**Date:** 20060519

**Files:** 166-02-35993 to 35995

**Citation: 2006 PSLRB 59**

*Public Service Staff Relations Act*

Before an adjudicator

BETWEEN

**LINDA VAN DE MOSSELAER**

Grievor

and

**TREASURY BOARD**
**(Department of Transport)**

Employer

Indexed as
*Van de Mosselaer v. Treasury Board (Department of Transport)*

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

**REASONS FOR DECISION**

***Before:*** Paul Love, adjudicator

***For the Grievor:*** Karen Wilcock, Labour Relations Officer, Professional Institute of the Public Service of Canada

***For the Employer:*** Simon Kamel, counsel

Heard at Edmonton, Alberta,
January 24 and 25, 2006.

Grievances referred to adjudication

[1] Ms. Linda Van de Mosselaer filed the following grievances, which were referred to the Board, concerning her employment as an Aircraft Certification Engineer (EN-ENG-3) with the Department of Transport:

> **October 10, 2003 (Now Board File 166-02-35993)**
>
> *I grieve the necessity of expanding my area of mobility, as set out in Ms. T. Rezeweski's letter of September 17, 2003, in order to receive a reasonable job offer and, as evidenced by this letter, being given a guarantee of a reasonable job offer when the deputy head did not know and could not predict employment availability. As a result, I have been denied access to the options available under Section 6.3 of the Workforce Adjustment Directive. This is unfair and inequitable treatment, has resulted in an untenable employment situation for me, and is in violation of section 6.1 of the Workforce Adjustment Directive which forms part of the collective agreement.*
>
> **February 8, 2004 (Now Board File 166-02-35994)**
>
> *I grieve being laid off from my employment effective March 1, 2004 as set out in the letter from Mr. Roger Beebe dated January 26, 2004. This layoff is an unwarranted disciplinary action which is based on inaccurate information. This layoff is premature as meaningful and appropriate employment within Transport Canada is and has been available in Calgary but has been denied me.*
>
> *This layoff is in violation of Work Force Adjustment provisions of Appendix "J" of the collective agreement.*
>
> **February 16, 2004 (Now Board File 166-02-35995)**
>
> *I grieve that I have been the recipient of discriminatory treatment by my employer, Transport Canada, on the basis of my gender. This is in contravention of: 1) Article 44 of the AP collective agreement; and 2) section 7 of the Canadian Human Rights Act. This discriminatory treatment has been done deliberately and persistently with the object of jeopardizing my employment with the public service.*

[2] 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*, these references to adjudication 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*").

Process for jurisdictional objection

[3] The employer's counsel advised the Board by letter dated November 17, 2005, that it intended to raise as a jurisdictional issue the fact that the grievances referred to adjudication were settled at a mediation session in 2004. The employer was instructed by the Board to raise the jurisdictional issue at the outset of the hearing. At the hearing the parties did not agree on the process to hear the objection. The employer argued the Board ought to hear evidence on the jurisdictional issue and reserve and issue a written decision on jurisdiction, consistent with the practice at the Board in dealing with jurisdictional issues alleging settlement of grievances: *Vogan v. Public Service Alliance of Canada*, 2004 PSSRB 159; *Lindor v. Treasury Board (Solicitor General Canada – Correctional Services)*, 2003 PSSRB 10; *Bedok v. Treasury Board (Department of Human Resources)*, 2004 PSSRB 163; and *Castonguay v. Treasury Board (Canada Border Services Agency)*, 2005 PSRRB 75.

[4] The bargaining agent objected to this process on the basis that the employer's objection was "unfounded, fatuous, and an attempt to delay the hearing of the merits of the case." The bargaining agent alleged that none of the grievances at issue were settled; a conditional agreement was reached concerning a section 23 complaint. The bargaining agent wished to embark upon the full hearing, and argued that I should decide the jurisdictional issue after hearing all the evidence.

[5] After hearing from the parties it appeared more convenient to hear the evidence and argument on the jurisdictional objection first. This was not a case where the evidence on the jurisdictional point was interconnected with the evidence on the merits. Further, based on submissions made by the employer's counsel, there was insufficient time set aside to hear evidence on the merits and the jurisdictional issue, particularly given the types of grievances filed.[1] I indicated that if, after I heard evidence and argument, there was little substance to the employer's jurisdictional objection as suggested by the bargaining agent, I might proceed to make use of the remaining hearing time to hear the balance of the evidence on the merits, as the events concerned older grievances, there have been adjournments, and I wished to make

[1] The bargaining agent did not agree on the time estimate; nevertheless it appeared to me that a hearing on both the merits and the jurisdictional objection would take longer than the four days set aside for this hearing, particularly since one of the grievances alleged discriminatory treatment or harassment.

efficient use of the time available, given the likely difficulties in resuming this hearing in a timely manner.

[6] After hearing the evidence and argument on the jurisdictional issue I advised the parties that the employer had raised a serious issue and that I would be adjourning for the preparation of a written decision. After considering the evidence, the submissions and the relevant case law, it is apparent that there is no jurisdiction to hear the merits of the grievances raised and my findings follow.

Summary of the evidence

[7] I have determined the facts in this case on the evidence presented through the examination and cross-examination of the employer's witnesses, including documents filed as exhibits, after hearing argument from the parties. No evidence was called by the bargaining agent. I was surprised that no evidence was called by the bargaining agent to address the issue of settlement. I do not, however, draw any adverse inference against the grievor.

[8] The parties agreed to proceed to mediation and signed a mediation agreement. A copy of the agreement was not before me. The mediation proceeded before a Board-appointed mediator on August 25, 26 and 27, 2004, in Edmonton, Alberta. The employer representatives present at the mediation were Roger Beebe, Regional Director for Civil Aviation for the Prairie and Northern Region,[2] Fred Wright, Regional Manager of Aircraft Certification, and Claire Carrière, Director of Human Resources, Labour Relations, Occupational Health and Official Languages. The grievor was present at the mediation and she was represented by James Bart, Regional Representative/Negotiator, and Karen Wilcock, Labour Relations Officer, of the Professional Institute of the Public Service of Canada (PIPSC).

[9] The evidence on this preliminary objection was carefully tailored by the employer to exclude reference to the exact discussions and proposals exchanged in mediation. This is in keeping with the notion that mediation is a confidential, without prejudice process. Some information was led which allowed me to see the overall structure of the process and the participants in the process who were present and

[2] This was his job title at the time of the mediation. He now occupies an advisory position as he intends to soon retire from the federal public service.

ultimately signed the Memorandum of Agreement. I was also able to determine what matters were allegedly settled by the Memorandum of Agreement.

[10] I made some rulings on questions raised by the bargaining agent to ensure that the confidential discussions at mediation remained confidential. There was an attempt by the bargaining agent to cross-examine the employer's witnesses on particular issues raised during the mediation process. After hearing from the parties, I determined that particular conversations could not be introduced as the mediation process is intended to be confidential. In my view, there is a duty to protect the confidentiality of that process while allowing exploration of the issue of whether the parties reached a binding settlement incorporated into a Memorandum of Agreement.

[11] The Board has indicated the importance of preserving the confidentiality of discussions at mediation during the course of a later adjudication process. In *Carignan v. Treasury Board (Veterans Affairs Canada)*, 2003 PSSRB 58, the Deputy Chairperson indicated that:

. . .

> *[37] The discussions that take place during a mediation session must be kept confidential or mediation would no longer be effective. Without such confidentiality, the parties would hesitate to enter into frank and open dialogue and would not be likely to make offers that are much different from their initial positions. Soon this method of resolution would fall out of use. It is for that reason that the arbitral jurisprudence recognizes that it is in the employees' and employers' interest that comments made during a mediation session be inadmissible in evidence (see Skandharajah (supra)).*
>
> *[38] The agreement that came out of the mediation contained a confidentiality clause and similarly could not be disclosed. I have thus limited the information on the mediation and the agreement in this decision to the basics. It also sets out the grievor's allegations and the reasons for my decision in general terms.*

. . .

[12] From a purely pragmatic point of view, it is unhelpful to hear evidence of settlement discussions as a point made during negotiations is not necessarily agreed to by the opposing party unless it is documented in a written agreement.

[13] The mediation appears to have followed the standard Board process. The mediator met with each party separately in a pre-mediation session to identify the issues from that party's perspective and to explain the mediation process. There was a joint session where the mediator assisted the parties in identifying the interests, and options for settlement. At the outset of the joint session the parties signed a mediation agreement which contained a confidentiality clause. There were separate caucus meetings during the course of the joint session. The mediator shuttled back and forth between the parties caucused in separate rooms. The parties came together to sign a written agreement and shake hands. The main mediation session lasted two days.

[14] The only departure from the Board's practice is that the mediator hand-drafted a Memorandum of Agreement. Ordinarily, under the Board's mediation process, the drafting of a Memorandum of Agreement is left to the parties. All the parties signed the Memorandum of Agreement, and each party was given a copy of the Memorandum of Agreement. The mediator reported to the Board by letter that a settlement had been reached.[3]

[15] Generally, mediation agreements and settlement documents are private documents, and they are not filed with the Board. In order to determine the jurisdictional argument it was necessary for the mediation agreement to be filed as an exhibit.[4] I have considered the approach set out in *Vogan* (*supra*), in which Deputy Chairperson Giguère limited the information presented in the decision in order to maintain as much as possible the confidentiality of the mediation process.

[16] It is necessary to set out portions of the agreement, as arguments were presented on each clause and recital in the agreement. I have edited the document to eliminate unnecessary text and to preserve the confidentiality of the settlement. The document is entitled Memorandum of Agreement between Linda Van de Mosselaer (the "Employee"), The Professional Institute of the Public Service of Canada (the "Union"), and Transport Canada (the "Employer"). The salient portions of the document include:

. . .

[3] The mediator's letter to the Board was not filed as an exhibit; however, the Board's letter to the parties reporting a settlement on PSSRB File No. 161-2-1283 was filed as an exhibit.

[4] Exhibit E-1.

*Memorandum of Agreement*

. . .

[description of the parties]

*The parties have agreed to resolve the following matters on the terms outlined in this agreement.*

[nine matters are listed including]

- *workforce adjustment grievance*

  *dated Oct 10/03*

. . .

- *Section 23 complaint*

  *dated Oct 30/03*

. . .

- *Jan 26/04 letter of layoff effective Mar 1/04, grievance*

  *dated Feb 8/04*

. . .

- *Discriminatory treatment grievance*

  *dated Feb 16/04*

. . .

1. *The Employer will pay to the Employee the sum of* [amount deleted].

2. *The Employee and the Union will inform the Employer about the structure and timing of the payment in 1.*

3. *The Employer will rescind and remove from the Employee's file:*

   [documentation of certain disciplinary and performance issues]

4. *The Employer will provide a Letter of Reference for the Employee, the wording of which will be jointly prepared by the Union and the Employer.*

5. *The Employer will assist the Employee to find employment outside Transport Canada by actions such as:*

[steps to be taken by the employer]

6. *The Employer and the Union will, to the best of their ability, respectively recover, seal and dispose of according to retention policies or recover and destroy, if possible, all files and emails relating to all "matters" in dispute from the following key people:* [names deleted]. *The Union and the Employer will maintain contact to implement this action.*

7. *The Employer will reinstate* [days deleted] *sick leave credit to the Employee's sick leave bank.*

8. *The Employer and the Union will, by September 13, 2004, draft and finalize the wording of a contract to implement the terms of the Agreement and will also include:*

   *a) a confidentiality clause*

   *b) a without prejudice clause*

   *c) a dispute resolution clause containing a mediation provision if all agree or failing agreement on mediation that the dispute is referred jointly and automatically to binding adjudication*

9. *Upon implementation of this Agreement, the Employee and the Union will withdraw all the listed matters (complaints, grievances and investigation requests).*

   *The parties have read and voluntarily agreed to this Agreement.*

   *Dated at Edmonton, AB on August 27, 2003*

   [Signed by all parties]

[17] I find as a fact that the three grievances at issue in this case are matters outlined in the Memorandum of Agreement, referred to in the recital and in clause 9. While the Board's file numbers are not set out in the Memorandum of Agreement, the description of the grievances match the Board files before me which have been referred to adjudication.

[18] Following the signing of the Memorandum of Agreement, all the management representatives at the meeting believed that the grievances had been settled. Mr. Beebe was the senior Transport Canada decision maker for the purpose of the mediation. He has had extensive experience in contract negotiations in his 30-year career with the Department. He testified that he would not have signed the agreement if he had

believed it was a tentative agreement. Mr. Beebe had the authority to bind the Department to any mediated settlement. He testified that there was no discussion at the time of signing of this being a tentative agreement. Mr. Wright testified that neither the union nor the mediator raised any issue that this was a tentative agreement. Mr. Wright considered that "it was intended to bind us and allow us to move forward at the time of signing." Ms. Carrière believed that the agreement concluded the grievances and she indicated that there was some discussion about "going for a drink" after the signing of the agreement but someone was too tired.

[19] In the days following the mediation, the employer started to work on implementing the agreement. Within one week of the signing of the mediation agreement, on September 3, 2004, Mr. Bart phoned Ms. Carrière and advised her that "there was some hesitation on Linda's part in following through with the agreement and that he was meeting with her to discuss some items." He suggested to Ms. Carrière that "I not move too quickly on actioning the agreement as Linda was re-visiting the mediated agreement."

[20] The employer took steps to implement clause 4 of the agreement concerning a letter of reference. Ms. Carrière e-mailed Mr. Wright on August 31, 2004, to obtain a letter of reference for the grievor. Mr. Wright obtained a draft reference letter and circulated it to Ms. Carrière by e-mail dated September 13, 2004. Ms. Carrière likely would have had some input into the letter before it was provided to the bargaining agent.

[21] The employer took steps to implement clause 5 of the agreement to assist the grievor to find employment. Mr. Beebe was the Departmental executive who was ultimately responsible for ensuring that the agreement was implemented. He delegated some of this work to Ms. Carrière. Ms. Carrière designated a single point of contact, a senior human resources officer in the Winnipeg office with 28 years of experience. Mr. Beebe contacted a colleague on the Alberta Federal Council to assist in marketing Ms. Van de Mosselaer.[5]

[22] Ms. Carrière took steps to implement clause 6, which dealt with the recovery of documents. She wrote an e-mail on August 31, 2004, asking the addressees to send the documents to her. Mr. Beebe and Mr. Wright complied with her request.

[5] A collection of Federal employers with offices in Alberta.

Mr. Wright had some difficulties in burning some of his documents onto a compact disk format and required the assistance of a colleague.

[23] The bargaining agent disputes that the employer complied with clause 6 of the Memorandum of Agreement relating to the collection and storage of documents about the grievor. Through an access to information application, the grievor obtained and filed documents that were in the possession of Mr. Wright. The bargaining agent says that this shows that Mr. Wright's evidence was not credible and that the employer did not comply with the agreement and, therefore, there was no agreement.

[24] In my view, this evidence has little weight, and it certainly does not indicate the lack of an agreement. At the time that the access to information request was initiated[6] the employer knew that the bargaining agent was taking the position that no settlement had been reached. The employer was entitled to have documents in its possession to prepare for the grievance process and pending adjudication. Mr. Wright was cross-examined on this and he also candidly indicated that he was required to use his judgement on whether a document in his possession related to "all matters in dispute" as referred to in clause 6 of the memorandum of settlement or whether the document related to other operational concerns. He may have mistakenly retained documents. The bundle of documents filed as an exhibit[7] does not help me in deciding whether or not there was an agreement. Even if Mr. Wright had documents in his possession that he should have given to Ms. Carrière this does not demonstrate the lack of an enforceable settlement agreement. Mr. Wright remained a credible witness after cross-examination.

[25] Although Mr. Beebe believes that the employer reinstated sick leave credits to Ms. Van de Mosselaer pursuant to clause 7 of the Memorandum of Agreement, Mr. Beebe delegated the task of implementing the agreement to Ms. Carrière. Ms. Carrière testified that the sick leave credits were not reinstated, but that it was open to do so at this time. The tenor of the evidence before me is that Ms. Carrière relied on the information of Mr. Bart in the September 3, 2004 telephone call and did not proceed speedily to implement this term of the memorandum of agreement.

[6] The response from the Acting Coordinator for Transport Canada was dated November 4, 2005.
[7] Exhibit G- 8.

[26] The employer did not pay the consideration agreed to under clause 1. The payment of the consideration under clause 1 was conditional on information from the employee and the bargaining agent concerning the structure and timing of the payments, as employment insurance had been collected by Ms. Van de Mosselaer and there were tax implications to the settlement. Mr. Beebe testified that the employer intended to do what was requested of it by the bargaining agent when the information was transmitted as required under clause 2. The bargaining agent did not give to the employer any information concerning the timing and structure of payments. The bargaining agent did not demand payment. The employer did not make the payment because it was concerned that it could not take unilateral action on the payment given clause 2. Cooperation was not forthcoming from the bargaining agent, and cooperation was necessary to implement the memorandum.

[27] With regard to clause 8, Mr. Bart at no time objected to the fact that a written agreement had not been tendered to it in advance of September 13, 2004. The indication from the employer's witnesses was that Mr. Bart undertook to supply language to the employer for the confidentiality, without prejudice, and dispute resolution clauses.

[28] On September 16, 2004, a Dispute Resolution Coordinator from the Board wrote to both parties and confirmed that the Board had been advised by the mediator that the complaint under section 23 of the former *Act* was settled. The letter from the Board to the parties referred only to Board file 161-2-1283, which I find is the matter described in the Memorandum of Agreement as "Section 23 complaint dated October 30/03." Again I note that the practice of the Board is that the Board does not have a copy of any Memorandum of Agreement and relies on advice given by the mediator concerning the settlement of grievances.

[29] Ms. Carrière still had positive hopes of bringing the matter to a conclusion and was deflated when she received a telephone call from Mr. Bart on September 17, 2004, advising her that "Linda would not be entering into the mediated agreement," but that he would be withdrawing the section 23 complaint and would be reviewing the other grievances as he felt some of these would be withdrawn as well. Ms. Carrière circulated an e-mail on September 17, 2004, to Mr. Beebe and others on the management team advising them of the position of Ms. Van de Mosselaer and

indicated that she would review the outstanding grievances and contact the PIPSC to re-schedule grievance hearings.

[30] The employer ceased to take steps to implement the agreement after it received the letter from Ms. Wilcock dated September 27, 2004. This letter reads as follows:

. . .

> *Re: Mediation Agreement – Ms. Linda Van de Mosselaer*
>
> *This is further to the conversation between yourself and Mr. Bart on September 17, 2004 regarding the reconsideration of the tentative agreement reached through mediation on August 27, 2004. The agreement was drawn up late in the evening, about 22:30, on August 27th after two days of negotiation. After further consideration, it has become evident that the tentative agreement, in its current form, does not address all Ms. Van de Mosselaer's concerns nor does it reflect her understanding of the resolution of some of the issues.*
>
> *Therefore, I am advising that Ms. Van de Mosselaer does not wish to finalize this tentative settlement. Further mediation is still an option if there is a mutual willingness to continue. However, in the absence of continuing with mediation, Ms. Van de Mosselaer will pursue her various issues in the appropriate fora with the exception of the complaint pursuant to Section 23 of the Public Service Staff Relations Act, which she will be withdrawing.*

. . .

[31] While this letter is before me as part of the unfolding of events[8] there was no oral testimony from any bargaining agent witnesses or the grievor. This was a carefully crafted letter written almost a month after the mediation. I am satisfied that the only evidentiary value that can be accorded to this document is that Ms. Van de Mosselaer changed her mind about the settlement that she signed, did not intend to honour the settlement reached and wished to re-open discussions to sweeten the deal, in the absence of which she would proceed to adjudication.

[32] The employer did not respond in writing to the bargaining agent's letter. The employer participated in further steps in the grievance process and the scheduling of the three grievances for adjudication. Some of the grievances contained in the Memorandum of Agreement were settled in the grievance process, and some were

[8] The *res gestae*.

abandoned or withdrawn. There was discussion of further mediation, which did not take place. The only grievances which remain to be dealt with are the three grievances outstanding in this reference to adjudication that are presently before the Board.

[33] There was great disappointment on the employer's side when it learned that Ms. Van de Mosselaer did not intend to honour the agreement reached at mediation. Mr. Beebe indicated that he sincerely believed that there was an agreement, that a lot of energy had been spent at mediation to resolve the matter, and that he was at a loss to understand how one party could withdraw from a binding contract. The employer did not raise the agreement as a defence during the grievance process as it considered itself bound by the confidentiality agreement in the agreement to mediate and in the Memorandum of Agreement and wished to ensure that it acted in good faith consistent with the agreement. Mr. Beebe also hoped that by providing further information during the grievance process the grievances would be settled informally.

Summary of the arguments

[34] The employer argues that the Board has no jurisdiction to decide these grievances. A binding agreement was reached at mediation that disposed of all the grievances. All the objective evidence at the time of contract formation showed that a final and binding settlement had been reached: *MacDonald v. Canada,* [1998] F.C.J No. 1562 (FCTD) (QL). The evidence shows that the grievor backed out, or attempted to back out, from the settlement agreement. The written agreement was not completed by September 13, 2004, because James Bart, the bargaining agent's representative at the time, phoned Ms. Carrière on September 3, 2004, and essentially told her to go slowly on the paperwork as the grievor was having second thoughts.

[35] After the signing of the settlement, both parties had further work to do to implement the settlement. There was nothing unclear in the terms of settlement, and the fact that more work remained to implement the settlement does not prove that the settlement was tentative or conditional.

[36] As there was a final and binding settlement reached at mediation, the Board is without jurisdiction to consider further the grievances or arguments related to the breach of the mediation agreement: *Bhatia v. Treasury Board (Public Works Canada)*, PSSRB File No. 166-2-17829 (1989) (QL); *Myles v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 53; *Skanharajah v. Treasury Board (Employment*

*and Immigration Canada)*, 2000 PSSRB 114; *Carigan* (*supra*); *Castonguay* (*supra*); *Vogan* (*supra*); *Lindor* (*supra*); *Bedok* (*supra*).

[37] The employer continued to try to resolve the grievances after the employee breached the mediation agreement; however, this is not a bar to the employer's objecting to jurisdiction at the hearing. The employer did not raise the mediation agreement during the grievance process, as it considered it was bound by the confidentiality clauses in the agreement to mediate and in the settlement agreement. The employer was merely attempting to resolve the matters, at minimal expense, knowing that if necessary it could raise this point in an adjudication process before the Board. The employer concluded that it would be difficult, if not impossible, to pursue unilaterally the implementation of the agreement, as implementation required the cooperation of the grievor, and the grievor was required to do certain things. This is a purely jurisdictional matter and is not a procedural matter. While a party may be held to waive a procedural defect if the objection is not made in a timely manner, a jurisdictional issue can be raised at any time before or during a hearing.

[38] If the Board permits the grievor to escape from the consequences of signing a mediation agreement, a shadow will be cast over the usefulness of the mediation process in resolving workplace disputes. The employer is still willing to work to implement the agreement reached at mediation.

[39] The bargaining agent says that a conditional agreement was reached at mediation on August 27, 2004, relating to a section 23 complaint, whereby the bargaining agent and the employer would draft a formal written contract. The deadline for finalizing the contract was September 13, 2004. This date passed without the settlement contract being drafted. The bargaining agent called Ms. Carrière, with the employer, on September 17, 2004, and notified her in writing on September 27, 2004, that the grievor intended to withdraw from the agreement.

[40] The whole course of conduct between the parties after the signing of the agreement is material to this issue, and this demonstrates that no agreement was reached. At no time did the employer raise its objection to jurisdiction in a timely manner. The employer proceeded as if there was no agreement by failing to press for strict performance of the terms of the settlement agreement, by participating in the grievance process and by failing to notify the bargaining agent of its jurisdictional

complaint. The conduct of both parties subsequent to the mediation confirms that the mediated agreement was tentative and not final.

[41] The bargaining agent relies on *Re Pacific Forest Products Ltd., Nanaimo Division and Pulp, Paper and Woodworkers of Canada, Local 7* (1983), 14 L.A.C. (3d) 151 (Munroe), for the proposition that the "acceptance or rejection of a settlement argument should be based on an objective assessment of the parties' words or actions at the material time, regardless of subjective intention." The bargaining agent relies upon *Glace Bay (Town) and C.U.P.E., Local 755* (1994), 42 L.A.C. (4th) 188 (North).

Reasons

[42] The issue that I must determine is whether the signed Memorandum of Agreement is binding on the parties. If it is binding, I am without jurisdiction to hear Ms. Van de Mosselaer's grievances. Generally, a settlement agreement is a complete bar to an action in court for wrongful dismissal. This approach regarding the finality of settlement of agreements has been adopted by the Board in considering grievances that proceed to adjudication following a settlement agreement. Moreover, the Board has a residual discretion to determine that the settlement agreement ought not to be enforced as an unconscionable transaction. The standard is a very high one and was the subject of comment in *MacDonald* (*supra*). At paragraph 27, this case referred to *Stephenson v. Hilti (Can.) Ltd.* (1989), 29 C.C.E.L. 80 (N.S.S.C.T.D.), which summarized the test for an unconscionable transaction:

. . .

> *A transaction may be set as 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.*

. . .

[43] There is simply no evidence in this case of an unconscionable bargain.

[44] I do not accept the bargaining agent's argument that it was only the section 23 complaint that was settled. This submission is inconsistent with all the evidence before me. It is clear from the Memorandum of Agreement that all the issues before the Board in these grievance adjudication files are referred to as settled. The bargaining agent seeks to have me rely on the report given by the mediator to the Board, which references only one file number for a section 23 complaint as settled. From the evidence before me I cannot tell whether the mediator made an error in communicating with the Board, or whether the Board was mistaken in its communication to the parties. It is obvious that the Board did not have a copy of the Memorandum of Agreement. I note, however, that the Board's letter does not comment on other outstanding unsettled grievances. The Memorandum of Agreement is the best evidence of the grievances settled by the parties.

[45] The second issue is whether the parties reached a binding settlement agreement at the mediation in August 2004. Generally the test as to whether the parties are bound to a contract is an objective test. As set out in *MacDonald* (*supra*) at paragraph 35:

. . .

> *On the test of accord and satisfaction, I am satisfied that there was an agreement among the Department, PIPS* [*sic*]*, and the plaintiff, whatever might have been in the mind of the plaintiff when he signed, figuratively speaking, with his fingers crossed behind his back. The outward expression of his intention was his signing of the agreement. That is what is relevant. His unexpressed intention is immaterial. Once again, in the words quoted from Corpus Juris in Kerster:*
>
> > *If his words and acts, judged by a reasonable standard, manifest an intention to agree in regard to a matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.*
>
> . . .

[46] This is also consistent with the approach taken in *Re Pacific Forest Products Ltd.* (*supra*). Applying an objective test and considering all the facts at the time of the signing of the Memorandum of Agreement, there is no supporting evidence to suggest that this was other than a binding settlement. In my view a binding settlement was reached. There is clarity about the parties, the grievances that were the subject of the

settlement, the consideration for the settlement, and the mutual obligations of the parties which required implementation. There is no language in the agreement that suggests that the agreement was an agreement in principle, that the agreement was tentative, or that performance of the mutual obligations in the agreement was optional. In particular, there was no language in the agreement that gave the grievor an option to change her mind or to fail to perform her obligations under the agreement.

[47] The third issue to consider is whether the conduct of the grievor and of the employer demonstrates that no agreement was reached. The material point to focus on is the time of signing the agreement on August 27, 2004. This is consistent with the approach in *MacDonald* (*supra*), *Re Pacific Forest Products Ltd.* (*supra*) and *Bedok* (*supra*). On August 27, 2004, the grievor signed a settlement agreement. There is no evidence before me of duress. There was a shaking of hands and discussion of a celebration. The agreement itself contains recitals which indicate that the parties intended to settle certain grievances and that there was no duress. In my view this is strong evidence suggesting that a settlement was reached.

[48] The only point that I can surmise from the conduct of the grievor and of the bargaining agent is that shortly following the signing of the mediation agreement the grievor developed "settler's remorse" or she came to the conclusion that the agreement that she had reached did not meet her needs. I use the words "surmise" as the grievor did not give any evidence in this case and the only evidence that I can consider is the reports made by Mr. Bart to Ms. Carrière on September 3 and 17, 2004, reported in Ms. Carrière's testimony, and Ms. Wilcock's letter to the employer on September 27, 2004. In my view, the grievor's unilateral conduct is not evidence which shows that no agreement was reached; rather, it is evidence that shows that the grievor changed her mind. The objective evidence demonstrates that an agreement was reached.

[49] The fourth issue that I must consider is whether the implementation clauses of the agreement in any way rendered the agreement unenforceable as an "agreement to agree." There are clearly matters which the parties must implement arising out of the settlement agreement. There is no unclarity about what needs to be done. The fact that implementation of the memorandum has not yet been achieved does not prove that no agreement was reached, particularly where there was unilateral action by the grievor to resile from the agreement. There is no evidence that "time was of the

essence" in the performance of the implementation clauses. As an implied term of this agreement it is my view that the parties were required to use their best efforts to complete the implementation of the agreement within a reasonable time.

[50] Mr. Bart needed to supply the employer with information concerning the timing and structuring of payment of the monetary consideration and supply the employer with the PIPSC's wording concerning the confidentiality, without prejudice and dispute resolution clauses. These are implementation matters, within the control of the bargaining agent, which the bargaining agent failed to act on given the change of heart by the grievor. In my view these obligations are sufficiently clear from the memorandum of settlement that this cannot be characterized as a temporary agreement, or "an agreement to agree." In my view, there is an enforceable contract without the need for further agreed wording.

[51] It is clear that there are obligations on the employer's side. Some of those obligations depended on the bargaining agent's cooperation. Some of the employer's implementation work was not completed. Given the grievor's conduct it made little sense for the employer to attempt unilaterally to implement the agreement. There was no unclarity about the obligations and these were not conditional in any way. These obligations cannot be characterized as a temporary agreement or an "agreement to agree."

[52] I note again that the Board has no jurisdiction over the implementation of a mediation agreement. If there is a dispute between the parties and the parties do not wish to mediate that dispute or refer the dispute on an *ad hoc* basis for commercial arbitration, the remedy lies in a civil action to enforce the terms of settlement. In my view the reference to mediation if agreed or adjudication in clause 8 may well be beyond the jurisdiction of the Board. In my view the dispute resolution clause to be drafted was to deal with implementation issues which are outside of the jurisdiction of the Board.

[53] This is not a case where there has been a default by the employer in implementing the agreement but rather an attempt by the grievor to resile from the terms of an agreement that she accepted objectively by signing the Memorandum of Agreement on August 27, 2004. The employer found it pointless to continue with a unilateral implementation of the settlement after the grievor repudiated the settlement, since implementation required the cooperation of all parties.

[54] The fifth issue that I must consider is the effect of the grievor's unilateral conduct in resiling from the settlement and proceeding through the grievance process to adjudication. In my view this is evidence of a unilateral breach of a settlement contract and is not evidence of the lack of a contract. It is conduct which is irrelevant to a finding that there was a settlement of the grievances. Again from the authorities, the focus is on the time of contract formation and not on the actions of parties following contract formation.

[55] In *Bedok* (*supra*), a Board member considered the effect of a grievor changing his mind four days after the signing of a memorandum of understanding. The grievor argued that he had signed the agreement as a result of coercion or duress by financial circumstances. The Board held that what was critical in assessing whether a settlement was valid was the intention of the parties at the time of signing. The Board relied on the *Kerster* case referred to in *MacDonald (supra)* and held at paragraph 62:

. . .

> *. . . In any event, repudiation of a contract is only justified if consent was not obtained because of the improper persuasive conduct of the employer (see Skandharajah v. Treasury Board (Employment and Immigration Canada), 2000 PSSRB 1140). As I have already concluded, there is no evidence that the employer exerted improper persuasion on the grievor.*

. . .

[56] In *Carignan* (*supra*), the grievor sought to resile from an agreement reached at mediation on the basis that it was a temporary agreement and that he did not receive the monetary benefits that he anticipated under the mediation agreement. The Board member considered the agreement and determined that it did not indicate that it was temporary or conditional and found that it was a binding agreement. The Board held:

. . .

> *[48] Given that the Board has no jurisdiction to decide whether the conditions of the agreement and rules were respected, it also does not have jurisdiction to determine whether one of the parties acted in bad faith in the application of the agreement. That argument must accordingly be dismissed, as well.*

. . .

[57] As a policy matter, the grievor's conduct in resiling from a settlement agreement reached at mediation has a potential chilling effect on the use of mediation to resolve workplace grievances. This ought to be discouraged, as mediation is a timely, cost efficient and effective method of resolving workplace disputes and allows parties to preserve a mature bargaining relationship.

[58] Generally, mediation works well in order to resolve workplace problems and gives the parties an element of control over the solution to the problem, which is not available when a grievance is adjudicated by a Board member. Mediation agreements are usually hand crafted after significant give and take by all parties in the negotiating process. It is a "perfect solution" tailored by the parties at the time of its making. Often there are matters which must be implemented including the payment of money, the drafting of references or other matters agreed to by the parties.

[59] When the grievor breaches the settlement, in my view, there is no obligation on the employer to commence legal proceedings in court to seek a declaration that there is a binding settlement contract. It is perfectly permissible in this situation for the employer to continue to deal with the bargaining agent in order to clean up the settled matters in a business like manner and, failing that, to argue the preliminary jurisdictional point at adjudication.

[60] The fact that an employer fails to point out the agreement to the bargaining agent is not relevant to the question of jurisdiction. The Board's and an adjudicator of the Board's jurisdiction are conferred by statute and not by consent. Parties cannot consent to enlarge the Board's or an adjudicator of the Board's jurisdiction or waive jurisdiction, so the fact that the employer completed the grievance process cannot form an estoppel at adjudication. It was open to the employer to take a harder line position than it did on the "settlement argument" during the grievance process. The fact that it did not lends some credence to the employer's assertion that it was attempting to wrap up the grievances in a good faith manner.

[61] It is unfortunate when a party goes away from a mediation, after the signing of a Memorandum of Agreement, and develops second thoughts or "settler's remorse" about the settlement agreed to. In my view, it is only in extraordinary circumstances such as duress, which is completely absent here, that a party should be permitted to resile from a bargain made at mediation. Hopefully, this will be a rare occurrence,

because it does not assist in the development or maintenance of effective labour relations.

[62] In summary, the parties reached a binding settlement with respect to these grievances at mediation on August 25 to 27, 2004, which is contained in the Memorandum of Agreement dated August 27, 2004. It is a well established principle that a valid settlement agreement is a complete bar to an adjudicator's jurisdiction. Therefore, I am without jurisdiction to determine whether the terms of a settlement agreement have been observed and have no jurisdiction to hear further evidence on the merits of the grievances filed by Ms. Van de Mosselaer.

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

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

Order

[64] The grievances of Linda Van de Mosselaer in Board files 166-02-35993 to 35995 are dismissed.

May 19, 2006.

**Paul Love,**
**adjudicator**