salie the equivalent of 26 weeks' salary in lieu of notice, it mistakenly paid him the same amount for a second time. Mr. Salie now seeks to challenge the respondent's efforts to recover the overpayment, asserting that he was treated unfairly in the process and that the respondent should be precluded from recovering the money by operation of the doctrine of promissory estoppel.

[2] The respondent argues that this Court does not have jurisdiction to deal with this matter, asserting that Mr. Salie should have challenged the Government's actions through the grievance

process provided for in the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 [*PSLRA* or the Act]. The respondent further submits that Mr. Salie's application is premature, as a final decision had not been made with respect to the recovery of the overpayment at the time he commenced his application for judicial review. Finally, the respondent contends that the elements necessary to create a promissory estoppel have not been established in this case.

[3] For the reasons that follow, I have concluded that this Court does indeed have jurisdiction to deal with this matter, and that Mr. Salie's application should not be dismissed as premature. However, I have also concluded that Mr. Salie has not established that a clear and unambiguous promise was made to him by the Government of Canada, or that its conduct led him to reasonably conclude that such a promise had been made. I have also not been persuaded that Mr. Salie was treated unfairly in the process. As a result, his application for judicial review will be dismissed.

Background

[4] Because the outcome of this case is so dependant on the precise sequence of events that transpired between the parties, it is necessary to review the facts in some detail.

[5] Mr. Salie was employed by the Government of Canada for some 30 years. The last position he held was as a "Special Advisor, Government Operations Sector, Government Operations" at the EX-01 level at Treasury Board.

[6] On November 24, 2009, Mr. Salie was advised in writing that his position had been declared "surplus to requirements due to the discontinuance of a function" effective December 31, 2009. The

letter provided Mr. Salie with two options: he could either look for work elsewhere in the Public Service, or leave the core public administration in exchange for an unspecified cash and non-cash settlement. In this regard, Mr. Salie was referred to the Treasury Board's *Directive on Career Transition for Executives* ("the *Transition Directive*") for details regarding his options.

[7] On November 30, 2009, Mr. Salie advised his employer that he had chosen the second option, and it was subsequently agreed that January 4, 2010, would be his last day of work.

[8] In the meantime, on December 9, 2009, Mr. Salie was provided a detailed description of his entitlements upon the termination of his employment, which included a lump sum payment equal to 26 weeks' salary in lieu of notice, 28 weeks' salary as "earned severance pay", and other benefits.

[9] On December 31, 2009, Mr. Salie was sent a Settlement Agreement which included, amongst other things, reference to the lump sum payments for salary in lieu of notice and severance pay, as well as his other entitlements. The document also outlined certain restrictions on Mr. Salie's post-Public Service employment, and contained what the respondent describes as a "standard" confidentiality clause.

[10] In particular, the document advised Mr. Salie that he would have to repay the salary in lieu of notice (or a *pro rata* portion of it) if he became employed in any organization within the "core public administration" as defined in the *Financial Administration Act*, R.S.C. 1985, c. F-11 [*FAA*] during the notice period.

[11] Mr. Salie was further advised that if he were to return to the core public administration on a contract basis, he would be subject to a $5,000 ceiling for the period covered by the lump sum payments, and would further be subject to the Treasury Board's "fee abatement policy" on contracts for a further 12 months after the expiry of the notice period.

[12] The Settlement Agreement had a space for Mr. Salie to signify his acceptance of the agreement. Mr. Salie did not sign the document at that time.

[13] Mr. Salie says that when he made his decision to leave the Public Service, he was planning to perform consulting work for the core public administration. He says that he developed this plan based upon his understanding of his post-employment restrictions. Although he made no inquiries in this regard, he says that he understood that he would be subject to a one-year prohibition on working with organizations with which he had dealt closely as a public servant, and that he would also be subject to a one-year fee abatement policy.

[14] Mr. Salie's post-employment plan was allegedly developed before he received the Settlement Agreement on December 31, 2009, and he stresses that until that point he had not been made aware of any other material restrictions on his ability to earn a living.

[15] Mr. Salie says that based upon his understanding of the limitations on his post-employment activities, he took a number of steps to prepare to begin a consulting business.

[16] Although he received the Settlement Agreement on December 31, 2009, Mr. Salie did not advise his employer of any concerns that he may have had with respect to the terms of the agreement, including either the confidentiality clause or the post-employment restrictions referred to therein prior to his leaving his job on January 4, 2010.

[17] Mr. Salie acknowledges that on January 25, 2010, he was paid the sum of $39,180.30, which was the equivalent of 26 weeks of his net wages, as pay in lieu of notice as provided for in the Settlement Agreement. At this point, Mr. Salie had not signed the Settlement Agreement, nor had he expressed any desire to amend it.

[18] Due to an internal coding error within the Treasury Board, its human resources officials were not aware that Mr. Salie had received the January 25, 2010 payment.

[19] The payment of salary in lieu of notice is ordinarily triggered by the receipt of a signed settlement agreement from the affected employee, and it is not entirely clear why the January 25, 2010 payment was made to Mr. Salie without a signed agreement.

[20] Given that Mr. Salie had not signed the Settlement Agreement, a Treasury Board human resources manager named Isabelle Grenier assumed that no such payment had been made. Consequently, she contacted Mr. Salie by letter dated January 29, 2010, requesting that he sign and return the Agreement. The letter goes on to state that "[i]n order to proceed with your lump-sum payment and other conditions stipulated in the letter, we require your signature".

[21] Mr. Salie responded by letter dated February 9, 2010, enclosing an amended Settlement Agreement, in which he had modified the post-employment restrictions and eliminated the confidentiality agreement, amongst other things. Mr. Salie's covering letter made no mention of the fact that he had already received the lump-sum payment referred to in Ms. Grenier's January 29, 2010, letter.

[22] Ms. Grenier responded shortly thereafter, advising Mr. Salie that Treasury Board could not accept Mr. Salie's proposed amendments because they were in violation of the *Transition Directive*. Mr. Salie was once again advised that in order for his payment to be processed, Treasury Board had to receive a Settlement Agreement signed in its original form. Mr. Salie did not respond to this letter.

[23] In May of 2010, Mr. Salie was contacted by Kelly Mbokeli, a senior human resources advisor at the Treasury Board. While there is a disagreement between Mr. Mbokeli and Mr. Salie as to whether they spoke once or twice, they agree that Mr. Mbokeli reiterated the request that Mr. Salie return a signed copy of the un-amended Settlement Agreement, and that Mr. Salie advised Mr. Mbokeli that he was not prepared to sign the document in its original form without receiving additional consideration.

[24] Mr. Salie says that he proposed that the Treasury Board pay him an additional six to eight months' pay in exchange for him signing the Settlement Agreement in its original form, and that Mr. Mbokeli told him that "he'd see what he could do". Mr. Salie considers this conversation to

have been a further "negotiation", and has submitted what he says are contemporaneous hand-written notes to corroborate his version of events.

[25] The respondent has submitted an affidavit from Mr. Mbokeli, who denies having entered into any kind of negotiation with Mr. Salie or having told Mr. Salie that "he'd see what he could do". Mr. Mbokeli has provided his own contemporaneous notes of the discussion to corroborate his version of events. These notes simply record Mr. Salie's refusal to sign the Settlement Agreement.

[26] According to Mr. Mbokeli's affidavit, there was no discussion regarding any supplementary payments being made to Mr. Salie in exchange for his signing the Settlement Agreement. Mr. Mbokeli says that if Mr. Salie had tried to negotiate with him, he would have referred Mr. Salie to his supervisor, Ms. Grenier, as Mr. Mbokeli did not have the authority to negotiate changes to severance arrangements.

[27] Mr. Mbokeli's supervisor has also confirmed that no authorization was ever sought or approved for any additional payments to be made to Mr. Salie, beyond those contemplated by the original Settlement Agreement.

[28] Mr. Mbokeli also notes in his affidavit that Mr. Salie never mentioned having already received the payment for salary in lieu of notice contemplated by the original Settlement Agreement, and Mr. Salie does not dispute this.

[29] Following his discussion with Mr. Salie on May 27, 2010, Mr. Mbokeli sent emails to his superiors, including Ms. Grenier, advising them that it appeared that they had reached an impasse

with Mr. Salie, and asking how he should proceed. Ms. Grenier says in her affidavit that it was decided to go ahead and pay Mr. Salie in accordance with the original Settlement Agreement, even though he had refused to sign the Agreement.

[30] Ms. Grenier further deposes that payments are not ordinarily made in the absence of a signed agreement, and that because of the coding error that occurred in recording the January payment, she was not aware that a payment had already been made to Mr. Salie when the second payment to Mr. Salie was authorized in June of 2010.

[31] On June 25, 2010, Mr. Salie received a letter from Ms. Grenier advising him that the Treasury Board Compensation and Benefits unit would be contacting him within a few days in order to finalize the payment of the monies owing with respect to his settlement package. The letter further advises Mr. Salie that the Treasury Board could not accept his proposed amendments because they were "in violation of policy", and that as a result, the payment would be issued "based upon the conditions originally included" in the Settlement Agreement.

[32] On June 22, 2010, Mr. Salie was paid the equivalent of a further 26 weeks' salary in lieu of notice.

[33] Ms. Grenier asserts that this payment would not have been made to Mr. Salie had she been aware that he had already received payment for his salary in lieu of notice in January. Mr. Salie himself now acknowledges that the June payment by Treasury Board was the result of a mistake on its part.

[34] However, Mr. Salie notes that the amount that he received in June of 2010 was consistent with the offer that he says he had made with Mr. Mbokeli in May of 2010, namely that he would sign the Settlement Agreement in its original form with its post-employment restrictions and confidentiality provisions, if he was paid an additional six to eight months' salary in lieu of notice. As a result, he says that when he received the June payment, he understood it to mean that his counter-offer had been accepted by the Treasury Board.

[35] Mr. Salie also says that as a result of the payment having been made by Treasury Board in June of 2010, he understood that he was now bound by the post-employment restrictions contained in the original Settlement Agreement. According to Mr. Salie, he then changed his post-employment plans as a result. In particular, Mr. Salie says that he stopped seeking out consulting opportunities, and he declined a potential consulting contract in the spring of 2011 in order to comply with these restrictions.

[36] In late 2011, Treasury Board discovered its error. Mr. Salie was contacted by telephone in February of 2012 to advise him of the overpayment. This was followed by a letter to Mr. Salie dated March 26, 2012 ("the First Notice of Overpayment"), in which he was given notice that he had been overpaid by $58,402.33 due to the duplicate payments in January and June of 2010.

[37] The First Notice of Overpayment advised Mr. Salie that the overpayment constituted a debt to the Crown that had to be reimbursed pursuant to subsection 155(3) of the *FAA*. The letter added that failing reimbursement, the debt would be recovered from Mr. Salie's pension benefits.

[38] The final paragraph of the letter stated that Mr. Salie could contact the writer for additional information, or to discuss a recovery agreement. Mr. Salie was also told that if he did not respond to the letter within 30 days, further action would be initiated to recover the debt.

[39] It is this letter that is the subject matter of Mr. Salie's application for judicial review.

[40] Mr. Salie responded with a letter dated April 18, 2012, in which he explained his understanding of events and stated his position that the June 2010 payment was made pursuant to a renegotiated settlement. Mr. Salie also stated that he considered the March 26, 2012, letter to be "a preliminary notice of a possible decision", and that he hoped his explanation clarified matters.

[41] By letter dated June 8, 2012 ("the Second Notice of Overpayment"), the Treasury Board advised Mr. Salie that inquiries had been made into his claim that the June 2010 payment had been made as part of a renegotiated settlement. The letter further advised that it had since been ascertained that the payment had in fact been made as a result of an administrative error, and constituted an overpayment that Mr. Salie was obliged to repay.

[42] The Second Notice of Overpayment also advised Mr. Salie of his right to seek independent legal advice, including advice with respect to his grievance rights under the *PSLRA*. Mr. Salie has not filed a grievance in relation to this matter, nor has he sought judicial review with respect to the Second Notice of Overpayment.

Issues

[43] This application for judicial review raises a number of different issues.

[44] The first issue is whether this Court has jurisdiction to entertain the application, or whether Mr. Salie was obliged to seek redress through the grievance process.

[45] The second issue is whether the First Notice of Overpayment amounted to a final decision, and whether Mr. Salie's application for judicial review should be dismissed as premature.

[46] The third issue is whether Mr. Salie was denied procedural fairness in the process surrounding the assessment of the overpayment.

[47] The final issue is whether the actions of the Treasury Board are such that it should be estopped from seeking recovery of the overpayment made to Mr. Salie in June of 2010.

[48] Each of these issues will be considered in turn.

Does this Court have Jurisdiction to Entertain Mr. Salie's Application?

[49] The respondent argues that Mr. Salie is precluded from seeking judicial review in this Court until such time as he has exhausted the grievance process available to him under the *PSLRA*.

[50] Citing the decision of the Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146, at para. 1, the respondent submits that the *PSLRA* constitutes a "complete

code" for the resolution of employment-related issues such as those at issue in this case. Having failed to exhaust the grievance process, Mr. Salie is barred from bringing an application for judicial review.

[51] *Vaughan* was decided under the provisions of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 [*PSSRA*]. Since the decision in *Vaughan*, Parliament has enacted the *PSLRA*, which explicitly ousts the jurisdiction of this Court in relation to matters that are otherwise subject to the grievance process.

[52] Specifically, section 236 of the *PSLRA* provides in part that:

236. (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	**236.** (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.
[…]	[…]

[53] The parties agree that if Mr. Salie had access to the grievance process under the *PSLRA*, he would be barred from seeking judicial review in this Court by virtue of section 236. Where they disagree is on the question of whether Mr. Salie in fact had access to the grievance process with respect to the matter in dispute in this case, given that he was no longer employed in the Public Service when the overpayment issue arose.

[54] The respondent advised the Court that it does not take the position that the dispute relates to the termination of Mr. Salie's employment. Rather it says that this case involves an employment-related dispute arising out of the Public Service's *Directive on Terms and Conditions of Employment*. This *Directive*, which governed the terms and conditions of Mr. Salie's employment, provides that overpayments can be recovered from Public Service employees.

[55] Because the dispute relates to the terms and conditions of Mr. Salie's employment, the respondent says that it can be grieved in accordance with subsection 208(1) of the *PSLRA* which provides, in part, that:

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document

employer, that deals with terms and conditions of employment, […]	de l'employeur concernant les conditions d'emploi, […]
(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	*b*) par suite de tout fait portant atteinte à ses conditions d'emploi.
[…]	[…]

[56] However, in considering whether the grievance process was in fact available to Mr. Salie in this case, regard must also be had to subsection 206(2) of the *PSLRA*, the introductory section in Part 2 of the Act, which provides that:

206. (2) Every reference in this Part to an "employee" includes a former employee for the purposes of any provisions of this Part respecting grievances with respect to	**206.** (2) Les dispositions de la présente partie relatives aux griefs s'appliquent par ailleurs aux anciens fonctionnaires en ce qui concerne :
(*a*) any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(1)(*c*), (*d*) or (*e*) of the *Financial Administration Act*;	*a*) les mesures disciplinaires portant suspension, ou les licenciements, visés aux alinéas 12(1)*c*), *d*) ou*e*) de la *Loi sur la gestion des finances publiques*;

[57] Mr. Salie contends that his concern was not with a "disciplinary action resulting in suspension, or any termination of employment", with the result that, as a former employee, he did not come within the provisions of Part 2 of the *PSLRA* for the purposes of filing a grievance.

[58] I have reviewed the jurisprudence cited by the respondent which holds that former employees are entitled to grieve certain matters relating to their employment: see *The Queen v. Lavoie*, [1978] 1 FC 778 (FCA), at para 10; *Gloin v. Canada (Attorney General)*, [1978] 2 FC 307 (FCA), at para 8; *PIPSC v. Solicitor General*, [1979] CPSSRB No. 6 at para 28 [*Cardinal*]; *Hunt v. Treasury Board (Transport Canada)*, [1997] CPSSRB No. 84 at para 6.

[59] However, a review of these decisions reveals that in each case, the dispute either related to the rejection of an individual while on probation (in one case, for potentially disciplinary reasons) or related to matters that arose while the individual was still employed in the Public Service. None of these cases involved a dispute that arose long after the individual ceased to be a government employee.

[60] For example, in the *Lavoie* case, Mr. Lavoie sought to grieve what the employer called a rejection on probation, and what he alleged was in fact a disciplinary dismissal. The Federal Court of Appeal held that "the introductory words of section 90(1) of the *Public Service Staff Relations Act* [the predecessor to subsection 208(1) of the current *PSLRA*] must be read as including any person who feels himself to be aggrieved as an 'employee'". The Court explained that were it otherwise, "a person who, while an 'employee' had a grievance - e.g. in respect of classification or salary - would be deprived of the right to grieve by a termination of employment - e.g. by a lay-off." According to the Federal Court of Appeal, "[i]t would take very clear words to convince me that this result could have been intended": at para. 10.

[61] Thus, not only did *Lavoie* involve what was alleged to have been a disciplinary dismissal, the Court's comments cited above appear to preserve the right of former employees to grieve where the matter giving rise to the grievance arose during the course of the individual's employment, where the individual was 'aggrieved as an employee'.

[62] Similarly, in *Gloin*, the Federal Court of Appeal held that former employees could grieve their rejection on probation, even where it was not alleged that the rejection constituted disguised discipline, given that the individuals were nevertheless 'aggrieved as employees': at para. 8.

[63] *Cardinal* confirmed the right of a former Public Servant to continue with a grievance relating to his classification which had started while he was a government employee, the classification of an employee being clearly a matter that arises in the course of the individual's employment. Similarly, in *Hunt*, the former employee was permitted to grieve the denial of disability benefits and the application of certain policies to him. All of the events that gave rise to the grievances occurred while Mr. Hunt was a Public Servant.

[64] The above cases were all decided under the provisions of the *PSSRA*, whereas *Glowinski v. Canada (Treasury Board)*, 2006 FC 78, [2006] F.C.J. No. 99 [*Glowinski* #1]; *Glowinski v. Treasury Board (Department of Industry)*, 2007 PSLRB 91, [2007] CPSLRB No 69 [*Glowinski* #2] were decided under the new *PSLRA*. In *Glowinski* #1, this Court concluded that a former Public Servant had an adequate alternate remedy through the grievance process where the grievance related to the rate at which the individual was paid *while he was a government employee*.

[65] *Kidd v. National Research Council of Canada*, 2010 PSLRB 73, [2010] CPSLRB No 69 was also decided under the new *PSLRA*. In *Kidd*, the Public Service Labour Relations Board found that there was "no meaningful difference" between the operative provisions of the *PSSRA* and the *PSLRA*, with the result that a former employee was permitted to grieve the denial of leave requests - denials that occurred while Ms. Kidd was still a government employee: at paras. 29-33.

[66] In this case, Mr. Salie does not seek to challenge the termination of his employment or any matters that occurred during the course of his employment. Nor does he take issue with any of the terms and conditions that governed his employment, including the Public Service's *Directive on Terms and Conditions of Employment*.

[67] What Mr. Salie contests is the application of the government overpayment policy to him, some two and a half years after he ceased to be a Public Servant, in an effort to recover monies paid to him in error some six months after he left his employment. None of these events occurred while Mr. Salie was employed by the Federal Government, nor has he been "aggrieved as an employee".

[68] Consequently, I am satisfied that Mr. Salie did not have access to the grievance process established under the *PSLRA* when Treasury Board took steps in 2012 to recover the overpayment. As a result, this Court has jurisdiction to deal with this matter.

Is the Application Premature?

[69] The respondent also submits that this application should be dismissed on the basis that it is premature. According to the respondent, Mr. Salie's application for judicial review relates to the

March 26, 2012 Notice of Overpayment, which merely advised him of the overpayment and was an interim step in the process. The respondent submits that the final decision with respect to the overpayment was not taken until two months later, when the Second Notice of Overpayment was sent to Mr. Salie.

[70] The March 26, 2012 letter states categorically that there had been an overpayment made to Mr. Salie in the amount of $58,402.33, that the overpayment had been made in error, that it was a debt owed to the Crown, and that it had to be repaid. Mr. Salie was informed as to how the payment could be effected, and was further advised that if he did not repay the money, it could be recovered through his pension benefits.

[71] This letter concluded by stating: "Do not hesitate to contact the undersigned for additional information or if you wish to discuss a recovery agreement. In the event that we do not hear from you within 30 days of this letter, further action will be initiated for the recovery of this debt."

[72] There is nothing in the March 26, 2012 letter to indicate that it was merely an interim step in the process. The letter made it perfectly clear that there had been an overpayment made to Mr. Salie and that he had to pay the money back. The only issue left outstanding by the First Notice of Overpayment was when and how Mr. Salie was going to make the payment. In these circumstances, it was entirely reasonable for Mr. Salie to have commenced this application for judicial review. The fact that Mr. Salie himself stated that he understood the March 26, 2012 letter to be "a preliminary notice of a possible decision" in his response to the letter does not take away from the unqualified nature of the letter itself.

[73] Mr. Salie also could not have known that he would be receiving a second Notice of Overpayment, or when any such letter would be received. Given the 30 day time limit for commencing judicial review in this Court, it was entirely reasonable for him to have brought this application when he did.

[74] Moreover, even if I were to accept the respondent's argument that the March 26, 2012 letter was merely an interim step in the process, I would nevertheless exercise my discretion to decide the substantive issues raised by Mr. Salie. Both parties fully addressed the merits of the case in great detail, including the implications of both the First and Second Notices of Overpayment. No prejudice to the respondent has been alleged in this regard, and none is evident.

Was Mr. Salie Treated Unfairly in the Process?

[75] Mr. Salie asserts that he was treated unfairly by the respondent as he was only given six days to make a decision following receipt of the Options Letter on November 24, 2009. He also asserts that it was unfair of the respondent to offer him what Mr. Salie understood to be the minimal amount to which he was entitled on the termination of his employment.

[76] I would first observe that Mr. Salie was ultimately given until the end of December to make his choice between the options presented to him. The more fundamental difficulty with these submissions is that this is not an action for wrongful dismissal, and neither the amount originally offered to Mr. Salie as salary in lieu of notice nor the time period given to him to select one of the

options presented to him in late 2009 has anything to do with the overpayment at issue in this application.

[77] Mr. Salie also asserts that he was given virtually no opportunity to be heard before the respondent concluded that an overpayment had been made, nor was he given an opportunity to raise his estoppel argument. Mr. Salie further asserts that the respondent erroneously determined that the alleged overpayment amounted to $58,402.33, when in fact the amount that he had received on account of pay in lieu of notice was $39,180.30 (although I note that the pay stub in the Record records that amount paid as $40,881.63). This error would have been avoided, Mr. Salie says, had he been included in the process.

[78] Where an issue of procedural fairness arises, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43.

[79] Having regard to all of the circumstances of this case, I am satisfied that the duty of fairness has been satisfied in this matter. While I have concluded in the previous section of these reasons that it was reasonable for Mr. Salie to view the First Notice of Overpayment as a final decision for the purposes of commencing an application for judicial review, he was nevertheless given an opportunity to make submissions prior to any action being taken with respect to the collection of the overpayment. By letter dated April 18, 2012, Mr. Salie provided detailed submissions as to why he should not be required to pay the money back based upon his argument that the payment had been

made pursuant to a renegotiated agreement. These submissions were considered by the respondent, investigated, and ultimately rejected.

[80] Mr. Salie made no mention of his promissory estoppel argument in his April 18, 2012 submissions, and no reason has been provided as to why he could not have raised the issue then, in the alternative, if it was a matter that he wanted the respondent to take into account.

[81] It is true that Mr. Salie was not given an opportunity to be heard before the respondent concluded that an inadvertent overpayment had occurred. However, Mr. Salie does not now dispute that this was in fact the case.

[82] Insofar as the disagreement with respect to the amount of the overpayment is concerned, it is noteworthy that the submissions that Mr. Salie made in response to the First Notice of Overpayment make no reference to this discrepancy, although he had the opportunity to bring it to the respondent's attention if it was a matter of concern. It appears that $58,402.33 is the gross amount of the payment made on Mr. Salie's account, and that the lesser amount reflects the monies that Mr. Salie actually received, net of taxes. Presumably if Mr. Salie is required to repay the $58,402.33, he can seek a refund for the taxes paid in this regard.

Should the Respondent be Estopped from Seeking Repayment of the Overpayment?

[83] This then brings us to the central issue in this case, which is Mr. Salie's claim that the circumstances surrounding the June, 2010 payment are such that the respondent should be estopped from seeking repayment of the overpayment.

[84] I would note that because Mr. Salie did not raise this argument in his April, 2012 submissions to Treasury Board, the respondent did not decide the issue of promissory estoppel in determining that recovery of the overpayment should go ahead. As a consequence, there are no reasons from the respondent on this issue to which this Court could defer.

[85] Mr. Salie says that at the time that he received the second payment in June of 2010, the parties had been engaged in negotiations which had commenced with the telephone discussion between Mr. Salie and Mr. Mbokeli on May 27, 2010. In the course of this discussion, Mr. Salie had offered to sign the Settlement Agreement in its original form, in exchange for an additional lump sum payment equal to between six and eight months' salary.

[86] Given the amount, timing and method of the June, 2010, payment, Mr. Salie says that he reasonably believed that the payment of the money was the result of his negotiation with Mr. Mbokeli. He further asserts that the reasonableness of his belief in this regard was confirmed by the respondent's failure to notify him that an overpayment had occurred until some 21 months later.

[87] Mr. Salie submits that he changed his position to his detriment by declining a consulting contract in the Spring of 2011, based upon his belief that he was bound by the post-employment restrictions set out in the Settlement Agreement.

[88] The parties agree as to the elements that must be established in order to give rise to a promissory estoppel. As the Supreme Court of Canada observed in *Maracle v. Travellers Indemnity*

Co. of Canada, [1991] 2 S.C.R. 50, [1991] SCJ No. 43 at para. 13, "[t]he party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position": at para. 13.

[89] In *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, 146 D.L.R. (3d) 577, at p. 647, the Supreme Court had previously established that for an estoppel to arise, the promise must be unambiguous.

[90] Similarly, in *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, [1984] 1 FC 1081, 52 N.R. 196 (FCA), the Federal Court of Appeal held that "[w]hile the doctrine of promissory estoppel is far from clear, it seems established that there cannot be such an estoppel in the absence of a promise, by words or by conduct, the effect of which is clear and unambiguous…": at para. 8.

[91] Despite the very capable submissions of his counsel, Mr. Salie has not persuaded me that there was a clear and unambiguous promise made by the respondent, either through words or by conduct, that could have reasonably led him to believe that the June, 2010 payment was made as a supplementary payment resulting from a further negotiated agreement with respect to Mr. Salie's separation from the Public Service.

[92] Mr. Salie acknowledges that on January 25, 2010, he was paid the sum of $39,180.30 as pay in lieu of notice, as provided for in the Settlement Agreement given to him in December of 2009. He further acknowledges that he received this payment even though he had not signed the Agreement. In my view, at this point, Mr. Salie should have been aware that something was not right.

[93] The Settlement Agreement document made it clear that the signing of the Agreement was a necessary pre-condition to payment. Moreover, as an executive with many years' experience in the Public Service, Mr. Salie would or should have known that he would not normally receive his settlement monies without first signing the Agreement.

[94] Mr. Salie subsequently received a letter dated January 29, 2010, from Ms. Grenier requesting that he sign and return the Settlement Agreement. This letter advised Mr. Salie that his signature on the document was required in order for him to be paid. Given that payment had already been received by Mr. Salie, this letter should also have been a further indicator to him that something was awry in relation to his severance package. However, Mr. Salie did not seek clarification of the matter, and his February 9, 2010 response made no mention of the fact that he had already received the lump-sum payment referred to in Ms. Grenier's letter.

[95] Mr. Salie then received a second letter from Ms. Grenier in late February of 2010, telling him once again that the Treasury Board had to receive a Settlement Agreement signed in its original form from him in order for him to be paid his settlement monies. Once again, this should have put

Mr. Salie on notice that there was some confusion on the part of the respondent. However, rather than seek clarification of the matter, Mr. Salie simply did not respond to this letter.

[96] Even if I accept Mr. Salie's version of his May, 2010 discussions with Mr. Mbokeli, the statement attributed to Mr. Mbokeli that he would see what he could do was not a clear or unequivocal commitment on the part of the respondent to a particular result.

[97] Moreover, the June 25, 2010 letter from Ms. Grenier to Mr. Salie advising him that he would be contacted within a few days to finalize the payment of the monies owing with respect to his settlement package makes no mention of any amendment being made to the Settlement Agreement to reflect a negotiated increase in the benefits payable to Mr. Salie. Similarly, Mr. Salie was never asked to sign any form of release prior to receiving the June 22, 2010 payment of a further 26 weeks' salary in lieu of notice.

[98] Once again, these events should have alerted an experienced Public Service executive such as Mr. Salie that something was amiss.

[99] In these circumstances, Mr. Salie has not established that there was a clear and unambiguous promise on the part of the respondent, either by words or by conduct, that could have reasonably led him to believe that the monies paid to him in June of 2010 were the result of a renegotiated settlement. As a consequence, he has also not established that the respondent should now be estopped from recovering what Mr. Salie now accepts was an overpayment made in error.

[100] Before concluding, a brief comment should also be made with respect to Mr. Salie's detrimental reliance argument. Mr. Salie says that he turned down a consulting contract with a government department in the spring of 2011 - well over a year after he left the Public Service - in the belief that he was still governed by post-employment restrictions.

[101] However, when Mr. Salie was cross-examined on his affidavit, he stated that he did not know whether the post-employment restrictions were to last six months, 12 months or 18 months. Rather than trying to clarify his status with his former employer, Mr. Salie says that he simply turned down the consulting contract. This was not a reasonable course of conduct.

[102] I agree with the respondent that Mr. Salie's actions suggest that he was either not interested in the contract, in which case there was no detrimental reliance, or that he was reluctant to risk rocking the boat with Treasury Board by asking questions about his status. This latter alternative would in turn reasonably lead to an inference that Mr. Salie knew, or at least suspected, that there had been an overpayment.

Conclusion

[103] For these reasons, Mr. Salie's application for judicial review is dismissed. In accordance with the agreement of the parties, the respondent shall have his costs fixed in the amount of $7,216.27.

Misnomer

[104] The respondent submits that the President of the Treasury Board was improperly named as respondent in this matter, citing Rule 303 (2) of the *Federal Courts Rules*, SOR/98-106. Given that the President did not make the decision at issue and is not directly affected, the correct respondent is the Attorney General of Canada. Mr. Salie does not object to this request, and the style of cause will be amended accordingly.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed, with costs to the respondent in the amount of $7,216.27; and

2. The style of cause is amended to substitute the Attorney General of Canada as the respondent in place of the President of the Treasury Board.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-815-12
STYLE OF CAUSE:	DAVID SALIE v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 15, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
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