



ESTOPPEL

Estoppel - a doctrine of fairness

Estoppel is a very important and often misunderstood doctrine of fairness. Even where the collective agreement or an employer policy clearly does not establish an entitlement, a separate question may arise as to whether “fairness” would prevent its strict application.

A frequently cited description of the doctrine of estoppel was provided by Lord Denning in the famous English case of Combe v Combe¹.

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

Three conditions

Arbitrators seem to agree that a party can be “estopped” if three conditions are satisfied.

1. One of the parties, by its words or conduct (which may include silence, inaction or past practice), makes a promise or assurance (“**representation by words or conduct**”);
2. This promise or assurance is intended to affect the legal relationship between the parties, and the party to whom the promise or assurance was made has taken the other party at its word and acted upon it (“**acted on it**”);
3. If the strict rights under the collective agreement or policy were to apply, the party acting on the promise or assurance would suffer hardship as a result, then the other party cannot go back on its word and act as if the promise or assurance had not been made (“**detrimental reliance**”).

Some principles

1. The burden of proof that estoppel applies rests with a grievor.
2. “Detrimental reliance” may be the most difficult burden to meet.

For example, in the case of a salary overpayment, it has been found that “spending the money” does not of itself establish detrimental reliance².

However, if an employee undertakes a substantial financial obligation based on the promise of the higher salary, detrimental reliance may be successfully argued and then the employer would be estopped from recovering the overpayment and lowering the salary³.

In cases involving overpayment, an employee must be able to demonstrate that s/he made significant financial commitments, based on the reliance on the employer's representations regarding the amount(s), and that the payment of such amount(s) would continue. In addition, clear and convincing evidence would be required, including financial documents demonstrating that any recovery would result in a significant hardship.

3. Another feature of estoppel is that it is normally of limited duration. Where the representation is in the form of a practice, a notice of reversion to the strict rights will break the past practice and bring the estoppel to an end.

An example of this might be that the collective agreement entitles the Alliance to a hearing with a particular employer representative, e.g., the Chief Executive Officer (CEO), but the practice has been to meet with the Director of Human Resources. The union would be estopped from insisting on its strict rights to compel the CEO to hear a grievance until a notice be served advising the employer that in future we will be claiming our strict rights under the collective agreement.

Depending on the situation, a notice of reversion might have to wait until the expiry of the collective agreement.

4. Estoppel can also operate for a future period of time.

An example of this might be that the employer advises the union at the bargaining table that it has no plans to introduce a particular change, and, as a result, the union agrees to drop the demand relating to that change. Or, a long-standing practice has resulted in no effort on the part of the union to change the collective agreement to incorporate the practice. In both situations, the employer might be estopped from making any change until the current collective agreement expires. This would provide the union the opportunity to address the changes at the bargaining table.

Despite some inconsistency in its application by arbitrators, estoppel has resulted in a positive outcome for many PSAC members and it is important that stewards and other workplace representatives have an understanding of the doctrine. Below are summaries of a number of cases.

Based on communications with the employer, **Domenico Foglia**⁴ concluded he was in travel status during the early period of his relocation to Ottawa. After the employer decided the Relocation Directive and not the Travel Directive applied, notice of recovery was served and monies owed were deducted from Domenico's pay. The adjudicator found that the grievor relied upon clear representation made by the employer that he was in travel status and that he suffered detriment as a result. Estoppel applied and the employer was ordered to reimburse his expenses in accordance with the Travel Directive. (1993)

Douglas Oates⁵ had approximately four weeks of banked vacation leave credits from several previous years. The employer had allowed employees automatic carryover from year to year. The employer introduced a policy requiring employees to liquidate all but 5 days of banked credits and then unilaterally scheduled vacation leave for the grievor - leave he had not requested and did not want to take. The adjudicator found that the employer's actions did not contravene the collective agreement but the employer was estopped from introducing the new policy until the union had the opportunity to address the matter through negotiations. The employer was also directed to restore to the grievor all the leave in excess of that year's annual entitlement that had been scheduled without his consent. (1994)

The employer and the Alliance had accepted an interpretation in place for 25 years concerning the rounding-up of vacation leave entitlements. Without consulting the union, the employer decided to put in place a policy applying round-up to the annual entitlement remaining at the end of the fiscal year as opposed to the year-end balance. The adjudicator concluded that the collective agreement contained no ambiguity in limiting round-up to the annual entitlement. The adjudicator added that even if his interpretation was wrong, estoppel would apply in order to provide the union the opportunity to deal with it at the bargaining table. (**James MacDonald, Robert Belanger and Richard Douillette**⁶) (1995)

Wendell Costain⁷ and three others had their positions reclassified effective April 1, 1987. An employer representative had advised them that the reclassification would be effective April 1, 1986. As a result, they did not file classification grievances. The adjudicator agreed with the union that the grievors relied on clear and unambiguous representation made by the employer, to their detriment. Estoppel applied. (1989)

Denise Defoy⁸, a foreign service employee, was recalled from a foreign posting early and was granted an advance of \$4,500 on a “bridging loan” from the employer so she could purchase a new home. The Foreign Service Directive did not entitle her to the loan, and the employer sought recovery. The evidence indicated she could not have afforded the new home, and would not have purchased it, but for the advance on the loan. The adjudicator found that the employer was estopped from recouping the amount of the loan. (1994)

When **Anna Molbak**³ was promoted, she was quoted and paid a new salary. One year later, the employer discovered its error, lowered her salary by \$1,586 and commenced recovery action on the overpayment of \$1,598.78. Just prior to being advised of the overpayment, she had been approved for a mortgage to purchase a condominium. She had calculated her mortgage payments based on the salary she had been receiving. When advised on the overpayment, she attempted to cancel the condominium purchase but could not do so without incurring considerable costs. She had taken in roommates but those arrangements proved unsatisfactory. The rollback in salary had a severe effect on her finances and lifestyle and she was considering taking a second job. Detrimental reliance was demonstrated and the grievance succeeded. The deducted monies were restored and the employer ordered to make an annual “equalization payment” of \$1,586 until such time as her annual salary attained the level of the salary she had been receiving. (1995)

Ken Brierley⁹ occupied a full-time term position which was converted to a seasonal auxiliary position. He was advised that the conversion amounted to a lay-off and in accordance with past practice, he would receive severance benefits as a lay-off. However, he only received benefits at 50% of what was promised (resignation severance benefits). He grieved and the employer decided he was entitled to no severance benefits and recovered the severance payment. The arbitrator found there was no notice served to break past practice and that the grievor was entitled to severance pay. (1996)

Debbie Hansen (96-611) accepted a two year term position with the Government of the Northwest Territories upon the assurances of the Superintendent the position would become indeterminate. There were ongoing assurances until seventeen months later when she was involved in a verbal altercation with the Superintendent. Two weeks later, she was advised the term would not be extended past the two years. The arbitrator found that the principle of estoppel applied. (1998)

Until October 1st, 1997, Sydney Airport was owned and operated by Transport Canada. Prior to transferring control and operation of the airport to the Sydney Airport Authority, employees received an offer of employment for an indefinite period, guaranteed for a minimum of two years. When the employees were told their expertise was needed to run the airport, **Barry Mercer**¹¹ accepted the offers of employment with the new authority. On November 25th, 1998, he was handed a termination letter which stated that his termination was immediate and he should leave the workplace. The arbitrator found that estoppel did not nullify the termination; it simply suspended it until the expiration of the guaranteed two year period.

- ¹ Combe v Combe, [1951] 1 ALL E.R. 767 at p. 770
- ² Kirk Ellement, PSSRB File 166-2-27688
- ³ Anna Molbak, PSSRB File 166-2-26472
- ⁴ Domenico Foglia, PSSRB File 166-2-23755
- ⁵ Douglas Oates, PSSRB File 166-2-25880
- ⁶ James MacDonald, Robert Belanger and Richard Douillette, PSSRB Files 166-2-26406, 26435 and 26440
- ⁷ Wendell Costain, PSSRB File 166-2-18508 to 18511
- ⁸ Denise Defoy, PSSRB File 166-2-25506
- ⁹ Ken Brierley, 266-YG-82
- ¹⁰ The Minister of Personnel for the Government of the Northwest Territories and Union of Northern Workers (Grievance of Debbie Hansen; 96-611) (Tom Jolliffe)
- ¹¹ Public Service Alliance of Canada and Sydney Airport Authority (Grievances of Barry Mercer) March 8, 2000 (Bruce Outhouse)