Date: 20070918

File: 166-02-32088

Citation: 2007 PSLRB 98

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

COREY NASH

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Nash v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Himself, and John Feldsted

For the Employer: Stephan Bertrand, counsel

Heard at Edmonton, Alberta,
December 12 and 13, 2006 and April 25 and 26, 2007.

I. Grievance referred to adjudication

[1] Corey Nash is a parole officer (WP-4). On March 13, 2002, he filed a grievance alleging disguised discipline. The grievance was referred to adjudication on April 3, 2003. The employer now objects to this matter going to adjudication on the grounds that the grievance was settled when Mr. Nash signed a Memorandum of Agreement (MOA) on July 26, 2004. Mr. Nash submits that the MOA was obtained under duress and therefore is not a valid and binding settlement. The hearing was limited to the question of whether there was a valid and binding settlement of the grievance.

[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*, this reference 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.

[3] At the commencement of the hearing, Mr. Nash asked that a court reporter be allowed to record the proceedings. From his submissions, it became clear that he wanted the court reporter to serve as a note-taker. The employer did not object to the use of a note-taker. The court reporter in attendance was not able to provide this service, and we adjourned until 13:00 to allow Mr. Nash to obtain alternate services. I was clear that the note-taking was to be used solely to assist Mr. Nash in the presentation of his case, and any notes were not to be introduced as exhibits. Mr. Nash was unable to obtain the services of a note-taker, and the hearing proceeded.

[4] At the beginning of the continuation of the hearing on April 25, 2007, Mr. Nash advised that he had obtained a representative. John Feldsted attended by conference call and assisted Mr. Nash in the final two days of hearing.

[5] Mr. Nash sought to introduce an audiotape of settlement discussions that had taken place by telephone. He had taped these discussions without the knowledge or consent of the other participants. I ruled that the audiotape was inadmissible. The participants in the settlement discussions were available to be called as witnesses. I also held that admitting the audiotape as evidence would be contrary to labour relations policy, as the surreptitious recording of settlement discussions should not be encouraged.

[6] Mr. Nash called Derek Becker, an inspector with Human Resources and Social Development Canada (HRSDC), as a witness. Mr. Becker was a labour affairs officer with HRSDC in 2003 and 2004. Mr. Nash had had conversations with Mr. Becker about a work refusal under the *Canada Labour Code* that was part of the dispute that Mr. Nash had with his employer. The evidence provided by Mr. Becker was not relevant to the matters in dispute and I have not summarized that evidence.

[7] Mr. Nash testified on his own behalf. The employer called two witnesses. An order excluding witnesses was granted.

II. Summary of the evidence

[8] Mr. Nash was employed as a parole officer at the Stony Mountain Institution in Winnipeg, Manitoba in 2002. I did not hear direct evidence on the events that led to Mr. Nash leaving Stony Mountain Institution since the hearing was solely on the validity of the settlement agreement. After the events that occurred at the Stony Mountain Institution, Mr. Nash was on leave and receiving workers' compensation benefits through the Manitoba Workers Compensation Board.

[9] The Warden of Stony Mountain wrote to Mr. Nash on September 4, 2002, after a telephone conversation on August 30, 2002 (Exhibit E-13), offering a temporary placement as a WP-4 at the Edmonton Institution. He asked Mr. Nash to complete the Request for Inter-regional Transfer. Mr. Nash testified that this offer of a transfer was a temporary move only.

[10] Timothy Leis is Assistant Deputy Commissioner, Corporate Services, Prairie Region, Correctional Service of Canada (CSC). He participated in the settlement discussions. He testified that initially the negotiations were directly with Mr. Nash's union representative, Michel Charbonneau (a national representative with the Union of Solicitor General Employees (USGE)). Mr. Leis stated that the basic elements of the agreement were negotiated with Mr. Charbonneau in November 2003 (Exhibit E-2 and E-3: emails and attachments dated November 19 and 21, 2003). Mr. Charbonneau wrote to Mr. Nash on November 25, 2003, enclosing a draft Memorandum of Agreement. Mr. Nash did not sign this draft agreement.

[11] Mr. Nash advised the Public Service Staff Relations Board (''the Board'') on March 1, 2004, that the USGE/Public Service Alliance of Canada was no longer representing him.

[12] Marc-Arthur Hyppolite became Deputy Commissioner for the Prairie Region in January 2004 and became involved in the settlement discussions with Mr. Nash. A meeting to discuss a settlement was scheduled in Saskatoon on March 31, 2004, and Mr. Nash was invited to attend. Mr. Nash requested that his family also be put on travel status to attend the discussions but this request was refused by Mr. Hyppolite (Exhibit E-5). Mr. Nash attended the settlement discussions by conference call. Mr. Hyppolite, Mr. Leis and Bonnie Davenport, a human resources advisor, attended the meeting, along with representatives of the USGE, including Mr. Charbonneau. Mr. Leis and Mr. Hyppolite testified that at the end of the conference call all participants understood that there was an agreement. Mr. Leis testified that Mr. Charbonneau stated that there was a verbal agreement. In a letter to Mr. Hyppolite dated June 2, 2004 (Exhibit G-12), Mr. Nash referred to the result of the March 31, 2004, meeting as follows:

> *We had reached a verbal agreement as per the minutes of our March 31, 2004 meeting. . . .*
>
> *. . . you have not contacted me and have not followed through on the payment for the necessary relocation and protection of my family. I fully expect you to stand by our verbal agreement and your word in order that I may return to my position of employment without further harm and again without further delay.*

[13] A revised draft Memorandum of Agreement was prepared by Ms. Davenport after the conference call (Exhibit E-4). Mr. Leis testified that the document reflected the verbal agreement that had been reached at the meeting. The draft was sent to Mr. Nash by fax on April 1, 2004 (Exhibit G-11). Mr. Hyppolite wrote on the fax cover page that he required Mr. Nash's signature and a faxed-back copy that day. He also wrote that he had been provided with a copy of Mr. Nash's request for education leave and that he would not approve the request. Mr. Nash did not accept the revised Memorandum of Agreement.

[14] Mr. Nash wrote to Lucie McClung, Commissioner of the CSC on April 1, 2004 (Exhibit G-20), stating that the typed settlement did not reflect the agreement reached at the March 31, 2004 meeting:

. . .

> *. . . Although a clear understanding was reached by Mr. Hyppolite and myself this was not apparent in Bonnie Davenport's typed offer of settlement.*
>
> . . .
>
> *. . . With regard to settlement of the issues in a timely fashion, local and regional managers have broken the bond of trust that exists between employee and employer. I verily believe, from what I have experienced first hand, even if I signed an offer there would be no corrective action forthcoming. . . .*
>
> . . .

[15] Mr. Hyppolite wrote a memo to Mr. Nash on April 2, 2004 (Exhibit G-10). In the memo he wrote:

> . . .
>
> *Further to our lengthy discussion on March 31, 2004, in which we had a verbal agreement in the presence of your union representative as well as two others [from CSC], you provided me your assurance that you were in agreement with this settlement. I informed you that this was my final offer, and that if we were unsuccessful in obtaining an agreement, then we would let your grievances proceed through the appropriate process.*
>
> *You subsequently made the decision not to accept my offer. I am disappointed that you have decided to ultimately reject this offer, however, you have the right to change your mind and to proceed with your grievances through the appropriate process.*
>
> *In light of the above, I have serious doubts about your willingness to reach a final and reasonable resolution of the matter. I therefore, decline any further requests for additional meetings on this issue.*
>
> *Please note that this offer was final. In the event that you continue to reject it, the offer shall be declared null and void.*
>
> . . .

[16] Health Canada did a fitness-to-work evaluation and determined that Mr. Nash was fit to work on April 13, 2004 (Exhibit E-12). On May 12, 2004, Mr. Hyppolite wrote to Mr. Nash acknowledging that he had been advised of his fitness-to-work evaluation (Exhibit E-9). He further noted:

. . .

> *In considering your return to work, I am aware that you have unilaterally decided to live in Edmonton, and have been living in Edmonton close to two years. As a result, I am prepared to consider a request from you to return to work as a Parole Office in Edmonton if that is what you would prefer. I would appreciate if you would advise my office of your preference - a return to your substantive position, or a request to work as a Parole Office in Edmonton. Once this is received, action can be taken to return you to employment.*

. . .

[17] Mr. Nash wrote to Mr. Hyppolite on June 2, 2004 (Exhibit G-12):

. . .

> *I am participating in your process without full defence of my interest and without the full defense of the interest of my family under coercion and duress. I plan to address this unfair process through every means of recourse available to me. . . .*

. . .

[18] Mr. Hyppolite responded on June 3, 2004 (Exhibit E-10), stating that Mr. Nash had not indicated whether he wanted to return to his substantive position at Stony Mountain Institution or to a position in Edmonton.

[19] On June 4, 2004, Mr. Hyppolite wrote a further memo to Mr. Nash (Exhbit G-15) in reply to his letter of June 2, 2004:

. . .

> *. . . I am happy to see, that you would like to see a return to the agreement of March 31, 2004.*
>
> *As a result, I am attaching the agreement for your signature, and return. You will note that I have signed. Should you wish to discuss any portion of this agreement, I would request that you contact my office.*

. . .

> *I believe that this agreement will resolve your issues, and we can move forward from this point.*

. . .

[20] On June 4, 2004, Mr. Hyppolite responded in a separate memo to other concerns raised (Exhibit E-7) by Mr. Nash in his June 2, 2004 letter:

. . .

> *You state in your correspondence that you are participating in the process without full defense of your interest and without the full defense of the interest of your family under coercion and duress. I do not feel that this reflects the reality. You entered into mediation and initially agreed to a settlement with your union representative Mr. Charbonneau . . . . There has never been any intention to coerce you, nor to make you do anything under duress. You entered into the mediation process on your own accord, and chose not to accept the settlement on your own accord.*
>
> *. . . If it is your intention to reopen our offer of March 31, 2004, please advise us, and we will be more than happy to discuss.*

. . .

[21] Mr. Nash wrote to Mr. Hyppolite on June 5, 2004 (Exhibit G-9) and enclosed handwritten changes to the draft settlement provided by Mr. Hyppolite. In his cover letter, he stated that he was proposing a change to the effective date, to allow for the move of his personal effects from Winnipeg to Edmonton.

[22] Mr. Nash wrote an email to Mr. Hyppolite on June 14, 2004 (Exhibit G-13) setting out a revised settlement (which was attached). In his email he wrote:

. . .

> *. . . please find attached a reasonable proposal to settle all of these issues now. This agreement will provide the immediate assistance I have been requesting and will not represent a burden to the employer.*
>
> *I believe Mr. Hyppolite that we have now reached a wholly attainable settlement. Please note that the dates have been changed in order to accelerate necessary assistance being provided to my family and I.*
>
> *I would appreciate a reply email acknowledging the terms of this agreement have been received and accepted by the end of the working day June 14, 2004.*

. . .

[23] Mr. Hyppolite sent an email to Mr. Nash on June 16, 2004 (Exhibit G-14) in reply to a statement by Mr. Nash that he wished to return to work as soon as possible:

. . .

> *. . . Your base position is at Stony Mountain Institution (SMI). In view of the understanding that you do not wish to return to SMI, we have decided to approve your request to deploy to a WP-04 Parole Officer position at the District Office in Edmonton. This is consistent with our previous correspondence to you via memo on May 12, 2004 and again via memo on June 1, 2004. . . .*

. . .

[24] Mr. Nash replied on June 17, 2004 as follows (Exhibit G-14):

. . .

> *As per my letter to you dated June 02, 2004* [Exhibit G-12] *I am participating in your process without the full defense of my interest and without the full defense of the interest of my family. I plan to address this unfair process as I have previously advised.*
>
> *Your offer of employment in Edmonton is the result of an involuntary transfer for my families protection, under duress . . . I am requesting all costs for the Temporary and Permanent Relocation of my family and I as per the Integrated Relocation Program . . . These are the circumstances of my employment in Edmonton and I await your reimbursement for all costs incurred and all costs expected to be incurred.*
>
> *. . . As per your email below* [of June 16, 2004] *I have contacted Dave Chapman and left a message with regard to my transfered employment as per your direction at your request.*

. . .

[25] Mr. Hyppolite testified that the deployment to Edmonton had "nothing to do with" the settlement and was not conditional on Mr. Nash signing the Memorandum of Agreement.

[26] In a memo dated June 17, 2004 (Exhibit E-8), Mr. Hyppolite wrote in response to Mr. Nash's proposed changes to the Memorandum of Agreement:

. . .

> *In the spirit of collaboration, we reluctantly agreed to incorporate these demands in the body of the agreement so we can bring this issue to a successful resolution and move forward. . . .*
>
> *Surprisingly, you have unilaterally elected to resubmit a completely new proposal with a series of unprecedented and excessive demands which were never part of our discussions. Quite frankly, this is perceived to be on the borderline of influencing me as Deputy Commissioner to engage in financial transactions that I consider to be inappropriate and beyond my legal authority. As such, I have no alternative but to refute these inappropriate demands. Nevertheless, I continue to stand by the previous agreement of June 2nd which was a reflection of your wishes. Should you wish to accept this, please sign it and return it to my attention and this matter will be resolved once and for all.*
>
> *May I respectfully remind you that this is the third instance whereby an agreement has been struck with you either with the capable advice and support of your union representative, or in your direct negotiation with me, in the presence of several witnesses.*
>
> *In terms of continued employment with CSC, we respect your request to take employment in Edmonton and an offer of deployment will be forwarded to you.*

. . .

[27] Mr. Nash was sent a letter signed by Mr. Hyppolite on June 18, 2004 (Exhibit G-6) offering him a deployment to an indeterminate position at the Edmonton District Parole Office. Mr. Nash signed that he consented to this deployment on the same day that he signed the Memorandum of Agreement (July 26, 2004).

[28] In a memo dated June 21, 2004 (Exhibit G8), Mr. Nash requested the authority for a relocation to Edmonton. Mr. Hyppolite replied the same day (Exhibit G-7):

. . .

> *I am replying to your memo of June 21, 2004 in which you request relocation for your deployment. We wish to respectfully remind you that your relocation to Edmonton was a result of your own personal and unilateral decision. The Service did not authorize your move, nor did we participate in your choice to establish yourself in Edmonton.*

> *You are aware as per Treasury Board Policy that you would have had to request authorization prior to your actual relocation, in order to be considered for moving expenses.*
>
> *However, in consideration of your overall situation, we have chosen to make you an offer of a lump sum payment which covers all relocation expenses and all outstanding issues. You accepted this offer on several occasions and then chose to change your mind. It is worthwhile noting that previous lesser offers had been found to be reasonable by CSC and PSAC officials.*
>
> *As a result, we respectfully advise you to accept our offer and resolve this matter. No other relocation expenses, outside of this previous agreement will be considered for your deployment.*
>
> . . .

[29] The settlement was signed by Mr. Hyppolite on July 5, 2004 and forwarded to Mr. Nash (Exhibit G-5). Mr. Leis initialled some further changes proposed by Mr. Nash and Mr. Nash signed the settlement on July 26, 2004 (Exhibit E-1). Mr. Leis was acting for Mr. Hyppolite while he was on vacation during this period and testified that he was authorized to approve changes to the settlement.

[30] Mr. Nash added the following clause to the standard release from all complaints, grievances, requests and other recourse: "except for obligations arising under this agreement." Mr. Leis initialled this change. Mr. Leis testified that Mr. Nash never told him that he did not understand the terms of the agreement. Mr. Leis testified in examination-in-chief that no improper pressure had been put on Mr. Nash during the negotiations. In cross-examination he agreed that the negotiations were challenging.

[31] Mr. Leis was asked in cross-examination by Mr. Nash if there was a guaranteed job offer. Mr. Leis testified that as an indeterminate employee he had a guaranteed job. He also testified that there had been an offer of a transfer to Edmonton on the table "for quite some time" and that Mr. Nash had decided not to accept that offer. Mr. Leis did not agree with Mr. Nash in cross-examination that his employment was conditional on the signing of the settlement. In cross-examination Mr. Leis stated that had Mr. Nash not agreed to relocate to Edmonton his employment would have "continued where it was initially" (i.e., at Stony Mountain Institution).

[32] Mr. Nash was advised by the Manitoba Workers Compensation Board on July 9, 2004 that his wage loss benefits would be paid until July 16, 2004 (Exhibit G-21). Mr. Leis testified that he was aware that Mr. Nash's WCB benefits were in question and knew that they were coming to an end, although he was not certain of the date. Mr. Hyppolite testified that he was not aware of the status of the WCB benefits.

[33] In the Memorandum of Agreement the parties agreed not to divulge the contents of the agreement except for administrative or legal reasons. I have set out below only those terms that are strictly necessary for understanding the submissions of the parties and for coming to a decision on the jurisdictional question.

[34] In addition to a number of other terms, the CSC agreed to transfer Mr. Nash's employment to the Edmonton parole office. It was characterized in the agreement as a "voluntary relocation." Mr. Nash agreed to "withdraw all grievances and complaints against CSC to date of signing." In addition he agreed:

. . .

> *To release Her Majesty the Queen, Her servants and representatives from all complaints, grievances, requests or other recourse arising from his employment with CSC to date of signing. (Except for obligations arising under this agreement.)*

. . .

[35] On the same day (July 26, 2004) Mr. Nash signed a letter consenting to his deployment (Exhibit E-1 and G-6). Mr. Leis testified that on July 30, 2004 Mr. Nash suggested changes to the effective date of the agreement, but in the end it was not changed. In an email to Mr. Nash on July 30, 2004 (Exhibit G-1), Mr. Leis wrote:

. . .

> *As you are aware, on July 12, 2004, you indicated in an e-mail to Mr. Hyppolite your willingness to accept our offer of settlement. Following this, on July 13, 2004, Mr. Hyppolite indicated to you in writing that, in order to initiate the settlement, an original signed copy of the terms was required. On July 16, 2004, a faxed version of this agreement was received and indicated that the settlement would be effective for this date. However, upon receipt of the original agreement, it was noted that you had amended this date to July 26, 2004. As we had no objections to the date, and*

> *believed it to be the date you wished the 6 weeks of leave with pay to be initiated, we initialed this change as well as the others you had made and implemented the settlement accordingly.*
>
> *This being said, it is my understanding from your latest e-mail that you wish the date of settlement to be July 16, 2005, and have your 6 weeks of leave begin from that point. As I have no objection to this, and had indicated this to you on July 26, 2004, I am attaching a new agreement that reflects the dates you have requested. Once this agreement is signed and the original copy has been received by this office it will superceed* [*sic*] *the previous agreement and your 6 weeks of leave will be implemented as per the new date.*
>
> *Please note, until the original copy of the new agreement is received, the original agreement will be in force.*
>
> . . .

[36] Mr. Nash replied on the same day as follows:

> . . .
>
> *30 days commences from the date of the initial and sending me a certified copy. There is a loss of six days of pay from WCB coverage (as you are aware) and the time (as you indicated Mr. Hyppolite was unavailable to initial the changes and NHQ had already accepted the terms). This has been protracted and dragged out for long enough. There is a 6 day loss in pay which needs to be made up for. You have already delayed payment and reinstatement of my full salary long enough.*
>
> . . .

[37] Mr. Nash wrote to the Board on August 18, 2004 as follows:

> . . .
>
> *I am willing to withdraw my grievance matter from adjudication as long as the Public Service Staff Relations Board will remain seized of the matter to ensure the agreement is fairly and properly implemented by both sides.*
>
> . . .

[38] The Board wrote to Mr. Nash on August 25, 2004, stating that the Board did not have jurisdiction to adjudicate a grievance concerning the failure of one party to fulfil

its obligation under the terms of a binding settlement agreement. The Board also noted that it was Mr. Nash's responsibility to inform the Board when the terms of the settlement had been finalized "and to withdraw your grievance at that time."

[39] Mr. Nash wrote to the Board on November 22, 2004, advising that the terms of the settlement had not been "followed through with." He requested a hearing, to be held in Edmonton. He also asked for a six-month delay in order to obtain legal counsel.

[40] Mr. Nash wrote an email to Mr. Hyppolite on December 23, 2004 (Exhibit E-11), and stated:

. . .

> *. . . I would like to thank you for the support you have provided my family and I. I look forward to working closely with you in the New Year and the years to come. . . .*

. . .

[41] When questioned about this email in cross-examination, Mr. Nash said that "you get more bees with honey."

[42] Mr. Nash wrote to the Board on February 21, 2006, alleging that the settlement was entered into under duress. Pursuant to subsection 15(1) of the *Public Service Labour Relations Board Regulations*, the Board asked for further particulars from Mr. Nash (correspondence dated March 17, 2006). Mr. Nash replied on March 31, 2006. In that letter he referred to statements he had made during the settlement discussions that he was participating without full defence of his rights and under duress. He also alleged that the employer had colluded with the Manitoba Workers Compensation Board to end his benefits without his consent or input.

[43] Mr. Hyppolite testified in cross-examination that he did not coerce or intimidate Mr. Nash in the settlement process. He testified that at the time of signing the Memorandum of Agreement he fully intended to comply with the terms of the agreement.

III. Summary of the arguments

A. Submissions of the employer

[44] Counsel for the employer provided written submissions at the hearing. I have summarized those submissions below. The full submissions are on file with the Board.

[45] Counsel for the employer submitted that the one key objective of the *Public Service Labour Relations Act* is the resolution of labour disputes between employers and employees. This objective can be achieved in the case at issue by an order dismissing the grievance on the basis of the final resolution that was achieved by the parties through a valid settlement agreement.

[46] It is a well-established principle that a valid settlement agreement is a complete bar to an adjudicator's jurisdiction. In *MacDonald v. Canada* (1998), 158 FTR 1 (affirmed, [2000] F.C.J. No. 1902; leave to appeal dismissed, [2001] S.C.C.A No. 30), the Federal Court made it clear that when a public servant enters into a binding settlement agreement with the employer, he loses his right to pursue the matter at adjudication. An adjudicator has no jurisdiction to hear a grievance once the parties have signed a binding agreement whether or not the terms of that settlement have been fulfilled. It is not the role of the Board or of an adjudicator to supervise the implementation of a settlement. Counsel for the employer referred me to the following decisions: *Myles v. Treasury Board (Human Resources Development Canada),* 2002 PSSRB 53; *Castonguay v. Treasury Board (Canada Border Services Agency)*, 2005 PSLRB 73; and *Van de Mosselaer v. Treasury Board (Department of Transport)*, 2006 PSLRB 59.

[47] Counsel for the employer stated that, in addition, an adjudicator does not have jurisdiction to adjudicate a grievance concerning the failure of one party to fulfil its obligation under the terms of a binding settlement agreement. Even if the grievor had filed a new grievance complaining that the employer did not respect the terms of the settlement, an adjudicator would still be without jurisdiction to hear such a grievance.

[48] Counsel for the employer submitted that the settlement agreement was a valid agreement. There is no language in the agreement itself that suggests that it was an agreement in principle, or that the agreement was tentative, or that the performance of the mutual obligations in the agreement was optional. There is no language in the agreement that gave the grievor an opportunity to change his mind or to refuse to perform his obligations under the agreement, including his obligation to withdraw all

grievances and complaints against the employer. There was no ambiguity about the obligations, and the obligations were not conditional in any way. The evidence from the employer showed that there was no discussion at the time of signing an agreement that would suggest that this was a conditional or tentative agreement. In fact, after signing the agreement the employer commenced to implement the agreement and did implement the terms of this agreement. I was referred to *Carignan v. Treasury Board (Veterans Affairs Canada)*, 2003 PSSRB 58; *Lindor v. Treasury Board (Solicitor General Canada – Correctional Services)*, 2003 PSSRB 10; *Bedok v. Treasury Board (Department of Human Resources Development)*, 2004 PSLRB 163; and *Skandharajah v. Treasury Board (Employment and Immigration Canada)*, 2000 PSSRB 114.

[49] Counsel for the employer noted that the intention of the parties at the time of the signing of the settlement agreement is critical to assessing whether or not a settlement is binding. Generally the test as to whether the parties are bound to a contract is an objective one. It is immaterial what may be the real but unexpressed state of the grievor's mind at the time of signing (see *MacDonald*). Applying this objective test and considering all the facts at the time of the signing of the agreement, there is no supporting evidence to suggest that this was anything other than a binding settlement. Mr. Nash's words and acts clearly demonstrated an outward intention to agree on his part.

[50] Counsel for the employer submitted that both parties displayed a willingness and capacity to participate in the negotiations. Mr. Nash did not raise any compelling reasons that would justify invalidating the settlement agreement. He may very well have developed "settlor's remorse." However this does not give an adjudicator the authority to deal with this issue. If there is a dispute between the parties over the terms of the settlement, the remedy lies in a civil action to enforce the terms of that settlement.

[51] Counsel for the employer submitted that an adjudicator has a residual discretion to determine whether the settlement agreement ought not to be enforced if the agreement constitutes an unconscionable transaction. As set out in the *MacDonald* decision, a transaction may be set aside as being unconscionable if the evidence shows that:

(1) there is an inequality of bargaining position;
(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.

[52] Counsel for the employer noted that based on previous decisions of adjudicators, an adjudicator has jurisdiction only if the grievor can adduce evidence that he was the victim of a forced settlement or that it was signed under duress. Mr. Nash has failed to meet this onus. There is no evidence of a forced settlement or of duress and there is no evidence that the employer exerted improper pressure or coercion on the grievor. Mr. Nash's correspondence to the Board has made it clear that he believes the employer has not respected the settlement agreement and that this renders the agreement null and void. He does not speak of duress in this correspondence but rather focuses on the implementation of the agreement.

[53] Counsel for the employer noted that Mr. Nash moved to Edmonton on his own and was offered employment in Edmonton independently from the settlement agreement. The testimony of the employer witnesses was to the effect that Mr. Nash was given opportunities to request the transfer without having to sign the agreement first. It was Mr. Nash who opted to deal with the transfer to Edmonton through the agreement. He could have dealt with this issue before finalizing the agreement but he chose not to do so. His lack of cooperation left management with little choice but to remind Mr. Nash that without a deal on the agreement he would have to be returned to his substantive position.

[54] Counsel for the employer submitted that the settlement reached was “a good deal.” Mr. Nash could not accomplish any better if an adjudicator assumed jurisdiction over this grievance.

[55] Counsel for the employer submitted that prior to signing the agreement there were many opportunities for Mr. Nash to reconsider whether or not to sign. The negotiations went on for months. He was initially represented by his union and eventually opted to negotiate on his own. He made several counter-offers and made changes to the proposed agreement, and eventually agreed to a deal that was better than the one his union had supported a month earlier. At no point prior to, or even after, signing did Mr. Nash indicate to the employer that he was signing this agreement under duress. Mr. Nash raised the issue of duress only on February 20, 2006. Mr. Nash

thanked Mr. Hyppolite after the deal was reached and he cashed the cheque reimbursing his expenses.

[56] Counsel for the employer submitted that the grievance should be dismissed on the basis that the matter has been settled.

B. Submissions of the grievor

[57] Mr. Nash made final submissions on his own behalf. He stated that he had no choice but to agree to the settlement. The existence of the agreement cannot stand because of the employer's bad faith in not adhering to the terms of that agreement. To allow the agreement to stand would allow unscrupulous employers to create sham agreements and then simply ignore the terms.

[58] Mr. Nash argued that I should ignore any statements in the submissions of the employer that relate to matters occurring after the signing of the agreement. This would be consistent with my ruling that Mr. Nash could not adduce evidence about evidence after the signing of the agreement. Evidence about events that occurred after the agreement is signed are not within the scope of this hearing.

[59] Mr. Nash stated that this was not a case of “settlor’s remorse.” He had signed the agreement under economic, psychological and physical duress. The employer demonstrated its power and control to “bleed [his] family of happiness.” The employer had no intention of treating them fairly before or during or after the negotiations. His career has been road-blocked.

[60] Mr. Nash submitted that in *Lindor* the adjudicator stated that the settlement had to be a legitimate one. The settlement at issue here is not legitimate since the employer has not followed the terms of that agreement. There is a duty required of the employer to act fairly. He referred me to *Vogan v. PSAC*, 2004 PSSRB 159.

[61] Mr. Nash argued that there was a conditional clause in the agreement that he signed. The agreement provided that the non-fulfilment of the agreement would render it null and void (Exhibit E-1).

[62] Mr. Nash stated that he had no choice but to renounce the agreement due to the employer's abuse of authority. The bond of trust has been broken by the employer. What recourse does an employee have if not recourse before the Board?

[63] Mr. Nash submitted that harmonious labour relations are important. The uncertainty created by the employer in not abiding by agreements could also be harmful to harmonious relations. The employer has fiduciary responsibility to its employees.

[64] Mr. Nash noted that in *Castonguay*, representation was an issue. In this case, there was a lack of representation. The bargaining agent tried to withdraw his grievance without his consent. He could not afford representation. Also, in *Castonguay*, the adjudicator looked at the intention at the time of signing. In this case, Mr. Nash had repeatedly noted that he was participating "without full defense of his rights".

[65] Mr. Nash alleged that the employer colluded with the Manitoba Workers Compensation Board to end his benefits. Signing the agreement ensured that Mr. Nash was able to care for his family.

[66] Mr. Nash submitted that the facts in *Van de Mosselaer* were equal and opposite to his case. The agreement was unconscionable. There was an inequality of bargaining power. The employer unconscientiously used a position of power to achieve an advantage and the agreement is substantially unfair. The employer sought to further undermine his financial situation at the time of signing.

[67] Mr. Nash argued that since this was not a mediated settlement, setting aside the settlement will not have a chilling effect on mediation. Not granting jurisdiction could have a chilling effect on how the employer and union address grievous errors and malicious acts in a more timely fashion.

C. Reply submissions of the employer

[68] Counsel for the employer submitted that I do not have jurisdiction to consider the alleged bad faith of the employer in implementing the agreement.

[69] Counsel for the employer noted that the clause in the agreement that Mr. Nash characterized as a conditional clause was in fact an implementation issue and does not open the door to my jurisdiction.

[70] Counsel for the employer also submitted that I should look closely at the evidence as Mr. Nash's submissions were not supported by the evidence.

IV. Reasons

[71] The issue to be determined is whether the Memorandum of Agreement signed by Mr. Nash and the employer is binding on the parties. If it is binding, I am without jurisdiction to hear Mr. Nash's grievance. A valid settlement agreement is, generally, a complete bar to adjudication (e.g., see *Van de Mosselaer*) unless it can be shown that the agreement was unconscionable. It was evident at the hearing that Mr. Nash had been through a difficult experience in his employment with Correctional Services. The evidence before me, however, does not show that the settlement agreement signed by Mr. Nash was unconscionable or entered into under duress. For the reasons set out below, I have concluded that an adjudicator does not have jurisdiction to hear Mr. Nash's grievance.

[72] The first question is whether there was an agreement between the parties. The test as to whether the parties are bound to a contract is an objective test. As set out in *MacDonald* at paragraph 35:

. . .

> *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.*

. . .

[73] Mr. Nash did state on two occasions that he was participating in the settlement discussions "without full defence of his rights." Mr. Nash was represented by his bargaining agent during some of the settlement discussions and he decided to end that representation (which is his right). However, at the end of the day, Mr. Nash did sign an agreement.

[74] This agreement was negotiated over a long period of time and with many changes proposed by Mr. Nash, and many of those suggested changes were accepted by the employer. Mr. Nash also was proposing near the end of the process that there be changes in the effective date. His state of mind at the time of signing the agreement

is demonstrated by his attention to the details of the agreement. His words and actions manifested an intention to agree to the terms of the proposed Memorandum of Agreement.

[75] His statement to the Board that he was willing to withdraw his grievances if the Board would "remain seized of the matter to ensure the agreement is fairly and properly implemented by both sides" demonstrates that he entered into the agreement freely and without duress. It was not until February 2006 that Mr. Nash stated that the agreement was made under duress. The evidence demonstrates that at the time he signed the agreement he was not under duress. The fact that he was under financial stress at the time he signed the agreement is not relevant to a determination on duress. The motivation to enter into an agreement can be partly a financial one without amounting to duress.

[76] 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 anything other than a binding settlement.

[77] The second question is whether the settlement agreement ought not to be enforced as an unconscionable transaction. In *MacDonald* the court set out the test for an unconscionable transaction:

. . .

> *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 . . . it is sufficiently divergent from community standards of commercial morality that it should be set aside.*

. . .

[78] There is simply no evidence in this case of an unconscionable bargain. As noted in *MacDonald*, there may well be an inequality of bargaining power. Mr. Nash, although initially represented, became self-represented in the final stages of the negotiations. I

agree that there was an inequality of bargaining power. However, there was no evidence of the employer unconscientiously using its position of power to secure an advantage. Also, the agreement reached is not "substantially unfair" to Mr. Nash. Mr. Nash has retained his employment and has been relocated to another work location — an outcome that he was quite insistent on.

[79] In *Carignan*, the grievor sought to resile from an agreement 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. Mr. Nash has also argued that the agreement was not implemented, thus resulting in an agreement that is "null and void." The adjudicator 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.*

. . .

[80] The Memorandum of Agreement signed by Mr. Nash is a valid and binding settlement. 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 grievance.

[81] Mr. Nash made an allegation in correspondence to the Board and in his submissions at the hearing that the employer colluded with the Manitoba Workers Compensation Board. There was no evidence presented to support such an inflammatory allegation.

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

(The Order appears on the next page)

V. Order

[83] The grievance is dismissed.

September 18, 2007.

Ian R. Mackenzie,
adjudicator