**Date:** 20050720

**File:** 166-2-30919

**Citation:** 2005 PSLRB 73

*Public Service Staff Relations Act*

Before an adjudicator

BETWEEN

**LIONEL CASTONGUAY**

Grievor

and

**TREASURY BOARD**
**(Canada Border Services Agency)**

Employer

Indexed as
*Castonguay v. Treasury Board (Canada Border Services Agency)*

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*.

## REASONS FOR DECISION

***Before:*** D.R. Quigley, adjudicator

***For the Grievor:*** Himself

***For the Employer:*** Neil McGraw, counsel

Heard at Toronto, Ontario,
June 14, 2005.

Grievance referred to adjudication

[1] By letter dated August 20, 2001, the grievor filed the following grievance:

> […]
>
> *With reference to your letter dated August 16, 2001 please be advised that I object to my demotion from the PM5 job level.*
>
> *I am requesting representation in this matter for full redress of the financial penalty imposed upon me.*
>
> *In this regard the firm….will represent me and I hereby authorize Canada Customs and Revenue Agency to release information to the aforesaid law firm.*
>
> *Mr. Jeff Andrew, a partner in the firm, will specifically be attending to my grievance.*
>
> *I remain available to discuss the issue with you one on one and without prejudice.*
>
> […]

[2] Although initially the employer did not consider the letter to be a grievance, it subsequently accepted it as a proper grievance. By letter dated October 23, 2001, Sean Gaudet, Legal Counsel, Public Law and Central Agencies, Department of Justice, replied to the grievor's counsel as follows:

> […]
>
> *This is in response to your letters dated August 31, 2001 addressed to* […] *of the CCRA and Mr. Castonguay's letter dated August 20, 2001, also addressed to* […].
>
> *Judging from your client's reference to adjudication dated October 9, 2001, it appears that Mr. Castonguay intended his August 20, 2001 letter to be his written grievance under the grievance provisions of the collective agreement. While the CCRA did not interpret Mr. Castonguay's letter to be a grievance, it is prepared to treat it as such at this time and this letter constitutes the CCRA's response to the grievance.*
>
> *The CCRA denies that Mr. Castonguay has been demoted, and denies that there has been any financial penalty imposed upon him. Mr. Castonguay's grievance is accordingly denied.*
>
> […]

[3] This grievance was referred to adjudication on October 10, 2001, and a hearing was scheduled for March 2002. Prior to the commencement of the hearing, however, the parties were able to reach a settlement through mediation. A "Memorandum of Settlement" (MOS) dated March 19, 2001, was signed by both parties. (It should be noted that both parties are in agreement that the MOS should have been dated March 19, 2002, and not March 19, 2001.)

[4] At the outset, it should be noted that, at the time when Mr. Castonguay presented his grievance, he was an employee of the Canada Customs and Revenue Agency, which was a separate employer. As a result of the government reorganization announced on December 12, 2003, the grievor's position was moved from the Canada Customs and Revenue Agency to the Canada Border Services Agency, for which the Treasury Board is the employer. Accordingly, my decision in this matter applies to the grievor and the Treasury Board.

[5] Although the contents of a MOS are usually confidential, in this case the parties agreed that they could be referred to in my decision. However, counsel for the employer requested that the identity of any person mentioned therein be protected, and I agreed with counsel's request.

[6] At the beginning of this hearing, counsel for the employer raised an objection to my jurisdiction to hear this matter on the basis that the grievance was settled. Counsel argued that the grievor accepted a full and final settlement of his grievance on August 19, 2002, and signed a MOS to that effect.

[7] Counsel argued that based on previous case law, unless the grievor could adduce evidence to the effect that he was the victim of a forced settlement or that it was signed under duress, I lacked jurisdiction to hear this matter.

[8] I advised the parties that I would hear argument with respect to the question of jurisdiction only and would render a preliminary ruling.

[9] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act,* S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, I continue to be seized with this reference to adjudication, which must be dealt with in accordance with the

provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

Summary of the arguments

[10] The grievor read out loud a written statement that he had prepared, which is reproduced, in part, below. A copy of the statement in its entirety is on file at the Board.

> 1. *No withdrawal of grievance*
>
> - *…I did not withdraw or sign off this grievance. In the two PSSRB cases,* Myles *and* Bedok*, referred to in Mr. McGraw's June 6th letter the grievors had withdrawn or signed off their grievances.*
>
> - *The Public Service Labour Relations Board has several times from November 2002 asked me whether the agreement has been finalized and whether the Board could close its file. Each time I responded this was not possible until a CCRA Independent Third Party Review process was complete. From my perspective the review is still not complete as the Employer did not follow the spirit and intent of the Reviewer's Nov. 16, 2003 decision. The Employer has also denied me third party review of my allegation of arbitrariness as provided for in an Independent Third Party Review Memorandum of Settlement on June 12, 2002.*
>
> 2. *Settlement was conditional and not final and binding*
>
> - *…in the March 19, 2002 MOS preamble there is the wording "on the following basis". This means that the settlement was conditional on the employer fulfilling the enumerated terms.*
>
> - *The CCRA employer's own internal review process resulted in a decision that the employer had been arbitrary and had not complied with the March 2002 MOS…CCRA Reviewer, Tanja Wacyk's November 16, 2003 decision that the employer did not comply with the March 2002 PSSRB MOS.*
>
> - *…in accordance with the MOS the Employer was estopped from negative harmful comment or action that might prevent me from formal indeterminate PM5 appointment.*
>
> […]

3. *An Agreement is a meeting of minds*

- *… Consequently without any mutual undertaking of this very material term the MOS is not enforceable. In* Corbin on Contracts *Arthur Linton Corbin states that "vagueness of expression, indefiniteness and uncertainty as to any of the essential terms has often been held to prevent the creation of an enforceable contract". Perhaps the March 2002 MOS was done too hurriedly. One indication the MOS drafting was rushed is that even the year it was signed is in error. This MOS fails as a consequence of generalities subject to divergent interpretations by the parties.*

4. *Board Jurisdiction of MOS Enforcement*

[…]

- *… Employer representatives should not be allowed to escape bargainer's remorse of the March 2002 MOS by negating it later at their Independent Third Party Review process. By again making false allegations against me in the ITPR, not accepting that my work slate is clean, it has negated the MOS. As the PSLRB cannot adjust the MOS to reflect its true purpose the MOS is null and void.*

- *…the employer reps have never met with me or conferred with me after March 19, 2002 to review any term it considered ambiguous…*

5. *Indeterminate Position*

- *...at the time of the MOS signing the employer representatives held that my position was only acting with the final organisation and allocation of positions yet to be determined.*

[…]

- *I had every expectation that in due course I would be formally appointed indeterminately…*

- *In June 2002 I finally obtained a copy of the Southern Ontario CV&S organisation chart that showed an effective date of April 1, 2000. It shows the organisation's staffing positions including the one I was occupying. There is no acting beside it….*

- *In July 2002 I was informed that my position number was 30114636, an indeterminate position – effective April 1, 2000….*

- *There is a critical error in the MOS of referring to the position as acting. 30114636 was not an acting position in that it was temporary or there was no qualified person occupying the position. In other words substantively and procedurally my position was 30114636 – indeterminate and with due process and just cause requirements for removal from the position.*

[…]

- *…this position was also excluded from the collective bargaining agent. I had been excluded at the time of removal from the position. PSAC stated it would not represent me as a consequence of exclusion.*

[…]

*6. <u>Request to the Board</u>*

- *…please hear the original grievance. I want unconditional exoneration. I have a right to have the stigma removed that I am an harasser of employees and one who does not follow Employer policies and practices. I intend seeking reinstatement back to the date of removal from the position with full compensation.*

- *If the Board refuses to hear my grievance I am faced with proceeding with a judicial review application or an action under the* Crown Liability Act *against individuals who knowingly and with malice have made false injurious statements about me….*

- *…learned Supreme Court Justices, Bora Laskin and Bertha Wilson, have publicly orated that there are too many cases before the Federal Court and the Supreme Court that should have been resolved at the administrative level. I would add that mediation is an even more preferred process for resolution of grievances. I have always been open to mediation but one with a foundation of integrity and trust.*

[11] Counsel for the employer referred to the opening paragraph of the MOS (Exhibit E-1), which states: "The Grievor and the Employer agree to the full and final settlement of the Grievor's grievance dated August 20, 2001…" Mr. McGraw argued that the case law is quite clear: once a final settlement is entered into by both parties, and it was not signed under duress, an adjudicator does not have jurisdiction to intervene or hear the original grievance. Mr. McGraw also noted that the grievor was represented at the mediation session by counsel.

[12] Counsel further argued that if the grievor is unsatisfied or now disagrees with the terms of the MOS, I cannot amend any terms of settlement reached following mediation.

[13] As well, Mr. McGraw stated that previous case law has confirmed that once the parties have turned their minds to a settlement and it has been duly signed, the settlement sets aside the grievance. In other words, the fact that the grievor has not officially withdrawn his grievance is irrelevant.

[14] In support of his arguments, counsel referred me to the following decisions: *Bedok v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 163; *Vogan v. Public Service Alliance of Canada*, 2004 PSSRB 159; *Carignan v. Treasury Board (Veterans Affairs Canada)*, 2003 PSSRB 58; *Lindor v. Treasury Board (Solicitor General – Correctional Service Canada)*, 2003 PSSRB 10; *Myles v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 53; *Skandharajah v. Treasury Board (Employment and Immigration Canada)*, 2000 PSSRB 114; *MacDonald v. Canada,* [1998] F.C.J. No. 1562; *Bhatia v. Treasury Board (Public Works Canada)*, PSSRB File No. 166-2-17829 (1989) (QL); and *Treasury Board v. Déom*, PSSRB File No. 148-2-107 (1985) (QL).

Reasons

[15] The issue that I must determine in this preliminary decision on jurisdiction is whether or not the signed MOS is binding on both parties.

[16] For the reasons stated below, I have concluded that the MOS is a valid and binding agreement. Therefore, I am without jurisdiction to hear this matter.

[17] The intention of the parties at the time of signing of a MOS is critical in the assessment of whether or not a settlement is binding (see *MacDonald v. Canada* (*supra*) and *Bedok v. Treasury Board (Department of Human Resources Development)* (*supra*)). The issue of intention can take different forms: unconscionability, duress and lack of representation are three examples. The grievor does not assert that the mutual assent which is necessary to the formation of a contract is lacking by reason of the unconscionability of the MOS. In *Stephenson v. Hilti (Can.) Ltd.*, (1989), 29 C.C.E.L. 80 (N.S.S.C.T.D.) Hallett, J. summarized the law as follows at page 87:

> *A transaction may be set aside as being unconscionable if the evidence shows the following:*
>
> *(1) that there is an inequality of bargaining position arising out of ignorance, need or distress of the weaker party;*
>
> *(2) the stronger party has unconscientiously used a position of power to achieve an advantage, and*
>
> *(3) the agreement reached is substantially unfair to the weaker party or, as expressed in the* Harry v. Kreutziger *case, it is sufficiently divergent from community standards of commercial morality that it should be set aside.*

[18] Also, at no time during this hearing did the grievor assert that he was forced to sign the MOS or that he did so under duress or that he was without effective representation at the mediation session.

[19] In his grievance, the grievor objected to his alleged demotion from a PM-05 position and requested "representation…for full redress of the financial penalty imposed upon […]."

[20] In the MOS, it clearly states that both parties agree to:

> *…the full and final settlement of the Grievor's grievance dated August 20, 2001 which is the subject of this reference to adjudication on the following basis:*
>
> > *(1) The grievor shall be reinstated to his acting PM-5 position effective August 17, 2001 until the conclusion of his most recent acting PM-5 appointment on October 31, 2001 and shall receive all compensation and all other entitlements which would have accrued to him during that period.*
>
> […]

[21] This issue is not in dispute.

[22] In the second paragraph of the MOS, it states:

> *The letter from* […] *to the grievor dated August 16, 2001 attached as Schedule "A", is hereby removed from his file and shall not be relied upon by the Employer for any purpose. For greater certainty, the Employer agrees that it shall not make reference to or rely upon the matters referred to in the letter including the harassment grievance nor in future.*

[23] The grievor believes that the employer has not respected this portion of the MOS and thereby it is null and void and I should entertain his grievance *de novo*.

[24] As has been previously determined, an adjudicator appointed under the *PSSRA* has no jurisdiction to hear a grievance once the parties have signed a binding agreement following mediation, whether or not the terms of that settlement have been fulfilled (see *Myles v. Treasury Board (Human Resources Development Canada)* (*supra*) and *Carignan v. Treasury Board (Veterans Affairs Canada)* (*supra*)).

[25] Paragraph 4 of the MOS states:

> *This settlement agreement shall be without prejudice or precedent to the parties and without admission of liability. For greater certainty this settlement agreement is without prejudice or precedent to the grievor's Independent Third Party Review application and any remedy which may flow from that.*

[26] The wording in this paragraph is very clear. By signing the MOS, the grievor agreed that it was without prejudice or precedent to his ITPR application. The grievor has argued that the employer has ignored the results of the ITPR report. Whether it has or not, I would note that the findings of an ITPR and the enforcement of those findings are not within the jurisdiction of an adjudicator.

[27] The grievor has raised the issue of intention by arguing that the MOS was too vague to be enforceable. Whether or not an MOS can be struck down by an adjudicator for vagueness is perhaps a debatable issue, but in any event, the grievor has not established that the MOS was vague. He has only alleged that the terms are "generalities subject to divergent interpretations" without advancing any examples. Indeed, the only example he raises in support of his allegation is not an example of vagueness but of inattention. The fact that an incorrect date was attributed to the MOS does not invalidate it for vagueness or uncertainty as to the essential terms.

[28] The grievor has argued that an adjudicator retains jurisdiction over his grievance given the fact that he has not withdrawn his grievance from adjudication. Although the grievor states that he "did not withdraw or sign off this grievance" (emphasis added), it is clear, from the evidence placed before me by the parties, that the MOS was indeed signed by the grievor, although he never did formally advise the

Board that the grievance was now withdrawn. It is this fact on which the grievor relies to argue that his grievance is still a "live" one.

[29] Whether or not the grievor withdrew his grievance is of no consequence to the issue of jurisdiction. An adjudicator considered the effect of settlement agreements on its jurisdiction in *Lindor v. Treasury Board (Solicitor General – Correctional Service Canada)* (*supra*), and held at paragraph 16 that "it has long been established by this Board that a valid settlement agreement is a complete bar to its jurisdiction: (*Bhatia* Board file 166-2-17829), *Skandharajah* (*supra*) and *Déom* (Board file 148-2-107)." Adjudicators have, on several occasions, explained that it is in the interests of certainty in labour relations that legitimate settlement agreements be final and binding on all parties.

[30] The grievor asserts that his case is different from the decisions in Bedok v. Treasury Board (Department of Human Resources Development) (supra) and Myles v. Treasury Board (Human Resources Development Canada) (supra) in that he has not formally withdrawn his grievance. The issue in Bedok (supra), as enunciated by the adjudicator at paragraph 52, was whether or not the signed MOU was binding on the parties. Having found that the agreement was in fact a valid and binding agreement, the adjudicator held that he was without jurisdiction on the grievance. The adjudicator held, at paragraph 59, that the critical issue in assessing whether a settlement is valid is the intention of the parties at the time of signing. Finally, the adjudicator went on to say in paragraph 62, that in any event, repudiation of a contract is only justified if consent was not obtained because of the improper persuasive conduct of the employer. Once the adjudicator had determined that the agreement was signed voluntarily, the employer was entitled to treat the matter as closed. The issue of the withdrawal of the grievance itself following the signature of the MOU is not even alluded to in the decision portion of the case and forms no part of the decision. In other words, the fact that the MOU contained language which could be interpreted as constituting a withdrawal of the grievance was not held against him and used by the employer to support the notion that his grievance could no longer be adjudicated. Similarly, a failure to withdraw the grievance does not automatically mean that an adjudicator retains jurisdiction over a grievance.

[31] With respect to the decision in *Myles* (*supra*), the grievances in issue were settled prior to their purported referral to adjudication and further to the MOU, the

grievor had withdrawn her grievances. However, this factor played no role in the decision and as in the *Bedok* (*supra*) decision, the adjudicator based his decision on the validity of the agreement itself and the fact that a valid agreement "constitutes a complete bar to the grievor's proceeding to adjudication." The adjudicator then went on to outline the reason behind this principle at paragraph 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.*

[32] This principle holds true regardless of whether or not the grievor or bargaining agent formally withdraws the grievance. Further, the withdrawal of the grievance is implicit in the use of such wording in an MOU as "this constitutes a full and final settlement of the grievance in issue" or such similar language, as was the case here.

[33] The terms of the settlement in the case before me are clear and unequivocal and are not contingent on the grievor withdrawing his grievance. Indeed, the MOU begins by clearly stating that the settlement is in full and final satisfaction of the grievance.

[34] The facts in *Lindor v. Treasury Board (Solicitor General – Correctional Service Canada)*, are similar to the facts in this case. In that case, the grievor had received correspondence from the Board similar to the correspondence which Mr. Castonguay received but refused to withdraw his grievance despite acknowledging the fact that the agreement was valid. In addition, however, he also agreed that the employer had met the terms of the settlement. Again, the adjudicator looked at whether or not a valid and binding settlement existed and once again stated that such a settlement was a complete bar to the adjudicator's jurisdiction. It is the existence of a settlement which is the crucial factor in the determination of the adjudicator's jurisdiction and not whether or not the grievor or bargaining agent has expressly withdrawn the grievance.

[35] The grievor, in his argument on the issue of the withdrawal of his grievance, goes on to argue that since the employer had not fulfilled the spirit and intent of the ITPR's review, he had not withdrawn his grievance. As I have decided earlier, if the

grievor intends to argue that he kept his grievance alive in order to maintain an adjudicator's jurisdiction to enforce the ITPR report, such a jurisdiction does not exist. If, however, he offers this information as an explanation for why he did not withdraw his grievance, while it is logical and understandable, it does nothing to confer jurisdiction on an adjudicator.

[36] As well, I have concluded that there were no conditional agreement clauses in the MOS in the event that one or both parties did not fulfil their obligations.

[37] For all of the above reasons, I make the following order:

*(The Order appears on the next page.)*

Order

[38] I conclude that the MOS is a full and final settlement of the grievance and as a result, I do not have jurisdiction to proceed further with this hearing.

July 20, 2005.

**D.R. Quigley,**
**adjudicator**