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Citation: 2002 PSSRB 53



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**GAIL ELAINE MYLES**

Grievor

and

**TREASURY BOARD**  
**(Human Resources Development Canada)**

Employer

**Before:** Guy Giguère, Deputy Chairperson

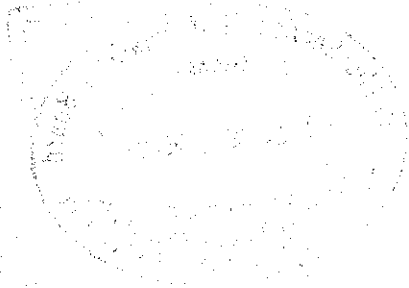
**For the Grievor:** John H. Yach, Counsel

**For the Employer:** Renée Roy, Counsel



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Heard at Ottawa, Ontario,  
March 27, 2002.



## DECISION

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[1] On December 15, 1999, Gail Elaine Myles filed two grievances. In one of those grievances (Board file 166-2-30744), Ms. Myles grieved that she had been denied an indeterminate appointment to the position of Manager, Financial Services and Procurement, a position she had been filling on an acting basis. In the other grievance (Board file 166-2-30745), Ms. Myles grieved that, as a result of the employer's action, she had been denied career development opportunities. She explained in her grievance that she felt intimidated by her supervisor's actions and behaviour, which resulted in her absence from work due to stress.

[2] On March 26, 2002, the grievor's counsel, Mr. Yach, wrote to the Board to confirm that the parties had agreed that the adjudicator would be asked to decide at the hearing the narrow issue of whether an adjudicator appointed under the *Public Service Staff Relations Act (PSSRA)* has jurisdiction to adjudicate on these matters given that a settlement agreement had been reached between the parties prior to the original grievances being referred to adjudication. He also wrote that the parties had agreed not to call any witnesses and an Agreed Statement of Facts would be provided to the Board with supporting documents so as to provide the adjudicator with the background necessary to determine this narrow issue.

[3] At the outset of the hearing, both counsel informed me that there would be no witnesses called to testify at the hearing and that they would rely solely on an Agreed Statement of Facts that they provided to me.

[4] In summary, the Agreed Statement of Facts explains that:

- the grievances filed by Ms. Myles on December 15, 1999 were settled prior to being referred to adjudication. The settlement is reflected in a Memorandum of Agreement (MOA) dated February 3, 2000.
- In the MOA, Ms. Myles agreed to withdraw her grievances and by letter dated February 9, 2000, she did withdraw the grievances.
- Subsequent thereto, Ms. Myles, through her bargaining agent representative, alleged that the employer had not fulfilled some of its obligations under the MOA. The employer denied those allegations.

- Ms. Myles then requested that the grievances be referred to the final level of the grievance procedure. At the final level, the employer replied by stating that the grievances had been settled and withdrawn. The employer also alleged that it had satisfied all of its obligations under the terms of the MOA.
- The parties agree that the MOA is a binding agreement.

### Arguments

#### For the Employer

[5] Ms. Roy submitted that an adjudicator cannot take jurisdiction over these grievances since the matter was resolved through a MOA and the grievor withdrew her grievances thereafter. She also submitted that an adjudicator cannot take jurisdiction over a grievance in respect of the application of the terms of a MOA since such a grievance would not meet the criteria set out in subsection 92(1) of the *PSSRA*. Ms. Myles is claiming that she can grieve that the employer did not fulfil the terms of the MOA. However, this claim cannot fall within the grievances before the Board as this should be the subject of a new grievance. It is, therefore, the employer's position that the Board is no longer seized with Ms. Myles' grievances, nor has an adjudicator jurisdiction to hear any dispute arising therefrom. The employer is asking that the matter be dismissed without a hearing.

[6] In support of her arguments, Ms. Roy relied on the following decisions: *MacDonald v. Canada*, [1998] F.C.J. No. 1562; [2000] F.C.J. No. 1902; [2001] S.C.C.A. No. 30; *Skandharajah* 2000 PSSRB 114 (166-2-24127); *Bhatia* (Board file 166-2-17829); *Deom* (Board file 148-2-107) and *Fox* 2001 PSSRB 130 (166-2-30414).

#### For the Grievor

[7] Mr. Yach submitted that two questions have to be answered in regard to the grievances filed by Ms. Myles. The first question is whether or not an adjudicator has jurisdiction to hear the original grievances. To take jurisdiction, an adjudicator would have to first find that there is no agreement. However, the position of the grievor is that there is an agreement and she is not asking that the original grievances be argued in their entirety. There is an agreement and, when the grievor found out that the employer was not following through with the terms of the agreement, she requested

that the grievances be referred to the final level of the grievance procedure and later to adjudication. This brings us to the second question that must be answered and that is whether or not an adjudicator has jurisdiction to decide that the employer has not met some of its obligations under the MOA.

[8] In view of the expertise of the Board in labour relations, the grievor would prefer to have an adjudicator deal with the alleged non-compliance of the employer on its obligation under the MOA.

[9] Mr. Yach conceded that under subsection 92(1) of the *PSSRA*, as recognized by jurisprudence, an adjudicator does not have jurisdiction to adjudicate whether or not the terms of a settlement have been fulfilled. The employer has submitted that Ms. Myles cannot grieve the terms of the MOA under the present grievances and therefore she would have to file a new grievance. However, in *Fox (supra)*, Chairperson Yvon Tarte found that even such a new grievance could not go further than the last level of the grievance procedure, as it is not adjudicable under subsection 92(1) of the *PSSRA*.

[10] Mr. Yach concluded by saying that the parties will eventually end up in another forum and the grievor would like the adjudicator to make a clear decision so that the employer cannot make a contrary argument on jurisdictional issues.

#### Reasons for Decision

[11] The first question to be determined is whether an adjudicator appointed under the *PSSRA* has jurisdiction to hear these grievances.

[12] In the Agreed Statement of Facts, the parties in the instant case recognize that the MOA is a binding agreement that settled the grievances prior to their being referred to adjudication.

[13] As I explained in *Skandharajah (supra)*, when there is a valid and binding settlement agreement, the agreement constitutes a complete bar to the grievor's proceeding to adjudication. As Justice Gibson of the Federal Court, Trial Division, found in *MacDonald (supra)*, when a public servant enters into a binding settlement agreement with the employer, he loses his right to pursue the matter at adjudication under the *PSSRA*.

[14] The grievance procedure is designed to provide employers and employees with a method for the orderly processing of grievances, where they may attempt to settle their disputes at various stages and at various levels. Therefore, if through discussions between themselves the parties conclude a binding settlement agreement, they should not be allowed to have second thoughts about the matter. Otherwise, the employer or the employee will never know whether or not an agreement has been reached and this will permanently damage good labour relations and jeopardize any attempts at settlement.

[15] For all these reasons, I find that an adjudicator is without jurisdiction to hear these grievances.

[16] I will answer the second question as submitted by Mr. Yach, even if it is hypothetical, as I understand that the reason these grievances were referred to adjudication is to ensure that if an adjudicator is without jurisdiction, this is clearly established and a contrary argument cannot be made by the employer before another tribunal.

[17] Does an adjudicator have jurisdiction to adjudicate a grievance concerning the failure of one party to fulfil its obligation under the terms of a binding settlement agreement?

[18] Subsection 92(1) of the *PSSRA* establishes what types of grievances can be referred to adjudication. It stipulates as follows:

*92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*

- (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
- (b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*

*(i) disciplinary action resulting in suspension or a financial penalty, or*

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication

[19] Taking into consideration the evidence before me, a grievance concerning the alleged failure by the employer to fulfil its obligation under the terms of a binding settlement agreement does not come under the terms of subsection 92(1) of the PSSRA.

[20] As found by then Vice-Chairperson J.M. Cantin, Q.C. in *Deom (supra)*, neither the Board nor an adjudicator is a competent tribunal to decide whether the terms of a settlement have been fulfilled. Even if the grievor had filed a new grievance complaining that the employer did not respect the terms of the MOA, an adjudicator would be without jurisdiction to hear such a grievance for the reasons explained in *Fox (supra)* by Chairperson Tarte.

[21] For all these reasons, the grievances are dismissed.

**G. Giguère,  
Deputy Chairperson**

OTTAWA, May 17, 2002

